



## **COMPLEMENTARY PROTECTION IN AUSTRALIA:**

### **FILLING THE GAP IN THE PROTECTION OF ASYLUM SEEKERS**

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<sup>1</sup> A famous image of the well known London Underground phrase “Mind the Gap”, available at [http://www.sabusinessclub.com/event\\_images/thumbs/Mind%20the%20Gap.jpg](http://www.sabusinessclub.com/event_images/thumbs/Mind%20the%20Gap.jpg) (accessed 26 May, 2009)

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## INTRODUCTION

There is currently a gaping hole in the effective protection of asylum seekers in Australia. The 1951 Convention Relating to the Status of Refugees (hereinafter, the “Refugee Convention”)<sup>2</sup> is the cornerstone document in dealing with the protection of persons seeking asylum. However, if a person in need of international protection falls outside its legally narrow ambit, their protection is uncertain. The issue of complementary forms of protection has thus been identified as a vital protection mechanism to add to the Refugee Convention. International obligations have been developed under other human rights instruments to provide additional, or alternative, protection, but the lack of a binding nature of these obligations results in a lack of comprehensive protection.

In some regions, the Refugee Convention itself has been expanded to include those persons falling outside its legal definition of “refugee”<sup>3</sup>. This was done by African States in the Organisation of the African Union Convention<sup>4</sup> and by Latin American States in the Cartagena Declaration<sup>5</sup>. Both these mechanisms provide for the expansion of the domestic refugee definition to include those in need of complementary protection. Other states have opted for the use of a system of “Complementary Protection”<sup>6</sup>, where asylum seekers applications will be assessed against international human rights treaties as well as the Refugee Convention. A separate visa category is introduced to cover those in need of protection who do not fall within the Refugee Convention definition. This option has been followed by the United States and Canada, as well as the European Union through a “Qualification Directive”<sup>7</sup>

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<sup>2</sup> 1951 Convention Relating to the Status of Refugees, adopted on 28 July, 1951, 189 U.N.T.S. 150, [http://www.unhcr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhcr.ch/html/menu3/b/o_c_ref.htm) (accessed 12 February, 2009)

<sup>3</sup> The legal definition of “refugee” is discussed shortly, at para. 1.2

<sup>4</sup> The **1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa** includes “Any person compelled to leave his/her country ‘owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality”, available at [http://www.africaunion.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Refugee\\_Convention.pdf](http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf) (accessed 16 March, 2009)

<sup>5</sup> The **1984 Cartagena Declaration on Refugees** includes “Persons who have fled their country ‘because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order’, available at <http://www.asylumlaw.org/docs/international/CentralAmerica.PDF> (accessed 16 March, 2009)

<sup>6</sup> I will discuss the definitions of this concept in section 1

<sup>7</sup> The full title being the “Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted”, 29 April, 2004, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML> (accessed 15 February, 2009). This Directive will be discussed as part of a comparative analysis with Complementary Protection in the Case Study.

aimed at harmonising asylum procedures across Europe. The development of a system of Complementary Protection is also a goal of the “Agenda for Protection”<sup>8</sup> adopted by the United Nations High Commissioner for Refugees in 2002, which outlines one of its core objectives as “Provision of complementary forms of protection to those who might not fall within the scope of the 1951 Convention but require international protection”<sup>9</sup>.

Complementary Protection has thus become a feature of most Western protection systems, but notably not yet in Australia. It is therefore a controversial issue here, with Australia remaining one of the few developed countries which has yet to establish a system of *codified* complementary protection. Australia thus lacks a visa category for those persons who fall outside the criteria for the grant of “refugee” status, and so their cases are currently decided by a Ministerial Discretion. The introduction of a codified system of complementary protection is thus now at the forefront of the Australian Labour government’s agenda with the newly released “Draft Complementary Protection Visa Model” (hereinafter, the “Draft Model”) in November 2008<sup>10</sup>. This Draft Model, if legislated, will provide the comprehensive protection which has been lacking in the domestic system, assessing asylum seekers against both the Refugee Convention, as well as the applicable international human rights treaties. It will ensure that Australia is both fulfilling its international obligations as well as meeting international best practice, and the promises made by the Australian government when adopting the “Agenda for Protection”<sup>11</sup>. It will also improve the efficiency of the current immigration practise, reducing costs and eliminating the current time-wasting procedures. It is vital that in the light of the new Rudd government, as well as the “new values”<sup>12</sup> in immigration which it is promising, that the gap in protection of those in need is filled.

The aim of this paper is to examine this proposed Draft Model for Complementary Protection in Australia, and assess whether it will help to fill the gap in the protection of asylum seekers. In meeting this aim, I will first look to some basic definitions of Complementary Protection. I will then examine the Refugee Convention definition of “refugee” which illustrates the narrowness of the current legal definition, and thus the categories of persons who fall outside

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<sup>8</sup> UNHCR’s Agenda for Protection, 3<sup>rd</sup> Edition, October 2003, available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3e637b194> (accessed 12 February, 2009)

<sup>9</sup> Ibid. at Goal 1, Objective 3

<sup>10</sup> “Draft Complementary Protection Visa Model: Australia”, circulated prior to the 13 November, 2008 consultation on complementary protection and work rights, Department of Immigration and Citizenship, [www.immi.gov.au](http://www.immi.gov.au) (accessed June, 2009)

<sup>11</sup> Australia implemented UNHCR’s Agenda for Protection in 2004

<sup>12</sup> “New values” announced at “New Directions in Detention- Restoring integrity to Australia’s Immigration System”, speech by Minister for Immigration Chris Evans, at Australian National University, Canberra, 29<sup>th</sup> July 2008, text available at <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> (accessed 3 February, 2009)

its protection. I will then turn to the development of *non-refoulement*<sup>13</sup> obligations under human rights law. These international obligations greatly affect the position of asylum seekers as they attempt to provide an alternative form of protection to the Refugee Convention. The development of these international obligations has also greatly affected the traditional concept of state sovereignty. The sovereignty of states is thus a vital issue to look at as it is a potential reason for the gap between the theory of international obligations and the reality of domestic implementation. This requires an examination of the tensions between a state's *right* to sovereignty versus its *duty* to fulfil international obligations of protection. Analysing these concepts should shed some light as to why this gap between theory and reality exists.

Armed with this theory and background, I will then look to the case study of Complementary Protection in Australia, which is an example of such a gap between international obligations and domestic implementation. This case study will illustrate how Australia is attempting to fill the gap in the protection of asylum seekers. It is important to first examine the current system in place, which shows the inadequacy of a Ministerial Discretion to meet international obligations, and thus the need for reform. I will then analyse details of the proposed reform i.e. the Draft Model, looking at persons both included and excluded in the proposed system. I will finally carry out a comparative analysis with the E.U. Qualification Directive. This E.U. system of "subsidiary protection", which has been in place for over four years, has faced many interesting challenges over the interpretation of some of its provisions. Examining particular aspects of this legislation will enable us to learn from the experience which the E.U. has gone through, thus providing guidance for the implementation of such protection in Australia's future.

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<sup>13</sup> "*Non-refoulement*" is core refugee law principle which prevents the return of a refugee, or asylum seeker, to their home state where they would face persecution or a respective threat to their life or freedom. I will discuss this principle in detail below.

## 1. COMPLEMENTARY PROTECTION

Complementary Protection has been described as simply being the intersection between human rights law and refugee law, or better yet, where they fail to intersect<sup>14</sup>. It is a form of protection aimed at protecting asylum seekers who fall outside the ambit of the Refugee Convention, yet who are still in need of international protection. It is not an “emergency or provisional device”<sup>15</sup> in response to a mass influx of asylum seekers, but rather a “response by states to individual asylum seekers who cannot be removed by virtue of the extended principle of *non-refoulement* under international law”<sup>16</sup>. While it does not have an international law definition, it has been an important issue globally in recent years with a great expansion in the numbers as well as the categories of people seeking international protection<sup>17</sup>. Prior to examining the obligations under international law which have a bearing on the status of non-Convention refugees, it is necessary to first look at the protection gap between the Refugee Convention and the range of persons in need of international protection. This entails a proper examination of the scope of the definition of a “refugee” under the Refugee Convention.

