From Humanitarian Discretion to Complementary Protection — Reflections on the Emergence of Human Rights-based Refugee Protection in Australia

JANE McADAM*

Abstract

For many years, Australia stood alone among industrialised countries for its failure to provide 'complementary protection' to people who are not refugees, but who are nonetheless at risk of return to serious human rights abuses in their country of origin or former habitual residence. The passage of the *Migration Amendment (Complementary Protection) Act 2011* (Cth) on 19 September 2011 heralded a new era in protection in Australia, codifying obligations under international human rights treaties which preclude countries from returning people to a risk of arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment. As Australia enters this new protection paradigm, it is useful to reflect upon the way that decision-makers have dealt historically with humanitarian claims falling outside the refugee definition. Legislative precursors relating to protection on humanitarian and compassionate grounds may provide the key to why Parliament stalled for so long on codifying Australia's extended *non-refoulement* obligations in domestic law. This article pieces together and examines the legislative and jurisprudential development of humanitarian protection in Australia from the 1980s through to the present day, providing a timely contribution to take stock of where we have come from, and where we are going.

I Introduction

For many years, Australia stood alone among industrialised countries for its failure to provide 'complementary protection' to people who are not refugees, but who are nonetheless at risk of return to serious human rights abuses in their country of origin or former habitual residence. 'Complementary protection' describes protection that is complementary to Australia's obligations under the *Refugee Convention* ('Convention'),[1] based

* BA (Hons) LLB (Hons) (Syd), DPhil (Oxf); Professor, Faculty of Law, University of New South Wales, Australia; Non-Resident Senior Fellow, The Brookings Institution, Washington DC; Research Associate, Refugee Studies Centre, University of Oxford. I am grateful to the Australian Research Council for supporting this research through the Discovery Project 'Immigration Restriction and the Racial State, ca 1880 to the Present'. Thank you to Melissa McAdam for her help in locating the various versions of the Ministerial Guidelines and Trina Ng for research assistance. This article was written in 2011, prior to the entry into force of Australia's complementary protection regime on 24 March 2012. To the extent possible at the final proofs stage, the article takes account of that development.

1 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) read together with the *Protocol relating to the Status of Refugees*, adopted 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

on its expanded *non-refoulement* (non-removal) obligations under international human rights law.[2]

Such protection in Australia has traditionally been discretionary, even though the international human rights obligations on which it is based are absolute and non-derogable. Until the passage of the *Migration Amendment (Complementary Protection) Act 2011* (Cth) on 19 September 2011, the only way that an individual could have claims based on a fear of return to torture, arbitrary deprivation of life, or a risk of cruel, inhuman or degrading treatment or punishment assessed was via the 'public interest' power of the Minister for Immigration and Citizenship under section 417 of the *Migration Act 1958* (Cth) ('*Migration Act*'). The Ministerial intervention process is non-compellable, non-reviewable and inefficient, since it requires people to proceed through the refugee determination process — including merits review by the Refugee Review Tribunal — before the power can be enlivened. It is not transparent or subject to procedural fairness considerations.

On 24 February 2011, the Migration Amendment (Complementary Protection) Bill 2011 was introduced into the Australian Parliament. The Bill was largely a reiteration of an earlier 2009 instrument, which had lapsed at the prorogation of Parliament in August 2010. Its purpose was to extend Australia's protection obligations to people at risk of torture or cruel, inhuman or degrading treatment or punishment if returned home, or who would be exposed to the death penalty or arbitrary deprivation of life. It was a response to numerous recommendations in Australian parliamentary and United Nations (UN) reports that Australia adopt a system of complementary protection,[3] thereby bringing Australian

---

2 *International Covenant on Civil and Political Rights*, adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991) ('*ICCPR*'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); see also *European Convention on Human Rights* (formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*), opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*'), which gives rise to significant comparative jurisprudence.

3 See, eg, Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Administration and Operation of the Migration Act 1958* (2006) Recommendation 33, [4.50]ff; Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Report* (2004), see especially ch 8 ('*Ministerial Discretion Report*'); Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000); UN Committee Against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (22 May 2008) [15]; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (24 July 2000) [498]–[528]; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2 April 2009). See also UN High Commissioner for Refugees, *General Conclusion on International Protection*, ExCom Conclusion No 102 (2005); UN High Commissioner for Refugees, *Conclusion on the Provision of International Protection including through Complementary Forms of Protection*, ExCom Conclusion No 103 (2005); UN High Commissioner for Refugees, *General Conclusion on International Protection*, ExCom Conclusion No 87 (1999) [f]; ExCom Conclusion No 87 (2000) recitals. See further Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 3, 131–4; Office of the United Nations High Commissioner for Refugees (UNHCR) Regional Office (Australia, New Zealand, Papua New Guinea and the South Pacific), 'Discussion Paper: Complementary Protection' (No 2, 2005) <http://www.unhcr.org.au/pdfs/Discussion22005.pdf> ('UNHCR Discussion Paper'); Refugee Council of Australia et al, 'Complementary Protection: The Way Ahead' (April 2004) <http://www.refugeecouncil.org.au/docs/current/CPmodel04.pdf>; National Council of Churches in Australia, 'Fact Sheet: Introducing the Complementary Protection Model' (2007) (copy on file with author); Migration Legislation Amendment (Complementary Protection Visas) Bill 2006 (introduced by Senator Andrew Bartlett of the Australian Democrats).

domestic law into line with Australia's international obligations[4] and State practice in comparable jurisdictions (including the EU, Canada, the US and New Zealand).[5]

The new law received royal assent on 14 October 2011 and took effect on 24 March 2012.[6] As Australia enters this new domestic protection paradigm, it is a useful moment to reflect upon the way that Australian decision-makers have historically dealt with humanitarian claims falling outside the refugee definition. Indeed, legislative precursors relating to protection on humanitarian and compassionate grounds may provide the key to why Parliament stalled for so long on codifying Australia's extended *non-refoulement* obligations in domestic law. While one can glean elements of the history of humanitarian claims by dipping into various parliamentary reports or scholarly articles,[7] the present article tries to make sense of the history as a coherent narrative leading to contemporary deliberations about complementary protection. By piecing together and examining the legislative and jurisprudential development of humanitarian protection, it provides a timely contribution to the literature to take stock of where we have come from, and where we are going. Elsewhere, I have extensively analysed Australian complementary protection legislation and its relationship to international and comparative jurisprudence.[8] The purpose of this article is not to retrace those arguments, but rather to provide a historical companion piece so as to complete the picture of the development of humanitarian protection in Australian law.

II Humanitarian protection pre-1981

Until 1981,[9] the asylum regime that operated in Australia was highly discretionary.[10] The 'skeletal framework'[11] of the *Immigration Restriction Act 1901* (Cth) was characterised by a general prohibition on entry, combined with broad discretions to facilitate the entry of

---

4 *ICCPR*; *Second Optional Protocol to the ICCPR*; *CAT*; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); see also the *ECHR*, which gives rise to significant comparative jurisprudence.

5 *Directive 2004/83/EC of the Council of 29 April 2004 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* [2004] OJ L304/12 ('*EU Qualification Directive*'), arts 2(e), 15 (see also recast version: [2011] OJ L337/9, arts 2(f), 15); *Immigration and Refugee Protection Act*, RSC 2001, c C-27, s 97 (Canada); *Immigration and Nationality Act of 1952*, 8 CFR §§208.16, 208.17 (1952) (US); *Immigration Act 2009* (NZ) ss 130, 131.

