THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (REGAINING CONTROL OVER AUSTRALIA’S PROTECTION OBLIGATIONS) BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Border Protection, the Hon. Scott Morrison MP)
Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013

OUTLINE
The Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013 amends the Migration Act 1958 (‘the Act’) to remove the criterion for grant of a protection visa on “complementary protection” grounds, and other related provisions.

Complementary protection is the term used to describe a category of protection for people who are not refugees as defined in the Refugees Convention as amended by the Refugees Protocol, but who also cannot be returned to their home country, because there is a real risk that they would suffer significant types of harm that would engage Australia’s international non-refoulement obligations under certain other treaties.

The complementary protection framework was introduced into the Act on 24 March 2012 to allow consideration of claims raising Australia’s non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as part of the protection visa process and to allow a protection visa to be granted if those obligations are engaged and other visa requirements are met.

The purpose of the amendments in this Bill is to give effect to the government’s position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that non-refoulement obligations are a matter for the government to attend to in other ways.

Instead, Australia’s non-refoulement obligations under the CAT and the ICCPR will be considered through an administrative process, as was the case prior to March 2012. Where the Minister is satisfied that the person engages Australia’s non-refoulement obligations under the CAT and the ICCPR, it is then available to the Minister to exercise his or her personal and non-compellable intervention powers in the Act to grant that person a visa.

This amendment does not propose to resile from Australia’s international obligations, nor is it intended to withdraw from any Conventions to which Australia is a party. Anyone who is found to engage Australia’s non-refoulement obligations will not be removed in breach of those obligations.

FINANCIAL IMPACT STATEMENT
The financial impact of these amendments is low. The estimated costs associated with the implementation of the proposed amendments will be met from within the Department’s existing funding.

REGULATION IMPACT STATEMENT
The Office of Best Practice Regulation has been consulted and has advised that no Regulation Impact Statement is required. The advice reference is 16102.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS
A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia’s human rights obligations. A copy of the Statement of Compatibility with Human Rights is at Attachment A.
NOTES ON INDIVIDUAL CLAUSES

Clause 1  Short title

1. Clause 1 inserts the short title by which the Act may be cited.

2. Clause 1 of the Bill provides that this Act may be cited as the *Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Act 2013.*

Clause 2  Commencement

3. 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. Any other statement in column 2 has effect according to its terms.

4. 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.

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

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

7. 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 in column 3, or information in it may be edited, in any published version of this Act.

Clause 3  Schedule(s)

8. Clause 3 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, and any other item in a Schedule to this Act has effect according to its terms.

9. The purpose of this clause is to clarify that Schedule 1 to the Bill sets out the amendments to the Act, and that the particular provisions mentioned in that Schedule are amended in accordance with the particular items in that Schedule.
Schedule 1-Amendments

Migration Act 1958

Item 1    Subsection 5(1)

10. This item repeals the following definitions in subsection 5(1) of the Migration Act 1958 (“the Act”):

- Covenant
- cruel or inhuman treatment or punishment;
- degrading treatment or punishment
- receiving country
- significant harm
- torture.

11. The repealed definitions were introduced to the Act as part of the statutory framework for considering complementary protection on 24 March 2012.

12. The amendments made by this item are consequential to the amendments made below by:

- item 4, which repeals paragraph 36(2)(aa);
- item 6, which repeals paragraph 36(2)(c);
- item 7, which repeals subsections 36(2A), 36(2B) and 36(2C);
- item 8, which repeals and substitutes subsection 36(4); and
- item 16, which repeals paragraphs 336F(5)(ca), 336F(5)(cb) and 336F(5)(cc).

13. As these repealed provisions contain the only references in the Act to these definitions, they are no longer necessary.

Item 2    Subparagraph 5A(3)(j)(ii)

14. This item omits “Protocol; or” in subparagraph 5A(3)(j)(ii) of the Act and substitutes “Protocol;”.

15. This is a consequential amendment as a result of the amendments made by item 3 below, which repeals subparagraph 5A(3)(j)(iii).

Item 3    Subparagraph 5A(3)(j)(iii)

16. This item repeals subparagraph 5A(3)(j)(iii) of the Act.

17. This is a consequential amendment as a result of the amendments made by item 4 below, which repeals paragraph 36(2)(aa) of the Act.