### 2.1 Defining a “refugee”

*“We turn to human rights doctrine for assistance in filling out the grey areas. In doing so, we may wonder why it is permissible to distinguish in favour of Convention refugees, when other violations of rights seem no less serious. Why do some types of harm carry more ‘value’ than others?”*<sup>18</sup>

The Refugee Convention, drafted in 1951, must be viewed very much as a document of its time. Post World War II, the issue of refugees was at the forefront of the minds of political leaders. The Refugee Convention was drafted with the primary function of establishing a substitute protection system for those who had lost the protection of their home state. It thus

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<sup>14</sup> McAdam, Jane, “The Refugee Convention as a rights blueprint for persons in need of international protection”, UNHCR Research paper No. 125, July 2006, p. 1

<sup>15</sup> Mandal, R, “Protection Mechanisms outside of the 1951 Convention (‘Complementary Protection’) UNHCR Legal and Protection Policy Research Series PPLA/2005/02 (June 2005)

<sup>16</sup> McAdam, Jane (2007), *Complementary Protection in International Refugee Law*, Oxford University Press, p. 3

<sup>17</sup> The UN recently released a report, “Asylum Levels and Trends in Industrialised Countries, 2008 - Statistical Overview of Asylum Applications Lodged in Europe and selected Non-European Countries”, 24<sup>th</sup> March, 2009, available at <http://www.unhcr.org/statistics/STATISTICS/49c796572.pdf> (accessed 10 May, 2009), which outlines that there has been a 12 per cent increase in 2008 of new asylum applications over the number from 2007

<sup>18</sup> Goodwin-Gill, Guy S., “Editorial: Asylum 2001 – A Convention and a Purpose” (2001) 13 IJRL 1, p. 8

has a highly historical context, and its contents can be seen as reactive to the refugee problem which existed *at the time*. The drafters were focussing on two specific groups; first, the refugees from Nazi Germany who were in search of sanctuary, and secondly, displaced Eastern Europeans who refused to return to their countries after the war was over. The definition drawn up in the Refugee Convention therefore similarly reflected this focus on particular types of refugee. Under Article 1 of the Refugee Convention, a refugee is defined as someone who is outside their country of nationality and has a “well-founded fear”<sup>19</sup> of being persecuted for one of five reasons; namely “race, religion, nationality, membership of a particular social group or political opinion”<sup>20</sup>. They must also be unwilling or unable to avail of the protection of their country of nationality<sup>21</sup>.

The document thus never intended to cover *all* persons in need of protection<sup>22</sup>. A refugee after all has both a formal legal meaning, but also a more generic one. It can simply mean someone fleeing for safety, and thus the narrowness of the legal definition means that many asylum seekers in need of protection are falling *outside* the cornerstone definition within the Refugee Convention. The five grounds contained in Article 1 thus limit in many ways the modern categorising of displaced persons<sup>23</sup>. The specificity in the definition means that it does not encompass people for example who are stateless, who have been subject to gross violations of their human rights for reasons other than those listed in the Convention, or who would face torture upon return to their home country. Recognising that a “refugee-like predicament should result in a refugee-like status”<sup>24</sup>, the idea of an alternative or “complementary” form of protection has thus evolved. These “complementary” forms of protection are based on the international obligations to protect which states have committed to upon ratification of various human rights instruments. I will now look specifically at the obligations of “*non-refoulement*” which forms the basis for Australia’s proposed system of Complementary Protection.

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<sup>19</sup> Article 1 of the Refugee Convention, available at [http://www.unhchr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhchr.ch/html/menu3/b/o_c_ref.htm) (accessed 12 February, 2009)

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Discussed in “Complementary Protection - The Way Ahead”, January 2004 Report developed by the Refugee Council of Australia, Amnesty International and the National Council of Churches of Australia, para. 1, available at [www.ncca.org.au/cws/rdp/issues/complementary\\_protection](http://www.ncca.org.au/cws/rdp/issues/complementary_protection) (accessed 15 February, 2009)

<sup>23</sup> Discussed in Crock, Mary, “The Refugees Convention at 50: Mid-life Crisis of Terminal Inadequacy? An Australian perspective” in Kneebone, Susan (ed), *The Refugees Convention 50 Years On: Globalisation and International Law*, Ashgate: Aldershot, UK (2003), 47-91

<sup>24</sup> McAdam, Jane (2007), *Complementary Protection in International Refugee Law*, Oxford University Press, p. 2

## 2.2 Non-refoulement obligations

“*Non-refoulement*” is a core refugee law principle contained in Article 33 of the Refugee Convention. This fundamental international rule prohibits states from returning a refugee to a territory where their “life or freedom would be threatened”<sup>25</sup>. Under the International Human Rights Law framework however, further *non-refoulement* obligations have been developed which attempt to cover those who fall outside the parameters of the Refugee Convention. The International Convention on Civil and Political Rights (hereinafter, the “ICCPR”)<sup>26</sup> and the Convention against Torture (hereinafter, “CAT”)<sup>27</sup> also contain *non-refoulement* principles, both explicitly and implicitly<sup>28</sup>. These human rights instruments can provide protection through systems of Complementary Protection to those asylum seekers who *fail* to satisfy the legal definition of refugee<sup>29</sup>. Since Australia has ratified the Refugee Convention<sup>30</sup>, as well as the ICCPR<sup>31</sup> and CAT<sup>32</sup>, it has thus undertaken a responsibility that it will abide by the *non-refoulement* obligations contained in these treaties. Once asylum seekers arrive on Australian territory, and fall under one of the *non-refoulement* obligations, their safety becomes the responsibility of this state. With the current system of Ministerial Discretion in Australia, it is questionable whether Australia is sufficiently meeting this responsibility.

I will now look at the interrelationship of these international obligations with the principle of state sovereignty. With their ability to transcend borders, international law and the core refugee law principle of *non-refoulement* have greatly impacted upon the traditionally supreme sovereign rights of states. The concept of state sovereignty thus remains a thorn in the side of the effective implementation of international obligations. I will look to the history

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<sup>25</sup> Article 33.1 of the 1951 Refugee Convention, available at [http://www.unhchr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhchr.ch/html/menu3/b/o_c_ref.htm) (accessed 12 February, 2009)

<sup>26</sup> International Covenant on Civil and Political Rights, adopted on 16 December, 1966, [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (accessed 12 February, 2009), hereinafter “ICCPR”

<sup>27</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted on 10 December, 1984, [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm) (accessed 12 February, 2009), hereinafter “CAT”

<sup>28</sup> **Article 3 of CAT** outlines that “No state party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

**Article 7 of ICCPR** contains an implied *non-refoulement* obligation, outlining that “No one shall be subjected to torture or cruel, inhuman or degrading treatment of punishment”.

<sup>29</sup> Other treaties including the 1989 Convention on the Rights of the Child, the 1954 Convention relating to the Status of Stateless Persons, the 1965 International Convention on the Elimination of all forms of Racial Discrimination, and the 1979 Convention on the Elimination of all Forms of Discrimination Against Women do not impose such specific obligations on States, but they do provide a framework human rights standards which have been internationally accepted

<sup>30</sup> Australia ratified the Refugee Convention on 22 January, 1954

<sup>31</sup> Australia ratified the ICCPR on 13 November, 1980

<sup>32</sup> Australia ratified CAT on 8 August, 1989



of this concept, as well as the debate surrounding it currently which exemplifies how it is posing a barrier to the implementation of international obligations. The paradox between international obligations and the principle of state sovereignty is resulting in a gap in the protection of human rights. I will examine this paradox, looking to some political theories which help us to understand it. Through this examination I hope to highlight the divorce which exists between the *theory* of protection under the international framework, and the *practical application* of such a framework. I will then follow on with my analysis of the case study of Complementary Protection in Australia, which is looking to fill this gap in protection of asylum seekers in Australia.