6 For a useful overview of the new law, see Elibritt Karlsen, *Migration Amendment (Complementary Protection) Bill 2011*, Bills Digest No 79 of 2010–11, 11 March 2011; Jane McAdam, 'Australian Complementary Protection: A Step-by-Step Approach' (2011) 33(4) *Sydney Law Review* 687.

7 Two Australian Parliamentary Library research papers provide very useful insights into aspects of the history, but neither provides a comprehensive analysis of the genesis of humanitarian and compassionate claims in Australian migration law through to the introduction of complementary protection: Kerry Carrington, 'Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context' (Current Issues Brief No 3, Parliamentary Library, Parliament of Australia, 2003–04); Elibritt Karlsen, 'Complementary Protection for Asylum Seekers: Overview of the International and Australian Legal Frameworks' (Research Paper No 7, Parliamentary Library, Parliament of Australia, 2009–10).

8 See, eg, McAdam, above n 6.

9 *Migration Amendment Act (No 2) 1980* (Cth) s 6.

10 *Immigration Restriction Act 1901* (Cth), subsequently remodelled in the *Migration Act*. See Myra Willard, *History of the White Australia Policy to 1920* (Melbourne University Press, 1923, 1967 reprint); Sean Cooney, 'The Codification of Migration Policy: Excess Rules? – Part I' (1994) 1 *Australian Journal of Administrative Law* 125; Human Rights Commission, *Human Rights and the Migration Act 1958*, Report No 13 (1985) [16]–[22].

11 Carrington, above n 7, 2.

favoured groups.[12] Its successor, the *Migration Act 1958* (Cth), introduced a simpler system of entry permits, but until 1980–81, no grounds for granting such permits were stipulated. This effectively left it to immigration officers' sole discretion as to the circumstances in which it would be appropriate to grant an entry permit.[13] At this time, an 'entry permit' was distinct from a 'visa'.[14] A visa authorised travel to Australia and indicated the type of entry permit to be issued on arrival: temporary, which could be subject to conditions,[15] or permanent. Visa holders, nonetheless, had no right to an entry permit and could be refused one on arrival.[16]

It was arguably not until 1977 that Australia articulated a distinct and deliberate refugee policy.[17] Although Australia had taken in large numbers of displaced people through humanitarian schemes after the Second World War,[18] such programmes were closely tied to labour shortages and, during the Cold War, to an anti-Soviet ideology. On 24 May 1977, the Minister for Immigration and Ethnic Affairs articulated a comprehensive refugee policy that recognised refugee protection as an international obligation, although noted that the decision 'to accept refugees must always remain with the Government of Australia'.[19] Importantly, the Minister noted that:

> There will be people in refugee-type situations who do not fall strictly within the UNHCR mandate or within Convention definitions. Government policy will be sufficiently flexible to enable the extension of this policy, where appropriate, to such people.[20]

The broad, undefined discretionary framework of granting permanent resident status effectively continued until the 1980s,[21] when a variety of factors, including the impact of

---

12 Cooney, above n 10, 126.

13 *Damouni v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 87 ALR 97, 99 ('*Damouni*'); Mary Crock, *Immigration and Refugee Law in Australia* (The Federation Press, 1998) 34. For information on the *Migration Act* as a continuation of the 'machinery' legislation of the *Immigration Restriction Act*, see Human Rights Commission, above n 10, [18] and the substantially similar analysis by Sev A Ozdowski, 'The Law, Immigration and Human Rights: Changing the Australian Immigration Control System' (1985) 19 *International Migration Review* 535, 538.

14 The definition of 'entry permit' as inserted by the *Migration Legislation Amendment Act 1989* (Cth) s 4 was 'permission to enter or remain in Australia'.

15 *Migration Legislation Amendment Act 1989* (Cth) s 6.

16 Patricia Hyndman, 'Australian Immigration Law and Procedures Pertaining to the Admission of Refugees' (1988) 33 *McGill Law Journal* 716, 724. A single visa system was introduced in the *Migration Reform Act 1992* (Cth). Since 1 September 1994, the term 'entry permit' has been replaced by 'visa'. See Explanatory Memorandum, Migration Reform Bill 1992 (Cth) [8].

17 Barry York, *Australia and Refugees, 1901-2002: An Annotated Chronology based on Official Sources* (Parliament of Australia, last updated 16 June 2003) <http://www.aph.gov.au/library/pubs/online/Refugees_contents.htm> 3. See Ministerial Statement: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1977, 1713–16 (Hon Michael Mackellar MP, Minister for Immigration and Ethnic Affairs) ('Ministerial Statement'). This policy drew heavily on a 1976 report: Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Australia and the Refugee Problem* (1976).

18 Over 170,000 displaced people were admitted from European camps between 1947 and 1954: ibid 2.

19 Ministerial Statement, above n 17, 1714.

20 Ibid 1715.

21 Joint Standing Committee on Migration Regulations, Parliament of Australia, *Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control* (1992) 92, [5.20]; Cooney, above n 10, 126. For an article addressing the problems of this approach, compared to codified domestic refugee law, see RP Schaeffer, 'South-East Asian Refugees: The Australian Experience' (1976–77) 7 *Australian Year Book of International Law* 200. See also Geoff Warburton, 'The Rights of Non-Citizens in Australia: Modes of Reviewing Exercises of Discretionary Power under the Migration Act 1985 (Cth)' (1986) 9 *University of New South Wales Law Journal* 90, 93; *Simsek v Macphee (Minister for Immigration and Ethnic Affairs)* (1982) 148 CLR 636.

administrative law reforms on judicial intervention in migration decision-making,[22] led to an increasingly codified legal response to immigration. It was in this context that section 6A(1)(e) was introduced.

III Introduction of section 6A(1)(e)

In late 1980, the *Migration Act* was amended[23] to 'restrict the categories of immigrants eligible to be granted permanent residence subsequent to their arrival in Australia'.[24] The aim was to curb the 'principal incentive' of illegal migration — 'entering as a visitor and subsequently gaining the right of legal permanent residence'.[25] The introduction of section 6A(1) limited onshore grants of entry permits to certain categories of non-citizens already in Australia, thereby curtailing the previous generality of the discretion to grant such permits to *any* non-citizen.[26] Section 6A(2) indicated that the decision whether or not to grant the permit was discretionary: 'An officer may, in accordance with this section and at the request or with the consent of a non-citizen, grant to the non-citizen an entry permit'.

The grounds on which a permanent entry permit could be granted pursuant to section 6A(1) were as follows:

> An entry permit[27] shall not be granted to an immigrant after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say—
>
> (a) he has been granted, by instrument under the hand of a Minister, territorial asylum in Australia;
>
> (b) he is the spouse, child or aged parent of an Australian citizen or of the holder of an entry permit;
>
> (c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967;
>
> (d) he is the holder of a temporary entry permit which is in force, is authorized to work in Australia and is not a prescribed immigrant; or
>
> (e) he is the holder of a temporary entry permit which is in force and there are strong compassionate or humanitarian grounds for the grant of an entry permit to him.

---

22 See, eg, *Administrative Appeals Tribunal Act 1975* (Cth); *Ombudsman Act 1976* (Cth); *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Human Rights Act 1981* (Cth); *Freedom of Information Act 1982* (Cth); see Cooney, above n 10, 127.