Item 4    Paragraph 36(2)(aa)

18. This item repeals paragraph 36(2)(aa) of the Act.
19. Currently, paragraph 36(2)(aa) of the Act establishes a criterion for grant of a protection visa on complementary protection grounds.

20. Complementary protection is the term used to describe a category of protection for people who are not refugees as defined in the Refugees Convention as amended by the Refugees Protocol, but who also cannot be returned to their home country, because there is a real risk that they would suffer significant types of harm that would engage Australia’s international non-refoulement obligations.

21. This paragraph currently provides that a criterion for a protection visa 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), which relates to protection obligations under the Refugees Convention as amended by the Refugees Protocol) in respect of 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.

22. ‘Significant harm’ is currently defined in section 5(1) of the Act to mean harm of a kind mentioned in subsection 36(2A) of the Act. This definition is being repealed by item 1 of this Bill. Subsection 36(2A) of the Act provides that a non-citizen will suffer ‘significant harm’ if:

- the non-citizen will be arbitrarily deprived of his or her life; or
- the death penalty will be carried out on the non-citizen; or
- the non-citizen will be subjected to torture; or
- the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
- the non-citizen will be subjected to degrading treatment or punishment.

23. The effect of this amendment is to remove the criterion for grant of a protection visa on these grounds. In conjunction with item 6 below, which repeals paragraph 36(2)(c) of the Act, the repeal of paragraph 36(2)(aa) will limit the criteria for grant of a protection visa to:

- non-citizens in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- non-citizens in Australia who are a member of the same family unit as these non-citizens mentioned above and that non-citizen holds a protection visa.

24. The purpose of these amendments is to give effect to the policy intention that complementary protection should not be considered as a criterion for the grant of a protection visa. It is intended that claims for protection on complementary protection grounds should instead be considered through an administrative process, as they were prior to the commencement of the complementary protection provisions in section 36 of the Act in March 2012.
25. In those circumstances where a person is not found to engage Australia’s protection obligations under the Refugees Convention as amended by the Refugees Protocol (and is therefore not eligible for a protection visa), but the Minister is satisfied that the person engages Australia’s *non-refoulement* obligations under the CAT and the ICCPR, it is available to the Minister to exercise his or her personal and non-compellable intervention powers in the Act to grant that person a visa.

26. This amendment does not propose to resile from Australia’s international obligations, nor is it intended to withdraw from any Conventions to which Australia is a party.

**Item 5 Subparagraph 36(2)(b)(ii)**

27. This item omits “visa; or” and substitutes “visa.” in subparagraph 36(2)(b)(ii) of the Act.

28. This is a consequential amendment as a result of the amendments made by item 6 below which repeals paragraph 36(2)(c) of the Act.

**Item 6 Paragraph 36(2)(c)**

29. This item repeals paragraph 36(2)(c) of the Act.

30. Paragraph 36(2)(c) provides that a criterion for a protection visa is 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 current paragraph 36(2)(aa); and
- holds a protection visa.

31. This item is a consequential amendment as a result of the amendments made by item 4 above, which repeals paragraph 36(2)(aa).

**Item 7 Subsections 36(2A), (2B) and (2C)**

32. This item repeals subsections 36(2A), 36(2B) and 36(2C) of the Act.

33. Subsections 36(2A), 36(2B) and 36(2C) aid in the interpretation of and clarify concepts contained in paragraph 36(2)(aa).

34. The amendments made by this item are consequential to the amendments made by item 4 above, which repeals paragraph 36(2)(aa).

**Item 8 Subsection 36(4)**

35. This item repeals existing subsection 36(4) and substitutes a new subsection 36(4).

36. Existing subsection 36(4) of the Act provides that subsection 36(3) does not apply in relation to 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 noncitizen availing himself or herself of a right mentioned in subsection 36(3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

37. Subsection 36(3) provides that Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself of 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.

38. This item is a consequential amendment as a result of item 4 above which repeals paragraph 36(2)(aa). The repeal of paragraph 36(2)(aa) has the effect of removing the criterion for the grant of a protection visa on the basis that there is a real risk that the applicant will suffer significant harm.

**Item 9 Subsection 36(5A)**

39. This item repeals subsection 36(5A) of the Act.

40. Existing subsection 36(5A) of the Act 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 them 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.