## 2. WHY IS THERE A GAP BETWEEN INTERNATIONAL OBLIGATIONS AND DOMESTIC IMPLEMENTATION?

The interplay between international obligations and their translation into practical protection for asylum seekers is a challenging area of interstate relations. *Non-refoulement* obligations essentially involve placing the responsibility of what was traditionally within the sphere of sovereignty of one state onto another. After all, a state is primarily responsible for the protection of its citizens, and international protection only arises where that primary state protection *fails*. *Non-refoulement* obligations shift this responsibility to the state where the person is seeking asylum. Without a codified system of Complementary Protection, Australia is failing to meet its international obligations. Prior to examining the current system in Australia, I will first look to two central challenges facing the domestic implementation of international obligations generally. First is the paradox between the natures of state sovereignty versus international obligations. These concepts essentially entail opposing ideas, and so the clash between them is resulting in a lack of protection for asylum seekers. Secondly is the challenge of enforcement measures of the obligations. Without systems of accountability or domestic implementation, the protection outlined under these obligations essentially becomes meaningless.

### 2.2 A paradox in international law: State Sovereignty v. International Obligations

In the situation of return, there is a clear tension arising between the *right* of a state and the *duty* of a state. A paradox exists that while states *consent* to be bound by international obligations; if these obligations do not fall in line with their national interests, where is the incentive to abide by them? It has been outlined that the “difficulty of the human rights-sovereignty conundrum is perhaps nowhere more apparent than in the situation of return”<sup>33</sup>. Under the principle of state sovereignty, states should have the ultimate authority in determining who remains on its territory, yet they also have a duty to fulfil an international commitment made of *non-refoulement*. Agreeing to these *non-refoulement* obligations, states are subjecting themselves to a fundamentally confronting issue; the arrival of non-citizens on their borders claiming a right to not be sent back to where they came from. How a state deals with the protection of non-citizens has historically been a matter of international importance,

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<sup>33</sup> Van Selm-Thorburn, Joanna (1998), *Refugee Protection in Europe – Lessons of the Yugoslav Crisis*, Martinus Nijhoff Publishers p. 54

with a practice dating back to the 1800s of states refusing to extradite persons within their jurisdiction who faced prosecution for a political offence in their home state<sup>34</sup>.

The concept of state sovereignty is in direct contradiction to the nature of *non-refoulement* obligations. Dating back to the Treaty of Westphalia in the 17<sup>th</sup> century, it is essentially seen as granting upon the State a “supreme authority within their territorial borders and (denying) the existence of any higher authority beyond these borders”<sup>35</sup>. The fundamental problem, however, with States not being accountable to any international authority was vividly demonstrated during the reign of Hitler and the Nazi forces. World War II was thus seen to bring about a new era in international relations. With the UN Charter in 1945<sup>36</sup>, a period of *transnational* protection of human rights began. States now “grudgingly”<sup>37</sup> became accountable to international human rights bodies, and so this developing international human rights law was potentially seen as the beginning of the end for the traditional concept of state sovereignty.

State sovereignty and the desire of a state to put its self-interests first can be explained through the lens of realism. Realists view humans as first and foremost pursuing their own self-interests. In the context of world politics, realist theory sees states as only pursuing action where their self-interests are involved. In his pivotal work *Politics Among Nations*<sup>38</sup>, Morgenthau outlines that in the realm of world politics, the primary concern of a state is the acquisition and maintenance of power. He distinguishes the actions of states from those of individuals, arguing that political interests always come first, and thus universal moral principles cannot attach to states as they do to people<sup>39</sup>. The morality of any particular state instead is subject to concerns of self-preservation and the “desire for power”<sup>40</sup>. State sovereignty is one of the forefront barriers to the implementation of the international obligation of *non-refoulement*. According to his theory, treaties of international law will only be enforced when they are mutually beneficial for states. If there is a “direct bearing upon the relative power of the nations concerned”<sup>41</sup>, then the states will always enforce their self-

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<sup>34</sup> Lillich, Richard B. (1984), *The Human Rights of Aliens in Contemporary International Law*, Manchester University Press, p. 35

<sup>35</sup> Schwarz, Rolf, “The paradox of sovereignty, regime type and human rights compliance”, *The International Journal of Human Rights*, (2004) Vol. 8 (2), p. 199-215, p. 203

<sup>36</sup> The Charter of the United Nations came into force 24<sup>th</sup> October (1945), available at [www.unhcr.ch/html/menu3/b/ch-cont.htm](http://www.unhcr.ch/html/menu3/b/ch-cont.htm) (accessed 4 February, 2009)

<sup>37</sup> Schwarz, Rolf, “The paradox of sovereignty, regime type and human rights compliance”, *The International Journal of Human Rights*, (2004) 8:2, p. 199-215 p. 214

<sup>38</sup> Morgenthau, Hans (1993), *Politics Among Nations: The Struggle for Power and Peace*, edited by Kenneth W. Thompson, Boston: McGraw Hill

<sup>39</sup> *Ibid.* p. 4

<sup>40</sup> Morgenthau, Hans (1946), *Scientific Man Versus Power Politics*, University of Chicago Press, p. 193

<sup>41</sup> *Ibid.*

interests first. Liberalism on the other hand, which is far more optimistic as to human nature, represents the way in which the nature of international human rights law should work. Tracing back to humanism which challenged the original notions of sovereignty, liberalism focuses on the desire of humans to share and help one another. In liberalist theory, nation states thus do not insist upon the traditional notions of state sovereignty, but rather recognise the legitimacy of the international system<sup>42</sup>. Applying the idealistic liberal theory to the international obligations of *non-refoulement*, there should be no barrier of state sovereignty. States should thus meet their international obligations and provide protection for all those who fall within one of the Conventions' *non-refoulement* categories.

Human rights, with its basis in international co-operation and universalism, fits well with liberal thought. On the other hand, the principle of state sovereignty, as evidenced by its current operation in Australia, appears to fit well with the realist rather than the liberalist mindset. The asylum policies adopted by the recent Australian governments clearly reflect Morgenthau's realist view of putting the self-interests of the State first. In order for the international *non-refoulement* obligations to pass the barrier of state sovereignty, it is clearly necessary for there to be sufficient enforcement mechanisms of these obligations. Currently, such effective enforcement mechanisms are lacking, and thus pose an impediment for effective protection. Without a requirement to abide by its international obligations, Australia has managed to avoid implementing a codified system of extended protection afforded by *non-refoulement*.

### 2.3 Viability of the Human Rights framework : the challenges of enforcement

International law, which differs from domestic law in its lack of a central law-making body, is often the subject of debate as to its legitimacy to govern the action of states. The enforcement of international human rights law has thus been met with numerous challenges, including "inter-state negotiations, compromise, and the accommodation of other goals and values"<sup>43</sup>. By signing on to human rights instruments which confer rights on individuals, states are accepting the reciprocal duties which these instruments impose. However, while these obligations are placed on States upon ratification of human rights instruments, the enforcement mechanisms are somewhat lacking. Human rights treaties essentially rely on the concept of consensus, i.e. states voluntarily sign up to them, and thus are expected to adhere to their obligations. Reporting systems do exist through the various Conventions' Monitoring

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<sup>42</sup> Grant, Ruth (1987), *John Locke's Liberalism*, University of Chicago Press

<sup>43</sup> Cali, Basak, and Meckled-Garcia, Saladin (2006), "Lost in translation – the human rights ideal and international human rights law", *The Legalization of Human Rights*, Routledge, p. 14

Bodies<sup>44</sup> and under these systems states are expected to submit reports to the respective Monitoring Bodies. The idea is that a state is thus forced to assess its own actions, and this self-regulated aspect is then monitored by the Committee.

The problem with this whole procedure however, is that there is essentially no retribution for a state failing to adhere to its obligations. Enforcement is based on the tactic of “naming and shaming” in the hope that countries will live up to the promises they have made when faced with scrutiny from the international public. The shortcomings of this monitoring system are vividly exemplified in the case of *Elmi vs. Australia*<sup>45</sup> which I will discuss shortly; where Australia simply chose to ignore the findings of UNCAT. Herein lies the problem with the nature of achieving human rights protection through international obligations. While states sign up to international treaties which contain obligations including that of *non-refoulement*, the lack of enforcement methods mean these obligations often go unfulfilled.