23 *Migration Amendment Act (No 2) 1980* (No 175 of 1980) (Cth). Section 6A(1) entered into force on 14 January 1981.

24 Explanatory Memorandum, Migration Amendment Bill (No 2) 1980 (Cth) 2, 'Purpose of the Bill'.

25 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1980, 151 (Mr Macphee, Minister for Immigration and Ethnic Affairs). See Opposition critique of this motive, noting the difficulties of obtaining entry permits through channels such as family reunion: Commonwealth, *Parliamentary Debates*, Senate, 5 December 1980, 487 (Senator Grimes).

26 *Gunaleela v Minister for Immigration and Ethnic Affairs (No 2)* (1984) 74 ALR 263, 275–6.

27 Defined in s 6A(8) as 'an entry permit other than a temporary entry permit'.

The introduction of section 6A(1)(e) marked the first iteration of an onshore humanitarian entry permit in Australian immigration legislation. By contrast to offshore humanitarian programmes, it did not require applicants to demonstrate close ties to Australia (although sometimes such ties would be raised as part of the compassionate or humanitarian claim). Furthermore, although it was not conceptually linked to the refugee category in section 6A(1)(c) — which itself was transformed from an ad hoc to a statutory basis through the 1980 amendment — it nonetheless came to be utilised as an alternative basis for protection, both autonomously and as a fallback ground for unsuccessful refugee claimants. Sometimes, the two provisions functioned in a manner similar to the single assessment procedure that operates with respect to determining refugee/complementary protection status in the EU, Canada, New Zealand and now Australia,[28] by which an unsuccessful refugee claim is then assessed against the complementary protection grounds. Under section 6A, an unsuccessful refugee claim triggered subsequent consideration, by the Determination of Refugee Status (DORS) Committee or its Secretariat, of the claim's merits for a compassionate or humanitarian entry permit under paragraph (e).[29]

Once permanent residence was granted, the rights accorded to all permit holders were identical to those of an Australian citizen, excluding the right to vote and the right to work in government positions requiring Australian citizenship.[30] However, simply satisfying the threshold eligibility requirements of a paragraph of section 6A(1) was not sufficient to obtain an entry permit because of the residual discretion in section 6A(2). Even satisfying article 1A(2) of the Convention did not automatically lead to a grant of permanent residence,[31] although 'practice show[ed] that a favourable recommendation on refugee status create[d] a strong presumption that a grant of asylum w[ould] follow'.[32]

A decision made under section 6A(1)(e) could not be reviewed on the merits,[33] but was judicially reviewable by the courts under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

A Elements of section 6A(1)(e)

1 Valid temporary entry permit

The first eligibility criterion for being granted an entry permit either as a refugee (section 6A(1)(c)) or on 'strong compassionate or humanitarian grounds' (section 6A(1)(e)) was that the applicant hold a valid temporary entry permit. However, this requirement was

---

28 The rationale forthis procedure is explained in UNHCR, *Global Consultations on International Protection: Complementary Forms of Protection*, UN Doc EC/GC/01/18 (2001), [9], [11(e)].

29 Hyndman, above n 16, 742.

30 Ibid 743.

31 Ibid 742, describing two refugees from Melanesian Irian Jaya granted only temporary entry permits; see also Prime Minister Hawke's statement in Paul Kelly, 'Hawke Puts Jakarta First in Refugee Row', *The Australian* (Canberra), 17 September 1985, 1. Note, too, the additional criteria that the Determination of Refugee Status (DORS) Committee could impose: see Schaeffer, above n 21.

32 Hyndman, above n 16, 742; Minister for Immigration, Local Government and Ethnic Affairs 'Changes to Refugee and Humanitarian Procedures' (Press Release, 27 June 1990) Attachment A, [2(a)].

33 Immigration Review Panels were established with limited powers of merits review, including the power to refuse to grant permanent residence under s 6A(1). However, these panels had no statutory basis and could only make recommendations to the Minister rather than binding decisions. See Human Rights Commission, above n 10, [308]–[309].

not strictly enforced until late 1985[34] and, even in 1988, applicants for refugee status who did not hold such a permit were generally treated as an exception to the requirement.[35] If an applicant did not currently hold a temporary entry permit, but applied under section 6A(1)(e), the decision-maker could, if satisfied that the grounds in that section were made out, grant the applicant a further temporary entry permit under section 7(2).[36] In addition, many unlawful non-citizens simultaneously applied for a temporary permit under section 7(2) and a permanent permit under section 6A(1)(e), thereby enabling themselves to be considered under the latter provision for protection.[37] Of course, if no further temporary entry permit was granted, then the discretion to grant a permanent entry permit under section 6A(1)(e) could not arise for consideration.[38]

2 *Meaning of 'strong compassionate or humanitarian grounds'*

The next matter arising for determination under section 6A(1)(e) was whether or not the applicant could demonstrate 'strong compassionate or humanitarian grounds' for remaining in Australia.

(a) Departmental interpretation of section 6A(1)(e)

The phrase 'strong compassionate or humanitarian grounds' was not statutorily defined. According to the former Immigration Department Director of Asylum Policy, Dr Evan Arthur, the Department valued the considerable latitude this gave it in interpreting the phrase in relation to individual cases and in alignment with shifting political considerations.[39]

Departmental guidelines distinguished between 'compassionate' and 'humanitarian'. 'Compassionate' grounds were conceptually linked to the family reunion elements of migration policy, as well as 'severe misfortune and sufferings which individuals experience in their personal lives as a result of unusual or distressing circumstances personal to them'.[40] By contrast, 'humanitarian' grounds encompassed human rights violations, such as where 'an individual [is] being disadvantaged as a result of membership of some group or class which is being treated differently by the state in the applicant's country of origin or

---

34 See Human Rights Commission, above n 10, [51].

35 Hyndman, above n 16, 741. See Policy on Illegal Immigrants: Commonwealth, *Parliamentary Debates*, House of Representatives, 17 October 1985, 2332 (Chris J Hurford, Minister for Immigration and Ethnic Affairs). The requirement for legal entry is echoed in 2001 legislation prohibiting the grant of a permanent protection visa to onshore asylum claimants who entered Australia without a valid visa, and who had spent more than seven days in another country where they could have sought and obtained effective protection, either through that country's government or through UNHCR: see changes brought into effect by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

36 *Dahlan v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 217 ALR 1, 2, 34 (Hill J) ('*Dahlan*'). This was described as the correct approach in *Kioa v West* (1985) 159 CLR 550, 582 (Mason J).

37 *Minister for Immigration and Ethnic Affairs v Maitan* (1988) 78 ALR 419, 423 (Fox J): 'it seems to be the practice that, if permanent residence is justified, a temporary entry permit will be granted and so far as para (d) of s 6A(1) is concerned the provisions of sub-s (7) can be satisfied' (see also 421 (Fox J); 426 (Beaumont and Gummow JJ)).

38 Ibid 423 (Fox J); 426 (Beaumont and Gummow JJ).

39 Evan Arthur, 'The Impact of Administrative Law on Humanitarian Decision-Making' (1991) 66 *Canberra Bulletin of Public Administration* 90, 92.