41. Subsection 36(3) provides that Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself of 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.

42. This item is a consequential amendment as a result of item 4 above which repeals paragraph 36(2)(aa). The repeal of paragraph 36(2)(aa) has the effect of removing the criterion for the grant of a protection visa on the basis that there is a real risk that the applicant will suffer significant harm.

**Item 10 Subsection 48A(2) (paragraph (aa) of the definition of application for a protection visa)**

43. This item repeals and substitutes paragraph (aa) of the definition of application for a protection visa in subsection 48A(2) of the Act.
44. Existing paragraph (aa) of the definition of application for a protection visa provides ‘an application for a visa, a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c); and’.

45. Substituted paragraph (aa) of the definition of application for a protection visa provides ‘an application for a visa, a criterion for which is mentioned in paragraph 36(2)(a) or (b); and’.

46. This item has the effect of removing the reference to paragraphs 36(2)(aa) and 36(2)(c) from subsection 48A(2) of the Act.

47. This is a consequential amendment as a result of the amendment made by item 4 and item 6 above, which repeal paragraphs 36(2)(aa) and 36(2)(c) of the Act.

**Item 11    Subparagraph 336F(3)(a)(ii)**

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

49. This is a consequential amendment as a result of the amendments made by item 12 below, which repeals subparagraph 336F(3)(a)(iii).

**Item 12    Subparagraph 336F(3)(a)(iii)**

50. This item repeals subparagraph 336F(3)(a)(iii) of the Act.

51. Existing subparagraph 336F(3)(a)(iii) refers to an unauthorised maritime arrival who makes a claim for protection on the basis that the person will suffer significant harm.

52. This item is a consequential amendment as a result of item 4 above which repeals paragraph 36(2)(aa). The repeal of paragraph 36(2)(aa) has the effect of removing the criterion for the grant of a protection visa on the basis that there is a real risk that the applicant will suffer significant harm.

**Item 13    Subparagraph 336F(4)(a)(ii)**

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

54. This item is a consequential amendment as a result of item 14 below, which repeals subparagraph 336F(4)(a)(iii).

**Item 14    Subparagraph 336F(4)(a)(iii)**

55. This item repeals subparagraph 336F(4)(a)(iii) of the Act.

56. Existing subparagraph 336F(4)(a)(iii) refers to an unauthorised maritime arrival who makes a claim for protection on the basis that the person will suffer significant harm.
57. This item is a consequential amendment as a result of item 4 above which repeals paragraph 36(2)(aa). The repeal of paragraph 36(2)(aa) has the effect of removing the criterion for the grant of a protection visa on the basis that there is a real risk that the applicant will suffer significant harm.

**Item 15 Subparagraph 336F(5)(c)(ii)**

58. This item omits “Protocol; or” and substitutes “Protocol;” in subparagraph 336F(5)(c)(ii) of the Act.

59. This item is a consequential amendment as a result of item 16 below which repeals paragraphs 336F(5)(ca), 336F(5)(cb) and 336F(5)(cc) of the Act.

**Item 16 Paragraphs 336F(5)(ca), (cb) and (cc)**

60. This item repeals paragraphs 336F(5)(ca), 336F(5)(cb) and 336F(5)(cc) of the Act.

61. Existing paragraphs 336F(5)(ca), 336F(5)(cb) and 336F(5)(cc) refer to a person who is an unauthorised maritime arrival who makes a claim for protection on the basis that he or she will suffer significant harm.

62. This item is a consequential amendment as a result of item 4 above which repeals paragraph 36(2)(aa). The repeal of paragraph 36(2)(aa) has the effect of removing the criterion for the grant of a protection visa on the basis that there is a real risk that the applicant will suffer significant harm.

**Item 17 Paragraphs 411(1)(c) and (d)**

63. This item repeals paragraphs 411(1)(c) and 411(1)(d) and substitutes new paragraphs 411(1)(c) and 411(1)(d).

64. Section 411 of the Act deals with decisions reviewable by the Refugee Review Tribunal (RRT).

65. Existing paragraph 411(1)(c) of the Act provides that an RRT-reviewable decision is a decision to refuse to grant a protection visa (other than a decision that was made relying on paragraph 36(2C)(a) or (b)).