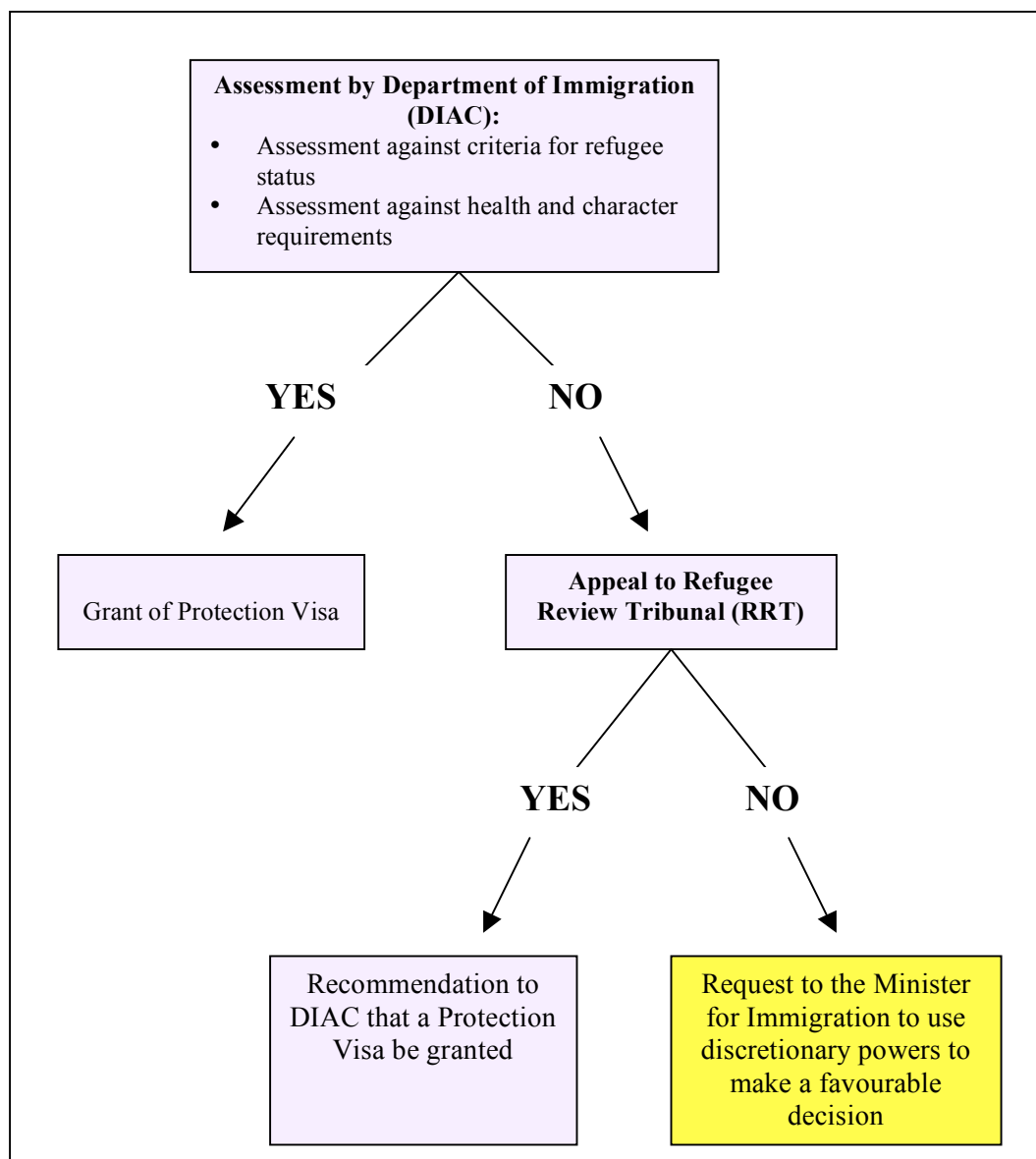
As well as there being a lack of accountability for not implementing the findings of these committees, there is no enforcement mechanisms to ensure these international obligations translate into effective domestic implementation. This poses a major challenge to the success of international obligations. As noted above, my case study of Complementary Protection in Australia directly exemplifies an attempt to legislate such domestic implementation of the international obligations of *non-refoulement*. Currently, no such domestic implementation exists. While Australia has ratified various Conventions which contain international obligations of *non-refoulement*, the state has failed to provide satisfactory codified protection at a domestic level. A Ministerial Discretion does exist to examine those cases which fall outside the Refugee Convention. However, as will be shown, the current system is inefficient, expensive and completely inadequate, resulting in a weak system of protection for asylum seekers. This case study shows clearly a divorce between the commitments given by states and the practical application of them. The gap that exists between the theory and reality of protection is thus evident as these formal obligations are not translating into effective protection of human rights.

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<sup>44</sup> The UN Human Rights Committee was established to monitor the implementation of the ICCPR and the Protocols to the Covenant in the territory of States parties, see details at <http://www.unhchr.ch/html/menu2/6/hrc.htm> (accessed 5 June, 2009), while the UN Committee against Torture (hereinafter, “UNCAT”) was established pursuant to article 17 of CAT to monitor its implementation, see details at <http://www.unhchr.ch/html/menu2/6/cat/index.html> (accessed 5 June, 2009)

<sup>45</sup> *Sadiq Shek Elmi V Australia*, Communication No. 120/1998: Australia. 25/05/99. CAT/C/22/D/120/1998. I will discuss this in detail below at para. 3.3

### 3. CASE STUDY: THE CURRENT SYSTEM IN AUSTRALIA



*Box 1. Current Refugee Status Determination System in Australia*

The current system in Australia to deal with asylum seekers falling outside the Refugee Convention is by way of a Ministerial Discretion. The process which faces the arrival of non-Convention refugees to Australia (see *Box 1*) is clearly a lengthy and cumbersome one. Asylum seekers arriving on Australian shores can only apply for the Minister of Immigration to exercise his discretion *after* the refugee process has failed. Many therefore, *knowing* that they do not fit within the Refugee Convention definition, still have to go through the lengthy application process just to be rejected, so that they can then apply for this discretion. Thus it is

clearly a “grossly inefficient”<sup>46</sup> system, which essentially forces asylum seekers to lodge unmeritorious claims through the refugee system so that they can get to the end stage of applying for Ministerial Discretion. I will shortly assess the proposed Draft Model, examining whether it is an improvement on the current system, and whether it will be sufficient to fill the gaps in protection.

Under the current process, the applicant’s claim is assessed against the Refugee Convention criteria, but not against the other human rights instruments which Australia has ratified as discussed above<sup>47</sup>. If the strict criteria for refugee status, as well as the health and character requirements are met with satisfaction, then a protection visa will be granted. If the application is refused, the applicant may first appeal to the Refugee Review Tribunal, or if this fails, they may then finally apply to the Minister for Immigration to exercise his Ministerial discretion. This discretionary procedure (see the highlighted box in Box 1) is legislated in section 417 of the 1958 Migration Act<sup>48</sup>. This procedure is “non-compellable, non-reviewable, and non-delegable”<sup>49</sup>. The Minister for Immigration thus does not have to intervene, and if they do, there is no obligation to give reasons for their decision. There is ultimately *no* guarantee that the applicant’s application will even be processed. This system is clearly in no way appropriate to meet the international commitments which Australia has made, and should be immediately legislated and subject to judicial review so as to ensure consistency, transparency and accountability.