40 Joint Standing Committee on Migration Regulations, above n 21, 93, [5.22], referring to the integrated departmental instructions manual dealing with s 6A(1) cases.

last permanent residence'.[41] However, as discussed below, the courts believed that sharp distinctions between the terms served no useful purpose.[42]

Of eight original departmental guidelines, two related to humanitarian factors: the occurrence of a natural disaster in the country of origin, or the outbreak of 'war or political turbulence' after the applicant had left his or her country of origin.[43] However, for these grounds to be 'triggered', it was necessary for the Central Office of the Department to first notify processing officers of a 'situation' considered to justify approval of cases under section 6A(1)(e).[44] (This foreshadowed a 1989 amendment to the Act whereby only gazetted country conditions could lead to a grant of an entry permit based on humanitarian grounds.)

A further humanitarian guideline was added in 1982 to cover 'gross and discriminatory denial of fundamental freedoms and basic human rights' on return to the country of origin. This substantially broadened the scope of 'humanitarian grounds', introducing international law-based grounds for non-removal (which lie at the heart of complementary protection today). No formal reference was made to Australia's international human rights obligations in this context.[45] However, in 1985, the Human Rights Commission recommended that the *Migration Act* explicitly incorporate a reference to 'human rights', particularly in relation to the family and children. Although it noted that such a reference would not alter the law materially, since the Department advised that the concept of 'humanitarianism' already encompassed human rights, it felt that the enumeration of such a category would better elucidate Australia's intention to comply with its obligations under the *ICCPR* and the *Declaration of the Rights of the Child*.[46]

In this respect, both the humanitarian and the compassionate components of section 6A(1)(e) were viewed much as compassionate protection is viewed today — as an act of generosity, rather than stemming from any legal duty. This is despite the fact that, in determining what might constitute 'gross and discriminatory denial of fundamental freedoms and basic human rights', decision-makers frequently referred to the Convention definition and the types of considerations that arose in determining whether or not a person feared persecution under article 1A(2).[47] Although section 6A(1)(e) grounds were regarded as normatively distinct from Australia's protection obligations under international law, refugee jurisprudence heavily influenced the reasoning and conclusions of decision-makers assessing humanitarian claims. Thus, in practice, the two types of protection were linked. The key difference was that under section 6A(1)(c), an explicit international legal

---

41 Ibid.

42 *Damouni* (1989) 87 ALR 97, 102; *Dahlan* (1989) 217 ALR 1, 133. Similar arguments have been made with respect to the terms 'cruel, inhuman or degrading treatment or punishment' in submissions relating to the Bill.

43 See Arthur, above n 39, 90. Arthur Glass, 'Reflections on Judging: Judging as Application' [2007] *University of New South Wales Legal Research Series* 35 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=989701>.

44 Arthur, above n 39, 90. The 'triggering' requirement of a formal declaration about a particular situation also operates in the US for Temporary Protected Status (TPS) (INA § 244, 8 USC § 1254) and in the EU for temporary protection (*Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof*, EC Directive 2001/55/EC (20 July 2001) art 2(a)).

45 Compare, for example, the Ministerial Guidelines on section 417, which make express reference to Australia's treaty obligations: see below n 120.

46 Human Rights Commission, above n 10, [57].

47 See evidence of Mr Luu (former officer of Department of Immigration, Local Government and Ethnic Affairs) in *Dahlan* (1989) 217 ALR 1, 18–9, 22–3 (Hill J).

obligation was identified, whereas under section 6A(1)(e), the principle of *non-refoulement* and its human rights-based sources were not expressly invoked.

(b) Judicial interpretation of section 6A(1)(e)

In the 1985 High Court judgment of *Kioa v West*, Mason J noted '[i]n passing' that whereas most of section 6A(1) 'refers to the objective existence of the conditions which it enumerates', strong compassionate or humanitarian grounds 'stand in a different position and may be very much a matter of opinion'.[48] However, the meaning of the phrase 'strong compassionate or humanitarian grounds' was not comprehensively considered by the courts until 1989 in *Damouni*.[49] There, French J (as he then was) found that there was little to be gained from distinguishing between 'compassionate' and 'humanitarian' grounds, since the 'term is a collocation which ultimately invites a normative judgment'.[50] The common element was hardship, actual or prospective, including physical, emotional and economic harm.[51] 'Strong humanitarian grounds' did not have to amount to Convention 'persecution' — 'something else would suffice'.[52] An example of conduct falling within the scope of section 6A(1)(e) would be the 'likelihood of continuous harassment by arrest for short periods coupled with the fear for safety that goes with such harassment'.[53]

In *Dahlan*, Hill J said:

> The words are very broad. Compassion is an emotion akin to pity; it is felt when the circumstances of others excite our sympathy so that we suffer with them. Hence compassionate grounds will exist when the circumstances of an applicant are such as to enliven in the reasonable man his compassion. By humanitarian grounds are meant no doubt grounds the denial of which would be inhumane having regard to the ordinary views of mankind.[54]

Furthermore, he said, these should be assessed in light of Australian standards of humanity and compassion, rather than standards in the country of origin.[55]

According to the courts, the addition of the word 'strong' implied that not all compassionate or humanitarian claims would be of sufficient weight to give rise to the discretion to grant an entry permit; only in this respect did assessment of fact 'demand[…] a judgment that the relevant hardship be substantial'.[56] However, the term did not require that the grounds of hardship be unique to the applicant, or affect the applicant in a particularly adverse way by comparison to others.[57]

---

48 *Kioa* (1985) 159 CLR 550, 582 (Mason J).
49 *Damouni* (1989) 87 ALR 97, 102.
50 *Damouni* (1989) 87 ALR 97, 102–3; *Dahlan* (1989) 217 ALR 1, 133.
51 *Damouni* (1989) 87 ALR 97, 103.
52 *Dahlan* (1989) 217 ALR 1, 133.
53 Ibid.
54 Ibid.
55 *Dahlan* (1989) 217 ALR 1, 135.
56 *Damouni* (1989) 87 ALR 97, 103.
57 *Damouni* (1989) 87 ALR 97, 103: '[T]he fact that many other persons may be in a like predicament to that which faces or threatens the applicant, is not, in my opinion, sufficient to take the case out of the class of those eligible for consideration under the paragraph'. Furthermore, French J noted that the impact on other parties of a refusal to grant a permit was 'necessarily' contemplated within the phrase and, therefore, did not have to personal to the applicant. A similar line of reasoning was adopted by the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 in relation to the best interests of the child: even if a child is not

In *Sinnathamby*, Burchett J drew a comparison with the situation of German Jews in 1938, noting that '[t]here may be "strong compassionate or humanitarian grounds for the grant of an entry permit" to an applicant who happens to be able to apply, because already outside his country, though thousands of his compatriots are desperately situated, but cannot even apply'.[58] This was affirmed in *Pesava*, where Wilcox J stated that matters relating to the applicant's likely hardship if returned to another country 'are not to be brushed aside by reference to the question whether the applicant is no worse position than other people who might still be in that country'.[59]

As the Court observed in *Danmouni*, there was no discretion involved at the 'preliminary assessment' stage of determining the existence of humanitarian or compassionate grounds.[60] It was a finding of fact that could be described, but not curtailed, by policy considerations.[61] Criticising the Department's attempt to confine the threshold eligibility for section 6A(1)(e) through non-binding policy guidelines, Hill J noted that while policies were useful in ensuring some predictability and uniformity in action, 'they may not be slavishly followed so as to be a substitute for the exercise of discretion in the particular facts of a particular case'.[62]

According to Arthur, this left the Department with only one option in determining the criteria amounting to 'humanitarian grounds': 'applicants had to show that if they were forced to leave Australia they would face a situation which would evoke strong feelings of pity or compassion in an ordinary member of the Australian public'.[63] But as Glass later observed,

> it is hard to see what else the Court could do in these circumstances. The question for the Court is — do the applicants circumstances come within the regulatory words? While the administrators may be guided in the application of these words by such matters as — the stock examples set out in binding policy, the numerical consequences of their decision-making and the experience of processing and refusing many claimants — these matters are excluded from the Court's interpretive context.[64]

---

personally the subject of a decision, there is a legitimate expectation that the child's best interests will be a primary consideration in the decision if that decision affects him or her.