66. Existing paragraph 411(1)(d) provides that an RRT-reviewable decision is a decision to cancel a protection visa (other than a decision that was made relying on paragraph 36(2C)(a) or (b)).

67. Substituted paragraphs 411(1)(c) and 411(1)(d) provide that an RRT-reviewable decision is:

- a decision to refuse to grant a protection visa (other than a decision that was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention);
a decision to cancel a protection visa (other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention).

68. The amendments made by this item are consequential to the item made by item 7 above, which repeals paragraph 36(2C)(a) and 36(2C)(b).

69. The purpose of existing paragraphs 411(1)(c) and 411(1)(d) is to make clear that the RRT is able to review decisions to refuse to grant or cancel a protection visa, with the exception of those decisions which are made relying on paragraphs 36(2C)(a) or 36(2C)(b). This is because decisions made relying on paragraphs 36(2C)(a) or 36(2C)(b) are currently reviewable by the Administrative Appeals Tribunal (AAT).

70. Item 18 below removes the AAT’s jurisdiction to consider decisions made relying on paragraphs 36(2C)(a) or 36(2C)(b). This means that it is no longer necessary to refer to these provisions in section 411. However, substituted paragraphs 411(1)(c) and 411(1)(d) make it clear that the RRT is not able to review a decision to refuse to grant, or to cancel, a protection visa on the basis of Articles 1F, 32 or 33(2) of the Refugees Convention. This is because these decisions continue to be reviewable by the AAT.

**Item 18 Paragraph 500(1)(c)**

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

72. 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, 33(2) of the Refugees Convention as amended by the Refugees Protocol or paragraphs 36(2C)(a) or 36(2C)(b) of the Act.

73. Substituted paragraph 500(1)(c) removes the reference to a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on paragraphs 36(2C)(a) or 36(2C)(b) of the Act.

74. This is a consequential amendment as a result of the amendments made by item 7 above which repeal paragraphs 36(2C)(a) and 36(2C)(b) of the Act. It is no longer necessary for the AAT to have jurisdiction to consider the decision to refuse to grant a protection visa, or to cancel a protection visa relying on paragraphs 36(2C)(a) and 36(2C)(b), as these paragraphs are being repealed.

**Item 19 Paragraph 500(4)(c)**

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

76. Existing paragraph 500(4)(c) of the Act provides decisions are not reviewable under Part 5 or 7 of the Act (that is, not reviewable by the Migration Review Tribunal or the RRT), including 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 as amended by the Refugees Protocol or paragraph 36(2C)(a) or 36(2C) (b) of the Act.

77. Substituted paragraph 500(4)(c) removes the reference to a decision to refuse a protection visa, or to cancel a protection visa relying on paragraphs 36(2C)(a) or (b).

78. The amendment made by this item is consequential to the item made by item 7 above, which repeals paragraphs 36(2C)(a) and 36(2C)(b) of the Act.

**Item 20 Application of amendments**

79. This item provides that the amendments made by this Schedule apply in relation to each application for a protection visa made:
   - on or after the day this Schedule commences; or
   - before that day, if a decision is not made in respect of the application before that day.

80. The effect of this item is that these amendments will apply to any application for a protection visa:
   - made after the commencement of this Schedule; or
   - made prior to the commencement of this Schedule, where there has been no primary decision made on that application.

81. This means that these applicants will not be assessed against the complementary protection criteria in repealed paragraphs 36(2)(aa) or 36(2)(c) and are therefore not eligible for a protection visa on this basis. However, these applicants will continue to have their application for a protection visa assessed against the criteria in paragraphs 36(2)(a) and 36(2)(b), which relate to claims under the Refugees Convention as amended by the Refugees Protocol.

82. Where there has been a primary decision and the matter is under review or has been the subject of review or judicial review (and has been remitted), the application will not be reviewed against the complementary protection criteria in paragraphs 36(2)(aa) or 36(2)(c).

**Item 21 Transitional – RRT and AAT review**

83. This item provides transitional arrangements for the review by the RRT and the AAT of decisions to refuse to grant a protection visa.

84. Subitem 21(1) provides that in this item, affected decision means a primary decision made before the day this Schedule commences, to refuse to grant a protection visa.