### 3.2 Inappropriateness of the Current System of Ministerial Discretion

*“One wrong decision to return someone home could mean torture, persecution or death. To leave such a decision in the hands of the Minister of the day, without any transparency or accountability, is to subject claimants to the vagaries of politics and the Minister’s personal whim.”*<sup>50</sup>

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<sup>46</sup> McAdam, Jane, “Complementary protection: Labour’s point of departure”, Inside Story article, 3 December, 2008, available at [www.inside.org.au/complementary-protection](http://www.inside.org.au/complementary-protection) (accessed 15 February, 2009)

<sup>47</sup> See discussion above of *non-refoulement* obligations at para. 1.3

<sup>48</sup> Migration Act 1958, available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118/](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/) (accessed 5 February, 2009)

<sup>49</sup> McAdam, Jane (2007), *Complementary Protection in International Refugee Law*, Oxford University Press p. 131

<sup>50</sup> Field, Nina, “Playing God with sanctuary – A study of Australia’s approach to complementary protection obligations beyond the Refugee Convention” (quoting Thomson, James, from the National Council of Churches), Oxfam Australia Report, June 2008, available at <http://www.oxfam.org.au/campaigns/refugees/docs/CP-PlayingGod-080604.pdf> (accessed 16 February, 2009)

The fact that the current Minister for Immigration himself has compared his discretionary power in this area to “playing God”<sup>51</sup> clearly highlights the need to implement immediate reform. When looking to the role a minister should play, the Minister for Immigration and Citizenship should clearly not be left to personally go through asylum seeker cases one-by-one<sup>52</sup>. The Discretion was designed to deal with only exceptional cases, and thus legislation is clearly needed to remove this inappropriate burden on the Minister. It is giving too much power to one individual, leaving this Ministerial position open to claims of an abuse of power. With the massive increase in the number of cases appealed to the Minister under section 417 in recent years, this particular discretion is no longer appropriate. As of January 2, 2009, it was reported there were 2,793 requests for intervention<sup>53</sup>. Due to the inability of asylum seekers to apply directly for complementary protection, major unnecessary delays are occurring; impacting upon the efficiency of the Department of Immigration and Citizenship (DIAC) and the Refugee Review Tribunal (RRT) and thus wasting resources which are already under great strain. This system also gives fuel to the arguments that “false-refugees” are clogging up the system, when in fact they have no other way to seek protection.

This Ministerial discretion has been described as “unpredictable and opaque”<sup>54</sup>, even an “expensive dinosaur”<sup>55</sup>. In addition to imposing such a major and inappropriate burden on the Minister, it is also a most expensive measure. It is costing the Australian government a great deal of money every day to keep these applicants in detention while they wait for the Minister to get around to their case. In a case study examined by the National Council of Churches<sup>56</sup>, an estimate was drawn up of the cost of keeping a family kept in detention for four years who were eventually granted visas from a Ministerial discretion. It was outlined that it would have cost the state between \$1.8 and \$15.8 million to keep this family in detention, depending on where they were detained. If a system of complementary protection was in place, therefore allowing them to get to the relevant assessment far quicker, the costs would have been

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<sup>51</sup> Senator Evans announced to a Senate estimates committee on February 19<sup>th</sup> 2008, reported in “I should not play God: Evans”, the *Sydney Morning Herald*, 20 February, 2008

<sup>52</sup> Proust, Elizabeth, “Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Migration Regulations”, January 2008, available at <http://www.minister.immi.gov.au/media/media-releases/2008/proust-report.pdf> (accessed 10 February, 2009)

<sup>53</sup> *The Age*, 9 January, 2009

<sup>54</sup> *Ibid.* p. 132

<sup>55</sup> Thomson, James, “Why Australia needs a Complementary Protection Visa”, National Council of Churches in Australia, transcript of radio programme on Complementary Protection, available at [www.ncca.org.au/cws/rdp/issues/complementary\\_protection](http://www.ncca.org.au/cws/rdp/issues/complementary_protection) (accessed 15 February, 2009)

<sup>56</sup> “Complementary Protection - The Way Ahead”, a January 2004 Report developed by the Refugee Council of Australia, Amnesty International and the National Council of Churches of Australia, available at [www.ncca.org.au/cws/rdp/issues/complementary\\_protection](http://www.ncca.org.au/cws/rdp/issues/complementary_protection) (accessed 15 February, 2009)



reduced to between \$220,000 and \$2 million. This example vividly indicates the money which is being wasted with the current system.

Under the various human rights instruments which Australia is a party to as discussed above, it is a requirement that if someone falls within one of the specific treaty grounds, they must not be sent back to their home country. Yet within the Australian system, this Ministerial discretion is non-compellable. As outlined, in some cases the Minister might not even look at the case. These obligations are not something which Australia can afford to treat lightly as they stem from Australia's ratification of the various treaties. Dealing with such international obligations by means of this informal discretionary mechanism is not acceptable, and reform must be introduced. I will now look to the case study of *Elmi v. Australia*, a case which sadly illustrates the irrationality of Australia's current system.

### 3.3 Case Study: *Elmi v. Australia*<sup>57</sup>

In this case, a Somalian asylum seeker from a persecuted minority clan claimed refugee status in Australia. While in detention, his claim was rejected by both DIAC and the RRT on the grounds that any harm he would face upon return to Somalia would be because of a situation of generalized violence from civil war, rather than a specific Refugee Convention reason. Thus, even though there was a clear case that Mr. Elmi would be subjected to torture upon return, his claim failed as it did not fall within the strict legal definition. While Mr. Elmi was still in detention, the appeal finally reached the stage of Ministerial Discretion where the Minister refused to exercise his discretion. Due to the non-reviewable nature of the system, Mr. Elmi could not know if his particular protection needs under CAT had even been assessed.

A complaint was subsequently made to UNCAT arguing that Mr. Elmi's deportation would be in breach of the *non-refoulement* provision under Article 3 of CAT<sup>58</sup>. UNCAT outlined that these *non-refoulement* obligations did in fact come into play, and declared Australia thus had an obligation to refrain from returning the applicant home. As outlined above, the committee's decision does not bind governments, and thus Australia was *legally* free to ignore its ruling. Instead of granting a protection visa in response to the UNCAT ruling, the Minister outlined that he would have to apply through the whole system again. Thus, after a

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<sup>57</sup> *Sadiq Shek Elmi V Australia*, Communication No. 120/1998: Australia. 25/05/99. CAT/C/22/D/120/1998

<sup>58</sup> Article 3 of CAT outlines that "No state party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"