58 *Sinnathamby v Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502, 516.

59 *Pesava v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 95, 100. The Federal Court's enlightened approach is significant in light of contemporary discussions in Europe about the degree of 'individual' risk that must be present in situations of generalised violence: *Elgafaji v Staatssecretaris van Justitie* (European Court of Justice, Grand Chamber, C-465/07, 17 February 2009); Jane McAdam, 'Individual Risk, Armed Conflict and the Standard of Proof in Complementary Protection Claims: The European Union and Canada Compared' in James C Simeon (ed), *Critical Issues in International Refugee Law: Strategies for Interpretative Harmony* (Cambridge University Press, 2010).

60 *Damouni* (1989) 87 ALR 97, 112.

61 *Damouni* (1989) 87 ALR 97, 115; *Dahlan* (1989) 217 ALR 1, 30; Arthur, above n 39, 93.

62 *Dahlan* (1989) 217 ALR 1, 35. For the significance of government policy on decision-making, see *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 420; *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404; *Chumbairux v Minister for Immigration and Ethnic Affairs* (1987) 74 ALR 480, 492–4, 495–6; *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291.

63 Arthur, above n 39, 91.

64 Glass, above n 43.

3 Exercise of the residual discretion

Meeting the 'strong compassionate or humanitarian grounds' threshold was a prerequisite to the operation of the final component of the decision-making procedure: the exercise of the residual discretion in section 6(2).[65] Whereas matters such as legality of entry and other questions involving general migration policy had no place in the preliminary assessment whether strong compassionate or humanitarian grounds existed, they could be taken into consideration in deciding whether or not the discretion to grant an entry permit should be exercised.[66] Nonetheless, French J stated that this was 'no mere matter of form, for where such grounds are found to exist, the intention of Parliament as indicated by the provisions of s 6A(1)(e) would seem to lie in the direction of sympathetic treatment of such persons'.[67] In other words, although section 6A(1) restricted the exercise of the broader section 6(2) discretion, once an applicant had fulfilled one or more of the section 6A(1) conditions, then there was a presumption in favour of the applicant being granted an entry permit.

B Conclusion

Section 6A(1)(e) was never intended as an alternative asylum category, even though, in some cases, it became a secondary consideration when an initial refugee claim under section 6A(1)(c) was unsuccessful. Nor was it regarded as a humanitarian visa class based on the domestic implementation of Australia's international protection obligations under human rights law. Rather, it was intended as a residual category for regularising immigration status by providing officials with the discretion to grant permits to deserving cases that did not meet the other four section 6A criteria.[68] It was viewed as an act of generosity, rather than implementation of any legal duty:

> Unlike Australia's refugee protection mechanisms, provisions such as s.6A(1)(e) are not the product of any international obligation. The Australian Government provides opportunities for people who are of humanitarian concern to remain in this country not because of any international treaty obligation but because there is a consensus among the Australian population (albeit often a fragile consensus) that this is a reasonable thing to do.[69]

IV 1989 reforms

The Government's expectations that section 6A(1)(e) would be a little utilised provision with less than 100 cases a year were misguided. Indeed, concerns about the high number of applications ultimately led to its abolition,[70] with 8000 applications on foot at the time of the provision's repeal in December 1989.[71]

---

65 *Damouni* (1989) 87 ALR 97, 112; *Dahlan* (1989) 217 ALR 1, 35.

66 *Damouni* (1989) 87 ALR 97, 112, 115; *Dahlan* (1989) 217 ALR 1, 30.

67 *Damouni* (1989) 87 ALR 97, 112.

68 Arthur, above n 39, 90, 93. See also Statement by Mr Macphee, above n 25, 151–4.

69 Arthur, above n 39, 94–5.

70 Mary E Crock, *Administrative Law and Immigration Control in Australia: Actions and Reactions* (unpublished PhD thesis, Melbourne, 1992) 95–6. See Joint Standing Committee on Migration Regulations, Parliament of Australia, *Illegal Entrants in Australia: Balancing Control and Compassion* (1990) 12ff; 37–8.

71 Arthur, above n 39, 90.

A Codified grounds

There were major reforms to the *Migration Act* in 1989. Section 6A(1)(e) was replaced by section 47(1), which came into effect on 19 December 1989.[72] It was largely the same as section 6A(1)(e), with the grounds for obtaining residence unchanged. However, 'strong compassionate or humanitarian grounds' was split into two separate paragraphs, thereby emphasising the departmental distinction between the terms in contrast to the Federal Court's collocative approach.

In reality, though, the splitting of the grounds had little, if any, impact. This was because changes to the application process meant that from 19 December 1989, it was, in practice, impossible to qualify specifically for protection on humanitarian and compassionate grounds.

First, section 47(1) (in conjunction with the Regulations) prescribed as a precondition for eligibility that all temporary entry permit holders obtain relevant extended eligibility temporary entry permits. The qualifying criteria for such extended entry permits were more limited than the basic ground for residence described in section 47(1).[73] Most significantly, section 47(1)(a) required all applicants (apart from those seeking political asylum) to hold a 'valid temporary entry permit' and, once again, the more restricted grounds rendered many people ineligible.

Second, and more significantly, regulation 141 stipulated conditions for an entry permit based on strong humanitarian grounds. These conditions incorporated the policy guidelines that previously had been used in decisions relating to section 6A(1)(e), such as major political upheaval or natural disaster. However, they now required that the circumstances constituting strong humanitarian grounds had arisen *after* the applicant's arrival in Australia *and* had been gazetted by the Minister.[74] The Minister did not gazette any situations of humanitarian concern during the period of regulation 141's existence (19 December 1989 to 12 July 1990).[75] Accordingly, no valid applications for humanitarian protection could be lodged during this period, even though between 19 December 1989 and 10 December 1990[76] approximately 5000 applications were submitted.[77] From 12 July 1990, the possibility to apply for an entry permit on humanitarian grounds was removed from the legislation altogether.[78]

B Ministerial discretion

Reforms to the *Migration Act* in 1989 initially sought to remove almost all discretion in migration matters on the grounds that decision-making guidelines were 'perceived to be obscure, arbitrarily changed and applied, and subject to day-to-day political intervention in

---

72 See *Migration Legislation Amendment Act 1989* (Cth) (No 59 of 1989) s 6, introducing s 11ZD(1)(f) and (g), which became s 47(1)(f) and (g).

73 Joint Standing Committee on Migration Regulations, above n 21, 99, [5.41].

74 Ibid. This paralleled the system of TPS in the US, introduced in 1990: see *Immigration Act of 1990*, Pub L No 101-649 (Act of 29 November 1990).