85. Subitem 21(2) provides that despite section 411 of the Act, an affected decision is not an RRT-reviewable decision to the extent that the decision was made relying on former paragraph 36(2)(aa) or 36(2)(c) of that Act, if the application for the visa is not finally determined before the day this Schedule commences.
86. The purpose of subitem 21(2) is to make clear that the RRT is prevented from reviewing those aspects of that decision which relied on repealed paragraphs 36(2)(aa) or 36(2)(c) of the Act, where:

- a primary decision has been made to refuse to grant a protection visa prior to the commencement of this Schedule; and
- the application is not finally determined (within the meaning of subsection 5(9) of the Act) before this Schedule commences.

87. The effect of subitem 21(2) is that if an applicant had a primary decision made prior to the commencement of this Schedule to refuse to grant a protection visa, and the decision was made relying on the complementary protection criteria in paragraphs 36(2)(aa) and 36(2)(c) (which are being repealed by items 4 and 6 above) prior to the commencement of this Schedule, the RRT will be required to apply the amendments made by this Schedule, and not the law that applied at the time of the primary decision. The RRT will only be able to commence or continue a review on the basis of a refusal to grant a protection visa, relying on the applicant not meeting paragraphs 36(2)(a) or 36(2)(b).

88. This subitem includes a note that states that for when an application is finally determined to see subsection 5(9) of the Act.

89. This subitem is not intended to prevent the RRT from reviewing the primary decision in relation to any other grounds that have been relied on for that decision.

90. Subitem 21(3) provides that despite section 500 of the Act, an affected decision is not reviewable by the AAT to the extent that the decision was made relying on former paragraph 36(2C)(a) or 36(2C)(b) of that Act if, on the day this Schedule commences:

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

91. The purpose of subitem 21(3) is to make clear that the AAT is prevented from reviewing or continuing to review a primary decision to refuse to grant a protection visa, to the extent that decision was made relying on former paragraph 36(2C)(a) or 36(2C)(b):

- where that primary decision was made before this Schedule commences; and
- the decision would still be subject to a form of review by the AAT or the period within which such a review could be instituted would not have ended.

92. The effect of subitem 21(3) is that if an applicant had a primary decision made prior to the commencement of this Schedule to refuse to grant a protection visa, and that decision was made relying on paragraphs 36(2C)(a) or 36(2C)(b) prior to the commencement of this Schedule, the AAT will be required to apply the amendments made by this Schedule, and not the law that applied at the time of the primary decision. The AAT will only be able to commence or continue a review on the basis of a refusal to grant relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention.
93. Item 18 above amends paragraph 500(1)(c) and removes the jurisdiction of the AAT to review a decision to refuse to grant a protection visa relying on paragraphs 36(2C)(a) or 36(2C)(b) of the Act.

94. This means that once the Schedule commences, the AAT will no longer have jurisdiction to review decisions to refuse to grant a visa, to the extent that decision was made relying on paragraphs 36(2C)(a) or 36(2C)(b) for:

- decisions made prior to the commencement of the Schedule (which are still subject to AAT review or within the period a review could be instituted); and
- decisions made on or after the commencement of the Schedule.

95. The note at the end of subitem (3) puts beyond doubt that review by the AAT will still be available to the extent that the decision was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention.

**Item 22  Transitional – bar on further protection visa applications**

96. This item provides that despite the amendments made by this Schedule, paragraph (aa) of the definition of application for a protection visa in subsection 48A(2) of the Act continues to cover an application for a visa, a criterion for which is mentioned in former paragraph 36(2)(aa) or 36(2)(c) of the Act.

97. This item also inserts a note which provides that the effect of this transitional amendment is to prevent a non-citizen from, on and after the commencement of this Schedule, applying for a protection visa if the non-citizen had earlier been refused a protection visa based on the criterion in former paragraph 36(2)(aa) or 36(2)(c) of the Act.

98. This item is a consequential amendment as a result of item 10 above. Item 10 repeals and substitutes paragraph (aa) of the definition of application for a protection visa in subsection 48A(2) of the Act. The amendments to that definition remove the references to paragraphs 36(2)(aa) and 36(2)(c).

99. Without this transitional provision, any person who had a protection visa application refused on the basis of the former paragraphs 36(2)(aa) and 36(2)(c), that is the complementary protection grounds, would no longer be subject to the section 48A bar on a further protection visa application. This would be an undesirable result following the repeal of the complementary protection provisions.