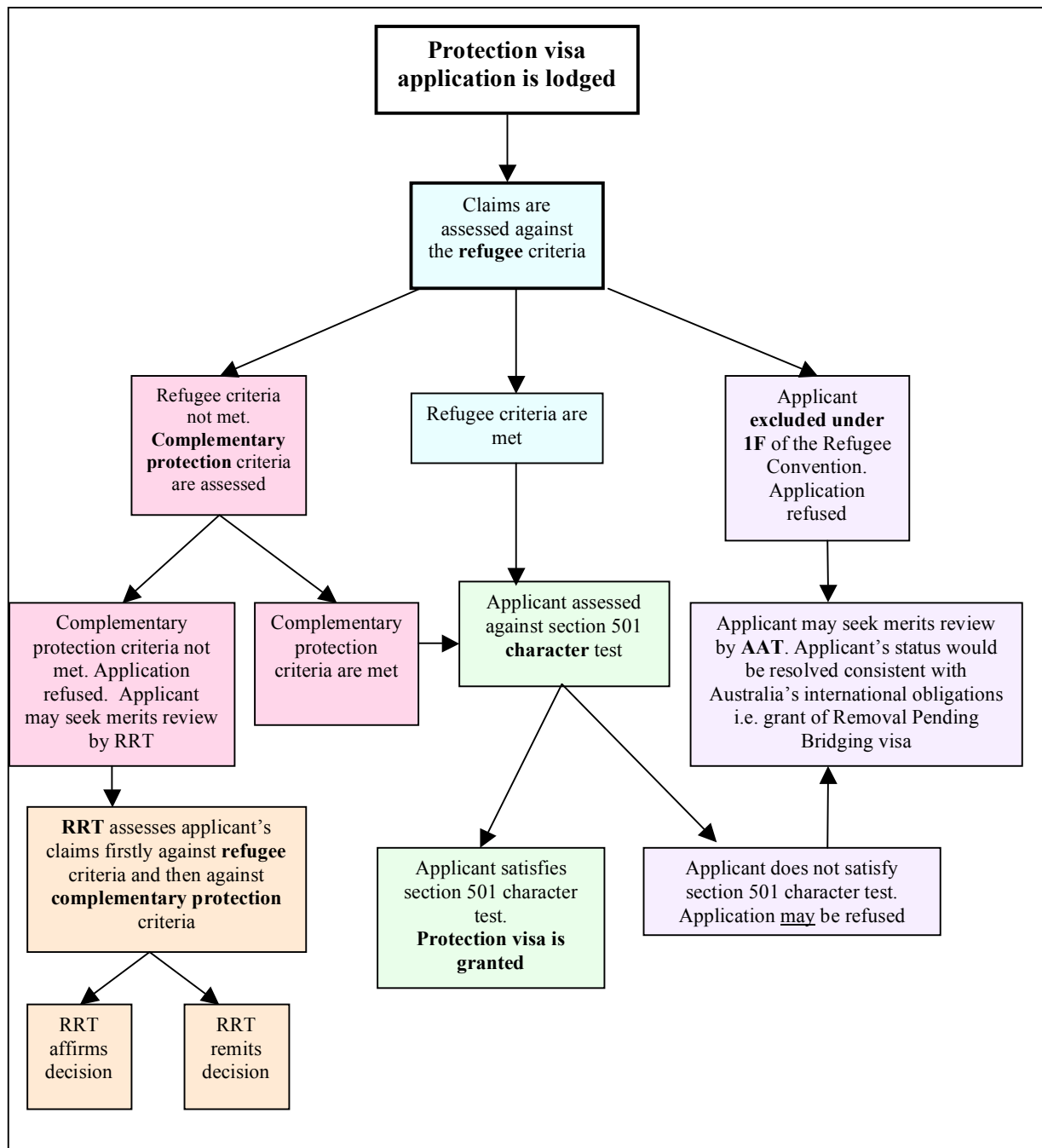
ruling by an international committee that this person is in need of protection under obligations which Australia is “duty-bound to respect under international law”<sup>59</sup>, the Australian government’s response was to put that person through the whole drawn-out procedure again. Clearly if a proper legislated mechanism was in place for assessing complementary protection grounds, Mr. Elmi could have had his claim assessed on the ground of torture from the start, and would not have to have spent such a long and ultimately pointless length of time in detention. In this case, Mr. Elmi in fact left Australia “voluntarily” rather than face more prolonged detention.

It is clear that under the current system, the failure to implement effective domestic measures results in a lack of accommodation for those in need of international protection. While the Minister may give consideration to the obligations in his discretionary assessment, his decision in the end is not reviewable, and thus without accountability or transparency, there is no guarantee that Australia is in fact meeting its obligations. Australia has ratified these commitments to international protection, and it is time a system is put in place to prevent cases like this one from occurring again. I will now look to the proposed Draft Model for Complementary Protection in Australia, which will, it is hoped, be part of the new era in the Australian immigration system. If this Draft Model system was in place for Mr. Elmi, perhaps there may have been a different outcome. Assessing his claim under the Complementary Protection system could have saved a prolonged period of detention, and could have resulted in a protection visa being granted to someone who was deserving of international protection.

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<sup>59</sup> McAdam, Jane, “Complementary protection: Labour’s point of departure”, Inside Story article, 3 December, 2008, available at [www.inside.org.au/complementary-protection](http://www.inside.org.au/complementary-protection) (accessed 15 February, 2009)

**3.4 Proposal for reform: the Draft Complementary Protection Visa Model**



*Box 2. The Draft Model for the Complementary Protection of Asylum Seekers*

The Draft Model was drawn up by DIAC in November 2008 as a proposal for a system of Complementary Protection. The system is intended to be based solely on the international obligations which Australia has committed to under CAT and the ICCPR, and would provide the recipients with equal status and rights as refugees in Australia, save one difference of the Travel document<sup>60</sup>. The Draft Model proposes that a single assessment procedure will be developed, with access to merits and judicial review. In order to maintain the primacy of the Refugee Convention, a two step system is proposed. The applicants' protection needs would be first assessed against the Refugee Convention, and only if the strict criteria of the "refugee" definition were not met would the grounds of complementary protection then be examined. McAdam outlines that this proposed system would therefore allow decisions makers to continue to "rigorously test and develop the bounds of the refugee definition" while at the same time also have "additional grounds on which they could grant protection in accordance with Australia's international obligations"<sup>61</sup>. As outlined in the 2005 ExCom Conclusion on International Protection<sup>62</sup>, it is vital that an international protection system is developed in a way which avoids protections gaps and allows those persons in need of international protection to get it. In order to assess whether the Draft Model will adequately fill the gap in protection of asylum seekers in Australia, it is necessary to look at the details of the proposed system.

### 3.4 (a) Who will be protected by the Draft Model?

In the Draft Model, DIAC recognises a broad range of people who can be generally included within complementary protection; including persons to whom Australia has an actual *non-refoulement* obligation under an international treaty, stateless persons, persons fleeing armed conflict or serious public disorder, persons fleeing indiscriminate effects of violence and serious threats to life, liberty and security, and victims of natural or ecological disasters<sup>63</sup>. However, the proposed complementary protection system in Australia will be limited to the first category i.e. persons who fall under specific *non-refoulement* obligations contained in

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<sup>60</sup> The travel document outlines the terms under which a refugee can travel. This equal status for those granted Complementary Protection status is a step up from the E.U. system, which I will look at below.

<sup>61</sup> McAdam, Jane, "Complementary protection: Labour's point of departure", Inside Story article, 3 December, 2008, available at [www.inside.org.au/complementary-protection](http://www.inside.org.au/complementary-protection) (accessed 15 February, 2009)

<sup>62</sup> ExCom Conclusion No. 103 on the Provision of International Protection Including Through Complementary Forms of Protection (2005) available at [http://www.unhcr.org/refworld/type\\_EXCONC...43576e292\\_0.html](http://www.unhcr.org/refworld/type_EXCONC...43576e292_0.html) (accessed 22 April, 2009)

<sup>63</sup> "Draft Complementary Protection Visa Model: Australia", circulated prior to the 13 November, 2008 consultation on complementary protection and work rights, Department of Immigration and Citizenship, [www.immi.gov.au](http://www.immi.gov.au) (accessed June, 2009)

human rights instruments which Australia has committed to. It is thus proposed by DIAC that the existing subclass 866 (Permanent) Protection visa will be extended to include those who fall under Australia's *non-refoulement* obligations in Article 3 of CAT, Art 6 and 7 of the ICCPR, and Article 1 of the Second Optional Protocol to the ICCPR. These articles, in summary, involve the inherent right to life, and the absolute prohibition on torture, inhuman or degrading treatment or punishment.

The Draft Model therefore does not cover other persons in need of international protection, and thus potentially fails to wholly fill the gap in protection of asylum seekers. The most contentious category of people omitted from the Draft Model is those fleeing "indiscriminate effects of violence". DIAC has indicated that this category of persons is unnecessary as a separate category as *most* people will fall under the ambit of the Refugee Convention, or under the new provision covering the *non-refoulement* obligation on inhuman/degrading treatment grounds. UNHCR argue however, that although this category *may* fall under the Refugee Convention, "explicit inclusion"<sup>64</sup> in the Draft Model would be necessary so as to ensure there are no gaps in protection. This category *is* covered by the E.U. Qualification Directive and its interpretation has proved a challenging issue among the Member States which I will discuss below. This wider scope of protection would of course be welcomed in the Australian proposed system, but from the European experience it is clear that the terminology used is vital to ensure protection is expanded and not narrowed, which is occurring in some Member States. Thus, if the category of "indiscriminate violence" is introduced into the Draft Model, albeit with slightly different wording to the troublesome E.U. section, *all* people that fall within this category would be ensured protection.