75 Repealed by *Migration Regulations (Amendment)* (Cth) (SR No 237 of 1990) reg 27.

76 The Department's database indicated that 4906 applications were lodged between 19 December 1989 and 30 June 1990, while 111 applications were lodged in the 1990–91 financial year: Joint Standing Committee on Migration Regulations, above n 21, 99, [5.44].

77 Ibid.

78 *Migration Amendment Act 1991* (Cth) (No 86 of 1991) s 12.

individual cases'.[79] The previously open-ended discretion was restricted to people with a domestic right of review.[80] Since unlawful non-citizens had no right of merits review under the new scheme, they were unable to benefit from the discretion.[81] However, the initial Bill proposing this (the Migration Legislation Amendment Bill 1989, introduced in the Senate in April 1989) was blocked because both the Opposition and the Democrats thought it went too far.

In his Second Reading Speech to the second bill (the Migration Legislation Amendment Bill (No 2) 1989), the Immigration Minister, Senator Robert Ray, expressed his (prescient) concerns about ministerial discretion generally:

> I have compromised on this issue in order to get this Bill through. … I have only one objection to ministerial discretion. It is a remaining objection and one I will probably always have. What I do not like about it is access. Who has access to a Minister? Can a Minister personally decide every immigration case? The answer is always no. Those who tend to get access to a Minister are members of parliament and other prominent people around the country. I worry for those who do not have access and whether they are being treated equally by not having access to a Minister.[82]

Section 26 of the legislation (which became the *Migration Legislation Amendment Act 1989* (Cth) (No 59 of 1989)) introduced a new provision into the *Migration Act* empowering the Minister to set aside a decision of the newly created Immigration Review Tribunal (IRT)[83] and 'substitute a decision that is more favourable to the applicant' where 'the Minister thinks that it is in the public interest to do so'.[84] This section (and its successors) required the Minister to put before each House of Parliament (within 15 sitting days of that House after setting the decision aside) a statement setting out the IRT's decision, the Minister's substitute decision, and 'the reasons for the Minister's decision, referring in particular to the Minister's reason for thinking that his or her actions are in the public interest'.[85] In December 1989, an amending Act inserted a provision stating that the Minister did not have a duty to consider whether to exercise the public interest power.[86]

These changes came to be embodied in section 115 of the *Migration Act*.[87] They were intended to provide a safety net, acting as a 'balance for an otherwise inflexible set of regulations to allow the minister a public interest power to grant a visa in circumstances not anticipated by the legislation where there are compelling, compassionate and

---

79 Commonwealth, *Parliamentary Debates*, Senate, 5 April 1989, 922 (Senator Robert Ray, Minister for Immigration), referred to in Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Report* (2004) 16, [2.5], referring to the Migration Legislation Amendment Bill (No 1) (introduced April 1989). For reforms, see *Migration Amendment Act 1989* (Cth), *Migration Legislation Amendment Act 1989* (Cth), *Migration Legislation Amendment Act (No 2) 1989* (Cth).

80 Joint Standing Committee on Migration Regulations, above n 70, 39, [16].

81 Ibid; Commonwealth, *Parliamentary Debates*, Senate, 8 December 1992, 4466 (Senator Tate).

82 Commonwealth, *Parliamentary Debates*, Senate, 30 May 1989, 3013 (Senator Robert Ray). The Bill was agreed to by both houses in June 1989: *Migration Legislation Amendment Act 1989* (Cth) (No 59 of 1989); see s 26, inserting new s 64U, which became s 115 of the *Migration Act*.

83 As established by s 64ZJ, inserted by *Migration Legislation Amendment Act 1989* (Cth) s 27.

84 Section 64U(1), inserted by *Migration Legislation Amendment Act 1989* (Cth) s 26. This part of the Act (pt III) came into force on 19 June 1990 (s 2).

85 *Migration Legislation Amendment Act 1989* (Cth) s 26, introducing s 64U(2)(c).

86 *Migration Legislation Amendment Act (No 2) 1989* (Cth) (No 180 of 1989), s 3, amending s 26 of Act No 59 of 1989 by introducing s 64U(6), which became s 115(10) of the *Migration Act*.

87 See *Migration Act*, reprint of 31 December 1989 <http://www.comlaw.gov.au/Details/C2004C05341>.

humanitarian circumstances for doing so'.[88] Such protection continued to be characterised by the Government as 'a positive, discretionary humanitarian act' of generosity, rather than the result of international obligations under human rights law.[89]

From 1990 to 1993, protection on humanitarian grounds effectively became subsumed in the refugee status determination process.[90] For the first time, the concepts of refugee status and humanitarian protection were linked. Humanitarian applications could no longer be made upfront on the basis of humanitarian considerations, but only at the end of an unsuccessful asylum claim. A ministerial press release in June 1990 stated that people who were recognised during the refugee determination process as having 'a grave and individualised threat to their lives',[91] but who fell outside the scope of article 1A(2) of the Convention, would be eligible for a temporary entry permit. In determining whether a permit would be granted, consideration would be given to the possibility of the applicant settling elsewhere, the national interest, and the likely duration of the harm from which the applicant was being protected.[92]

Three months after the revised statutory arrangements came into force, the Minister announced humanitarian guidelines to assist Refugee Status Review Committee decision-makers in referring matters to the Minister for consideration on humanitarian grounds. The guidelines noted that:

> it is in the public interest of Australia as a humane and generous society to ensure that persons who cannot meet the technical definition of a refugee are nevertheless not returned to their country of origin if there is a reasonable likelihood of their facing a significant, *individualised* threat to their personal security on return.[93]

This incorporated a position that had been previously explicitly rejected by the Federal Court — namely, that humanitarian protection should not require an individual threat of discrimination. This was criticised as being too strict and narrower than the Convention definition.[94] Others suggested that more 'general life-threatening conditions [such] as civil war, famine, or the hostile or repressive policies of home governments' should be taken into account.[95]

When the Parliamentary Joint Standing Committee on Migration Regulations considered the matter, it perceived that that the requirement for an individual to establish a 'sound basis' for expecting a significant, individualised threat to his or her personal security effectively 'restate[d] the Convention definition', although it was 'arguably more

---

88 *Ministerial Discretion Report*, above n 3, 17, [2.9].

89 Minister for Immigration, Local Government and Ethnic Affairs, 'Guidelines Released for Applications to Stay in Australia on Humanitarian Grounds', MPS 15/91 (15 March 1991).

90 Crock, above n 70, 131.

91 Minister for Immigration, Local Government and Ethnic Affairs, above n 32, Attachment B.

92 Ibid. The latter ground is echoed in the EU Directive, which premises subsidiary protection as being of shorter duration than Convention-based persecution, even though it has been argued that this is illogical: see Jane McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 *International Journal of Refugee Law* 461, 499.

93 Ministerial Guidelines (MPS 15/91), above n 89.

94 See submissions of Amnesty International Australia; Legal Aid Commission of NSW; Dr Dennis Shoesmith (for Darwin Citizens for Support of Cambodian Boat People): Joint Standing Committee on Migration Regulations, above n 21, 106–7, [5.62]–[5.66].