100. The purpose of item 22 is to ensure, that despite the removal of the references to paragraphs 36(2)(aa) and 36(2)(c) in paragraph (aa) of the definition of application for a protection visa in subsection 48A(2) of the Act, an applicant who has had a protection visa refused prior to the commencement of these amendments, on the basis of the repealed complementary protection criteria in paragraphs 36(2)(aa) or 36(2)(c) will still not be able to make a further application for a protection visa, unless the Minister exercises the non-compellable power under section 48B to enable the person to make a valid application for a protection visa.
Attachment A

Statement of Compatibility with Human Rights
Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill
This Bill seeks to amend the Migration Act 1958 (‘the Act’) to remove the criterion for the grant of a protection visa on the basis of complementary protection and to remove other related provisions.

Complementary protection is the term used to describe a category of protection for people who are not refugees as defined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugees Convention) (and therefore people in respect of whom Australia does not have a non-refoulement obligation under the Refugees Convention), but who also cannot be returned to their home country, because there is a real risk that they would suffer a certain type of harm that would engage Australia’s international non-refoulement (non-return) obligations under certain other treaties.

The complementary protection criterion currently in the Act allows consideration of claims raising Australia’s non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture, and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) as part of the protection visa process and allow a protection visa to be granted if those obligations are engaged and other visa requirements are met.

The Government’s position is that the non-refoulement obligations under the ICCPR and the CAT do not need to be assessed as part of the protection visa assessment process and are a matter for the Government to attend to in other ways.

Human rights implications
Non-Refoulement

Under the ICCPR and the CAT, Australia may not return a person where:

- there are substantial grounds for believing that he or she is at a real risk of irreparable harm (i.e. death penalty, arbitrary deprivation of life, torture, or cruel, inhuman or
degrading treatment or punishment) under the ICCPR and its Second Optional Protocol;¹ or

- there are substantial grounds for believing that he or she would be in danger of being subjected to torture for the purposes of the CAT.²

This Bill does not seek to resile from or limit Australia’s non-refoulement obligations. Rather, this Bill seeks to move the assessment of these obligations from being considered as part of the protection visa assessment process under the Act to a separate administrative process. The form of the administrative arrangements in place to support Australia in meeting its obligations is a matter for the Government.

The complementary protection provisions were introduced into the Act on 24 March 2012. This provided for a combined protection visa assessment process of both Australia’s obligations under the Refugees Convention and Australia’s non-refoulement obligations under the ICCPR and the CAT. Australia has been a party to the ICCPR since 1980 and the CAT since 1989. Prior to the commencement of the complementary protection provisions, Australia assessed its non-refoulement obligations under these treaties through administrative processes which either went towards the exercise of the Minister’s personal, non-compellable intervention powers under sections 195A, 351, 391, 417, 454 and 501J of the Act, or through pre-removal assessment procedures.

When this Bill is passed a similar administrative process will be re-established to assess Australia’s non-refoulement obligations, either as part of pre-removal procedures or through the Minister’s personal and non-compellable public interest powers to grant a visa under the Act.

Anyone who is found to engage Australia’s non-refoulement obligations will not be removed in breach of those obligations.

**Family Rights and Rights of the Child**

Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to protection of the law against such interference. Article 23 states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. Article 3 of the Convention on the Rights of the Child (CRC) requires that the best interests of the child are treated as a primary consideration in all actions concerning children.

The complementary protection provisions in the Act allow for a protection visa to be granted to family members of a visa applicant who is found to engage non-refoulement obligations.

This Bill, when passed, will mean that membership of the family unit of a person in respect of whom Australia has non-refoulement obligations will no longer expressly provide an

¹ This is an implied obligation in relation to Articles 6 and 7 of the ICCPR. See Human Rights Committee, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13.

² CAT, Article 3(1).
avenue to visa grant for a family member to also remain in Australia. However, as was the
practice under the administrative process previously in existence, it is intended that family
unity and the best interests of children will continue to be taken into account as part of the
new administrative process that will be re-established when this Bill is passed and members
of the same family unit of a person in respect of whom Australia has non-refoulement
obligations will continue to be permitted to remain in Australia.

Conclusion
The Bill is compatible with human rights because Australia’s human rights obligations will
continue to be met through administrative processes.