### **3.4 (b) Who will be excluded from the Draft Model?**

Under the Refugee Convention, it is recognised that certain categories of persons can be excluded from the Convention, and thus can be returned to their home country notwithstanding that they may have a well-founded fear of persecution<sup>65</sup>. Under the Draft Model, these exclusions clauses under 1(f) are adopted<sup>66</sup>. However, the Draft Model contains

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<sup>64</sup> "Draft Complementary Protection Visa Model: Australia, UNHCR Comments", 6 January, 2009, available at [www.unhcr.org.au](http://www.unhcr.org.au) (accessed June, 2009)

<sup>65</sup> Article 1(f) specifies that the Convention will not apply to persons whom there are "serious reasons" for considering that they have committed a "crime against peace, a war crime, a crime against humanity, ... a serious non-political crime outside the country of refuge, ... or has been guilty of acts contrary to the purposes and principles of the United Nations", the Refugee Convention, [http://www.unhchr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhchr.ch/html/menu3/b/o_c_ref.htm) (accessed 12 February, 2009)

<sup>66</sup> In comparison, the E.U. exclusion clauses, which I will shortly discuss, are far wider than article 1(f) and vary according to what status the applicant is granted.

a *further* hurdle which the applicant must pass. Once a person has been deemed entitled to complementary protection, or indeed has been deemed a “refugee” under the Convention, they still must face the section 501 Character Assessment Test in the Migration Act<sup>67</sup>.

Within the character test, a person will be deemed to have failed the test if they have a “substantial criminal record”<sup>68</sup>. However, within “substantial criminal record” someone who has been sentenced to life imprisonment and someone who has been in prison for one year are contained in the *same category*. Furthermore, a person can fail if the Minister decides because of the applicant’s “general conduct”<sup>69</sup> in the past; they are not of good character. Some of these provisions within the character test seem absurd, and the fact that a person can lose their right to international protection, even after fitting within the status of “refugee” or someone in need of complementary protection, is highly unfair. The Department outlined that this character assessment is “in line with international practise”<sup>70</sup>, where many states have adopted systems for excluding people with serious character concerns. If people have committed a crime, but have atoned for it, there is no reason they should be re-punished when they are fleeing from persecution and in search of asylum. Of course this area is a highly politically sensitive one, but in order to provide comprehensive and fair protection for those in need, it is essential to have further clarification and differentiation within the character test. It is vital that these character assessments are monitored by judicial review and reformed where necessary as they are essentially diluting the human right to seek asylum.

Where an applicant has been recognised as being in need of international protection, whether through refugee status or complementary protection, the denial of such protection on character grounds must be done through a transparent and fair approach with consistent assessment and clear criteria. However, within the section 501 procedure, the Minister decides whether the applicant passes the “character test”<sup>71</sup>, and if the test is failed, the Draft Model indicates that the Minister retains a discretion in deciding the final outcome. The problem of Ministerial discretion thus remains in the new proposed system. The Minister is still left with the ever-criticised position of “playing God” in certain circumstances, and so this remaining ministerial discretion is in need of legislating. UNHCR has indicated that

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<sup>67</sup> Migration Act 1958, available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118/](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/) (accessed 5 February, 2009)

<sup>68</sup> Ibid. s 501 ss 7

<sup>69</sup> Ibid. s 501 ss 6

<sup>70</sup> “Draft Complementary Protection Visa Model: Australia”, circulated prior to the 13 November, 2008 consultation on complementary protection and work rights, Department of Immigration and Citizenship, [www.immi.gov.au](http://www.immi.gov.au) (accessed June, 2009)

<sup>71</sup> Migration Act 1958, available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118/](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/) (accessed 5 February, 2009), s 501 ss 6

where there is a decision regarding a “substantive legal obligation not to *refoule* pursuant to an international obligation”, that decision should not be left up to Ministerial discretion. Even though it may only arise in exceptional cases, it should still be defined in legislation. The character assessment thus contained in the current Australian immigration system, and maintained in the proposed Draft Model could potentially pose a barrier to the effective implementation of its international obligations of protection.

#### **3.4 (c) Will the Draft Model succeed in filling the gaps of protection?**

After having analysed both the current and proposed system in Australia, it is now necessary to reflect on my original aim of examining whether the Draft Model for Complementary Protection will indeed fill the gap in the protection of asylum seekers. The Draft Model will clearly be a major step forward in affording international protection, by now assessing asylum seekers against the *non-refoulement* obligations as well as the original Refugee Convention criteria. With a proper codified system of Complementary Protection, Australia will no longer be meeting its international obligations with a discretionary mechanism. The downside, however, is that the new categories of protection do not go far enough, excluding many persons in need of protection. As will be analysed shortly, the E.U. system has expanded further, to include the category of “indiscriminate violence”. The fact that Australia is now introducing legislation to cover the gaps in protection, it is desirable that this legislation goes as far as possible to prevent certain holes remaining.

A major upside of the new system is that it will remove the irrational aspect of the current procedures, in that it will now result in a definite assessment against the complementary protection criteria rather than simply a minister’s discretionary assessment. It remains that asylum seekers must still go through the Refugee Convention status determination process first, but this will ensure that the primacy of this document is maintained. This aspect has proven to be an issue with the E.U. system, where there is a possibility that Complementary Protection is being afforded when in fact the asylum seekers should have been granted refugee status. This is of course not a desirable outcome, and so it seems positive that the two-step process is maintained.

The Draft Model is also succeeding (for the most part) in removing the controversial Ministerial Discretion. With a review system now in place, the “non-compellable, non-reviewable, non-delegable” power will be thankfully put to rest. However, as outlined above, a Ministerial Discretion will be maintained for applicants who do not pass the “character test”. This character test poses a threat to the full implementation of Australia’s international

obligations. It evidences an area where the sovereignty of the state is trumping the meeting of international obligations, by the state choosing to refuse those of undesirable character. The Draft Model should ensure that a proper review process is available, where the dubious “character test” is not passed, and that it is not just left up to the Minister’s discretion. I will now turn to a comparative analysis with the E.U. system of Complementary Protection. It illustrates both successes and problems which can occur within such a protection system.

### 3.5 A comparative analysis: “Subsidiary Protection” in the European Union

“Subsidiary Protection” was introduced in the E.U. as part of the Qualification Directive<sup>72</sup> in April 2004, with the aim of ensuring Member States “apply common criteria for the identification of persons genuinely in need of international protection”<sup>73</sup>. It was intended to remove the “asylum lottery”<sup>74</sup> which had formed due to the striking disparities in laws across the Member States. In *law*, the Directive expanded the scope of international protection. However, in *practice* research has found that subsidiary protection is in fact not granted to significant numbers of persons who are in need of international protection<sup>75</sup>. This gap in protection is due to two central factors; procedural flaws among the Member States and a narrow interpretation of the provisions of the Directive<sup>76</sup>. The Qualification Directive thus provides an insightful precedent for a system of Complementary Protection, illustrating many of the problems which this form of protection can face.

The Directive itself takes a holistic approach to international protection needs, containing minimum standards for *both* the recognition of refugee status *and* subsidiary protection. Subsidiary protection is thus *complementary* to refugee protection, and a person entitled to it is defined as

*“a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin... would face a real risk of suffering serious harm (see Box*

<sup>72</sup> The “Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted”, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML> (accessed 15 February, 2009), hereinafter, the “Directive”

<sup>73</sup> Ibid. at Recital 6

<sup>74</sup> The European Council on Refugees and Exiles Press Release, “Europe must end Asylum Lottery”, 4 November, 2004 available at [www.ecre.org/files/asylumlot.pdf](http://www.ecre.org/files/asylumlot.pdf) (accessed 10 February, 2009)

<sup>75</sup> “Asylum in the European Union- a Study of the implementation of the Qualification Directive”, UNHCR Report, November 2007, available at [www.unhcr.org](http://www.unhcr.org) (accessed 20 February, 2009), at para. 1.2.5

<sup>76</sup> Ibid.



*3 below)*<sup>77</sup>

Persons seeking asylum in the E.U. are thus assessed against criteria which is far broader than the legal definition under the Refugee Convention, and, if it is found they are in need of protection, they are granted a formal legal status. This has resulted in a potential undermining of the primacy of the Refugee Convention, with some asylum seekers being granted “complementary protection” status, when they should in fact have been granted the status of a “refugee”. This is particularly worrying seeing that under the Directive, those granted complementary protection status are afforded lesser rights and entitlements to legal “refugees”<sup>78</sup>. McAdam outlines that States are perhaps even favouring subsidiary protection, so as to avoid “the more stringent obligations”<sup>79</sup> required for Refugee Convention refugees.