95 Ibid 106, [5.65] (Evidence of Dr Dennis Shoesmith S823).

circumscribed'.[96] The Committee regarded the test as more onerous than the 'real chance' (of persecution) test in Australian refugee jurisprudence,[97] noting that '[r]efugees, unlike humanitarian claimants, do not have to show that they are targeted for persecution or discrimination'.[98] The Joint Standing Committee argued that its present formulation would seem to preclude *anyone* from being granted humanitarian protection, since a person who failed the less restrictive Convention test would not be able to succeed under the humanitarian threshold.[99] In support of this proposition, it made reference to evidence of the Attorney-General's Department:

> Certainly in some areas of the Department it was felt that the criteria for judging humanitarian was, in fact, tougher than the test for refugee. … It seemed to us that people who could meet the test for refugee would not meet the test for humanitarian. It seemed to be an inconsistent test as far as we were concerned.[100]

Much like the section 417 ministerial discretion mechanism, humanitarian protection could not be applied for independently. In order to access a residence permit on humanitarian grounds, individuals had to first apply for a refugee protection visa. If they were found not to be refugees, the Refugee Status Review Committee[101] or a senior delegate could refer a humanitarian case to the Minister and recommend that protection be granted on humanitarian grounds.[102] This procedure was strongly criticised by a 1992 Parliamentary Joint Standing Committee on Migration Regulations into Australia's refugee and humanitarian system.[103] The Committee argued that humanitarian applicants were forced through an irrelevant determination procedure and might ultimately never have their true claim considered, since the discretion to grant a temporary entry permit on humanitarian grounds was non-compellable.[104] The Joint Standing Committee emphasised

---

96 Joint Standing Committee on Migration Regulations, above n 21, 108, [5.73].

97 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

98 Joint Standing Committee on Migration Regulations, above n 21, 108, [5.73], referring to James Crawford and Patricia Hyndman, 'Three Heresies in the Application of the Refugee Convention' (1988) 1 *International Journal of Refugee Law* 155.

99 Joint Standing Committee on Migration Regulations, above n 21, 109, [5.74]. A similar rationale has been put forward by the Asylum and Immigration Tribunal in the UK, which has argued that the standard of proof for refugee and human rights-based (subsidiary protection) claims ought to be the same:

> Since the concern under each Convention [Refugee Convention and the European Convention on Human Rights] is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising. If an adjudicator were persuaded that there was a well-founded fear of persecution but not for a reason which engaged the protection of the Refugee Convention, he would, if Mr. Tam is right, be required to reject a human rights claim if he was not satisfied that the underlying facts had been proved beyond reasonable doubt. Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements. (*Kacaj** [2001] INLR 354, [10])

100 Joint Standing Committee on Migration Regulations, above n 21, 109, [5.74] (Evidence of the Attorney-General's Department 1544–5).

101 Replaced by the Refugee Review Tribunal (RRT) on 1 July 1993.

102 Cf Crock, above n 13, 129, referring to DORS officers also having this power under the *Migration (Review) Regulations 1989* (Cth) reg 8E and the *Migration Act* s 115.

103 Joint Standing Committee on Migration Regulations, above n 21, 107, [5.67].

104 Ibid 105, [5.57], referring to Evidence 1344: 'the person in Australia claiming refugee status does not have an option of humanitarian status, the Minister has an option to grant it. It is not an entitlement; it is a Ministerial discretion; it is an act of grace on the part of the Minister'.

that 'the humanitarian procedures were confined to the purview of the Minister … principally to overcome the wide interpretation given to the humanitarian provisions by the Federal Court'.[105]

Being recognised as having a protection need — whether as a refugee or humanitarian entrant — no longer led to automatic permanent residence.[106] Temporary entry permit holders could subsequently apply for a permanent entry permit provided that they had held their humanitarian temporary entry permit for at least four years, had a continuing need for protection, and there were available places in the migration programme (in accordance with government-set quotas). They were also eligible to apply for permanent residence on other grounds, such as work or marriage. Individuals who were unable to obtain permanent residence, but had an ongoing protection need, could obtain further temporary entry permits.[107] However, humanitarian protection was not available to border claimants or 'illegal entrants' since the Government maintained it had no obligation towards 'people who turn up on our shores uninvited', except 'in terms of the UN [Refugee] Convention'.[108]

In addition to the above, special regulations enabled the creation of humanitarian visas for particular nationalities or groups.[109] Periodically, through ministerial gazettal of political events or natural disasters that the Government considered gave rise to humanitarian claims for protection,[110] the regulations were amended to deal with particular groups of foreign nationals already in Australia requiring protection (the humanitarian equivalent of refugees *sur place*). Thus, Chinese students in Australia at the time of the Tiananmen Square massacre and nationals of States affected by the Persian Gulf conflict were granted humanitarian protection through special permits, although in most cases it was of a temporary nature and beneficiaries were expected to return home upon the permits' expiry.[111]

---

105 Ibid 110, [5.77].

106 Minister for Immigration, Local Government and Ethnic Affairs, above n 32, Attachment A, [2(a)]. There was an end to 'the assumption in law and practice that grant of protection, to those determined to be refugees or to have humanitarian claims, automatically leads to grant of residence status'.

107 Later incarnations of these policies can be seen with the creation of temporary protection visas (TPVs) in October 1999 (visa subclass 785).

108 Joint Standing Committee on Migration Regulations, above n 21, 103, [5.50], referring to Evidence 1340. Such people were also denied any right of review of an entry permit decision. See also Evidence 1345.

109 Minister for Immigration, Local Government and Ethnic Affairs, above n 32, Attachment B. See *Migration (Criteria and General) Regulations 1989* (Cth) (SR No 365 of 1989) reg 141, repealed by *Migration Regulations (Amendment)* (Cth) (SR No 237 of 1990) reg 27.

110 Crock, above n 70, 97.

111 This procedure is similar to TPS in the US, above n 44. See *Migration Regulations 1989* (Cth) regs 118 (Croatia, Slovenia and Yugoslavia), 119D (People's Republic of China), 119E (Lebanon), 119F (Sri Lanka), 119G, 119K (Gulf conflict temporary entry permit) and related *Migration (Iraq and Kuwait) (United Nations Security Council Resolution No 661) Regulations 1991* (Cth). Chinese nationals were eligible for permanent residence if they had entered Australia prior to 20 June 1989 and were in the country on that date: *Migration Regulations 1989* (Cth) regs 128(1)(a)(iii)(D) and 128(1A), cited in Crock, above n 70, 98–9; Crock, above n 13, 131. See *Migration Regulations 1989* (Cth) (SR No 365 of 1989) reg 129, repealed and substituted by *Migration Regulations (Amendment)* (Cth) (SR No 237 of 1990) reg 26.

V Ministerial discretion: Section 417

Section 417 of the *Migration Act* is the successor to section 115. It provides:

> If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

This provision took effect on 1 July 1993.[112] Even with the introduction of complementary protection criteria in section 36(2A) of the Act, individuals will still be able to bring humanitarian or compassionate claims under this head.

Like its predecessor, the Minister's discretion under section 417 is non-compellable,[113] non-delegable[114] and non-reviewable.[115] This means that the Minister has no obligation to consider whether to exercise the discretionary power under section 417(1), and if he or she does choose to exercise it and review a decision of the RRT, then neither the decision relating to the exercise of the power, nor the ultimate decision, can be reviewed.

Section 417 is a very open-ended provision, with the 'public interest' cited as the only constraining factor. Various Ministers have given varying degrees of guidance as to how the discretion will be exercised, ranging from broad-brush suggestions[116] through to very detailed Ministerial Guidelines.