As can be seen from Box 4 in Annex I, there are numerous areas in which the Directive and the Australian Draft Model contrast. I will now focus on one of those areas, indiscriminate violence, as it is a contentious matter for Australia. Article 15 of the Directive covers the *non-refoulement* obligations of the ICCPR and CAT, as well as this additional category of “indiscriminate violence”. As outlined above, UNHCR have argued for the inclusion of this category in the Draft Model to ensure persons in need of international protection do not fall through the gaps. Even if “indiscriminate violence” is not included in the final Australian legislation, this examination is still vital as European case law in this area can provide guidance as to how complementary protection has, and is still being developed.

### **3.5 (a) “Indiscriminate violence” – Has its inclusion succeeded in increasing protection?**

The Qualification Directive has extended to include the category of persons at risk of “serious harm” due to “indiscriminate violence” within Article 15(c), and has ever since experienced many problems with its interpretation. It has generated a wide range of diverse approaches to interpretation of the Directive, and hence to the grant of protection. Thus, it can be argued that instead of harmonising approaches among Member States, the article’s contentious wording has resulted in strikingly diverse interpretations of the provision and therefore rendering the protection offered “illusory”<sup>80</sup>. A highly restrictive approach has been taken to the term

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<sup>77</sup> The Directive, Article 2(e)

<sup>78</sup> See Annex I Box 4 for details on rights and entitlements

<sup>79</sup> McAdam, Jane, “The Refugee Convention as a rights blueprint for persons in need of international protection”, UNHCR Research paper No. 125, July 2006

<sup>80</sup> “Asylum in the European Union- a Study of the implementation of the Qualification Directive”, UNHCR Report, November 2007, available at [www.unhcr.org](http://www.unhcr.org) (accessed 20 February, 2009), at para 1.2.5

**QUALIFICATION FOR SUBSIDIARY PROTECTION**

Article 15

*Serious harm*

Serious harm consists of

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.**

*Box 3. Article 15 of the Qualification Directive*

“individual threat”, with a requirement for the applicant to show they are *greater* risk of harm than the rest of the population. This is therefore denying subsidiary protection to those who face the *same* risk as the rest of their population<sup>81</sup>. Further, a restrictive approach has been adopted in Germany as to the assessment of “risk”. There the implementing domestic legislation requires that the risk be “inevitable” with a “near certainty” of death, rather than the Qualification Directive requirement of simply a “real risk”. Similarly, regarding the term “internal armed conflict”, there are large discrepancies over what this should be defined as. This is resulting massively divergent opinions across Member States. For example, the situation in Iraq was accepted in France as falling within “internal armed conflict”, yet in Sweden it was not<sup>82</sup>. It is thus clear that without specific terminology and guidance on how to interpret the Directive’s provisions, Member States may narrow the definitions in this way, therefore denying protection to those deserving of it.

**3.5 (b) Has the Qualification Directive succeeded in filling the gaps in protection?**

The E.U. system aimed at harmonising the asylum seekers processes across Europe. It is debatable whether it has in fact succeeded in this aim, with the divergent interpretations outlined above. Whether or not the Qualification Directive will fill the gaps in protection for asylum seekers remains to be seen. This system does amply illustrate the dangers of codifying

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<sup>81</sup> Ibid. Chapter IV

<sup>82</sup> Ibid. Chapter IV p. 76

complementary protection, seeking to “dilute their obligations to a minimum level”<sup>83</sup>. While it does give enforcement to certain *non-refoulement* obligations, the system that is in place is potentially undermining the Refugee Convention. While the Directive includes a wide range of categories of persons in need of protection, the discrepancies in interpretation, particularly with respect to Article 15(c), is proving a challenge to protection. It is without a doubt an improvement on Australia’s current system, but whether the Draft Model will learn from the E.U.’s problems is yet to be seen.

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<sup>83</sup> McAdam, Jane, “The Refugee Convention as a rights blueprint for persons in need of international protection”, UNHCR Research paper No. 125, July 2006

#### 4. CONCLUSION

The essential idea of a complementary protection system is to adopt minimum standards for persons who are in need of an alternative form of international protection. To ensure there are no remaining gaps in the protection of asylum seekers, it is essential that the international human rights instruments are regarded as interconnected mechanisms which together constitute the international obligations to which States are committed<sup>84</sup>. The Draft Model in Australia is a step in the right direction to filling the gaps in protection, connecting the Refugee Convention with other human rights instruments. While it may not go as far as is needed to ensure protection for *all* those falling outside the Refugee Convention, it can provide a starting block upon which further protection provisions can be built. The pitfalls caused by having elusive definitions are clear from the E.U. experience. Should the Draft Model be expanded to cover further categories of persons, it is essential that the terminology used avoids the possibility of narrowing, rather than expanding protection.

Refugees are a global legal responsibility and it is essential that Australia steps up to its international obligations. Australia's avoidance of obligations of *non-refoulement* has resulted in many persons in need of protection suffering as a result. As a sovereign State, Australia has the right to protect its borders, but it also has a responsibility to do this in a manner which is in accordance with human rights treaties. With the era of change promised in the current Labour government's immigration policies, it would be a great shame for this area of asylum law to go unreformed. Many immigration policies adopted by previous governments have been reviewed in light of Australia's "new values". Changes have come, and the motions are now in place for a reform in the gap of protection. If new legislation is introduced, it is hoped that Australia will offer protection to a wider category of those in need in a transparent and efficient manner. The Draft Model, if slightly faulty, is in place<sup>85</sup>. What is needed now is the political will to support it.

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<sup>84</sup> Discussed in McAdam, Jane, "The Refugee Convention as a rights blueprint for persons in need of international protection", UNHCR Research paper No. 125, July 2006

<sup>85</sup> As of 12 June, 2009, the Draft Model is still in parliamentary processes

## ANNEX I

AUSTRALIA	E.U.
<b><u>Indiscriminate violence</u></b>	
<p>- <b>Indiscriminate violence</b> not included in draft. If recommend widening scope to include indiscriminate violence- should use more careful wording – see experience of E.U.</p> <p>- DIAC not in favour of adopting this category as feel <i>most</i> people will be caught under refugee or inhuman treatment grounds.</p>	<p>- Qualification Directive has extended to include <b>indiscriminate violence</b>- Art 15(c) has led to problems – generated a wide range of differing approaches by Member States to its interpretation and hence the grant of protection</p> <p>- 15(c) has been limited by restrictive definition of “individual threat”.</p> <p>- Benefits and problems with this inclusion.</p>
<b><u>Exclusion Clauses</u></b>	
<p>- Broader exclusions clauses than the Refugee Convention in the form of <b>s501 character test</b>.</p> <p>- Problem of remaining ministerial discretion.</p>	<p>- Broader <b>exclusion clauses</b> than Refugee Convention</p>
<b><u>Entitlements and Rights</u></b>	
<p>- <b>Equal entitlements, only exception is the Refugee Travel document</b>. But those granted Complementary Protection status also get a travel document therefore complying with freedom of movement.</p>	<p>Allows Member States to grant <b>lesser legal status and fewer rights than Refugee Convention</b> – shorter residency permits, more limited family unity social welfare and health care inter alia.</p> <p>Member States only prepared to pay for a lower set of rights for all those recognised, because of state budgets, and increasing number of people entitled to entitlements =&gt; Differential treatment between “refugees” and Complementary Protection. No justification in international law for differential treatment.</p> <p>Has led for some dilution of Refugee Convention- Member States granting Complementary Protection when should be Refugee Status because they want to grant the more stringent rights and entitlements.</p>
<b><u>Procedure</u></b>	
<p>Australia- <b>clear two-step process for Complementary Protection</b>. Will fully examine case under Refugee Convention first, and only when that fails, then consider under Complementary Protection. Clearly does not undermine Refugee Convention.</p>	<p>Subsidiary Protection system– seems to be a <b>possibility of undermining Refugee Convention</b></p>

*Box 4. Comparative analysis between the Draft Model and the Qualification Directive*

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