---

112 Section 417 replaced section 115 in 1992 via the *Migration Reform Act 1992* (Cth) (No 184 of 1992) s 32 (then s 166BE), which commenced on 1 July 1993 (see s 2(2)). See also Explanatory Memorandum, Migration Reform Bill 1992 (Cth) 72–3, [361].

113 *Migration Act* s 417(7).

114 *Migration Act* s 417(3). Only the decision to exercise or not to exercise discretion is personal and cannot be delegated. The discretion to decide not to consider whether to exercise the discretion may be delegated to Immigration Department officers: *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 141 ALR 322 (Merkel J). In practice, the Ministerial Guidelines delegate screening of s 417 applications to the Ministerial Intervention Unit and departmental officers (eg when the Department receives a rejected case from the Tribunal, a departmental officer may refer the case to the Minister for consideration). See also Department of Immigration and Citizenship (DIMIA), Guidelines for Stay in Australia on Humanitarian Grounds (Submission No 24 to the Senate Select Committee on Ministerial Discretion in Migration Matters (2004)) Attachment 7, [7].

115 *Migration Act* s 476(2) provides that 'the Federal Court and the Federal Magistrates Court do not have any jurisdiction in respect of a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under … section … 417'. The Federal Court has interpreted a decision under s 417 as a privative clause decision pursuant to s 474, which cannot be challenged 'unless one or more of the Hickman limitations can be made out': *QAAE of 2002 v MIMIA* [2002] FCA 1213, [48] (Cooper J). The High Court has maintained that mandamus cannot issue in respect of a s 417 decision due to the absence of a duty: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, 461, [48] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ); 474, [100] (Gaudron and Kirby JJ).

116 The first guidance was given by Minister Gerry Hand (April 1990 to March 1993), who told Parliament that he had no intention of using the intervention powers 'unless there is a serious reason', such as where there is 'a gap in policy', or 'the refusal is an unintended consequence of the regulations' or 'an individual case requires special consideration'. In such cases, he said he would 'move to amend the regulations as necessary': House Hansard (9 May 1990) 136 cited in *Ministerial Discretion Report*, above n 3, 46, [4.7]. Departmental officers used these remarks to assist them to prepare submissions on cases for ministerial consideration: DIMIA, Submission No 24, 27, cited in *Ministerial Discretion Report*, above n 3, 47, [4.8]. See also the more detailed guidance in the Minister's press release of 15 October 1990, in DIMIA, Submission No 24, Attachment 4 cited in *Ministerial Discretion Report*, above n 3, 47, [4.10]. Although Senator Robert Ray was Immigration Minister (September 1988 to April 1990) when s 417 was introduced, he appears never to have exercised the discretion, since he moved to a different portfolio a short time later: see *Ministerial Discretion Report*, above n 3, 46, [4.5].

Under Minister Nick Bolkus, the 'Guidelines for Stay in Australia on Humanitarian Grounds' outlined criteria for assessing 'persons of humanitarian concern who do not meet the requirements for refugee status but who face hardship if returned to their country of origin which would evoke strong concern in the Australian public'.[117] For the first time under the section 417 regime, humanitarian protection was posited as a complement to refugee status, underpinned by Australia's international human rights law obligations:

> In accordance with Australia's commitment to protection of human rights and the dignity of the individual, it is in the public interest to offer protection to those persons whose particular circumstances and personal characteristics provide them with a sound basis for expecting to face, individually, a significant threat to personal security, human rights or human dignity on return to their country of origin.[118]

It was not until Minister Ruddock's more detailed Guidelines of 1998[119] that an express reference was made to the human rights treaties underpinning Australia's duty not to remove people at risk of certain forms of harm — *CAT*, the *ICCPR* and the *Convention on the Rights of the Child* ('*CRC*').[120] Although revised in 2003, 2008 and 2009, the Guidelines' sections on the relevant human rights obligations remained substantially similar up until the entry into force of the complementary protection regime on 24 March 2012 (when they were reissued to reflect that Australia's *non-refoulement* obligations now form part of an integrated protection visa framework, rather than ministerial intervention).[121] The next section refers primarily to the Ministerial Guidelines in effect until that date.

Does the section 417 mechanism meet Australia's international protection obligations?

While the section 417 mechanism might be appropriate for assessing purely humanitarian and compassionate cases, a function it continues to serve, it was an ineffective mechanism for ensuring compliance with Australia's *non-refoulement* obligations under international law. This section explains its inadequacy.

---

117 DIMIA, above n 114. The document in DIMIA's submission is undated, and it is not clear from the text when it was signed. The language of 'strong concern in the Australian public' echoes the earlier Federal Court judgments.

118 Ibid [4], cited in *Ministerial Discretion Report*, above n 3, 49, [4.18]. The final guidelines issued by Senator Bolkus were far less detailed and their primary aim seems to have been to reflect the renumbering of the Act in 1994: *Ministerial Discretion Report*, above n 3, 49, [4.21].

119 *Ministerial Discretion Report*, above n 3, 50, [4.23].

120 Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be in the Public Interest to Substitute a More Favourable Decision under ss 345, 351, 391, 417, 454 of the *Migration Act 1958* (Migration Series Instruction (MSI) 225) contained in DIMIA, above n 114, Attachment 8.

121 MSI 225 was revised and reissued as MSI 386 on 14 August 2003, reflecting 'the passage of time and changes to policy and legislation': DIMIA, Answer to Question on Notice (Submission No 24B, 5 September 2003) 33 cited in *Ministerial Discretion Report*, above n 3, 51, [4.26]. These guidelines were replaced by ministerial powers: Minister's Guidelines on Ministerial Powers (s 345, s 351, s 391, s 417, s 454 and s 501J) (Procedures Advice Manual (PAM)3 of 5 December 2008), which was subsequently replaced by Minister's Guidelines on Ministerial Powers (s 345, s 351, s 391, s 417, s 454 and s 501J) (PAM3 of 14 September 2009), which updated the Guidelines to reflect changes with respect to partner visas. See also the table of 'Unique or Exceptional Circumstances' outlining the instances in which the Minister may consider intervening, and nature of supporting evidence that should be presented: <http://www.immi.gov.au/refugee/circumstances.htm>.

Obligations arising under international treaties were simply one of a number of matters that the Minister *could* consider under the Guidelines.[122] Even though Australia's international obligations under the *CAT*, the *CRC* and the *ICCPR* were expressly referred to,[123] the Minister had no obligation to take them into account if and when he or she chose to exercise the section 417 discretion.

This was despite the fact that the Government's 'Procedures Advice Manual' ('PAM') recognised that 'Australia is party to other international human rights instruments that impose non-refoulement obligations on Australia' and that such cases 'must be referred to the Minister'.[124] The Manual stated:

> The fundamental and absolute non-refoulement obligations under these instruments require state parties such as Australia not to return ('refoule') a person to a territory where they will be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment or where they will face a violation of their right to life.
>
> Non-refoulement obligations under CAT, ICCPR and CROC are absolute. This means that regardless of other considerations such as bad character, Australia has an obligation not to forcibly return a person to a place where they will face a real risk of torture or cruel, inhuman or degrading treatment or punishment or where they will face violation of their right to life.[125]

By its very nature, a discretionary power cannot fully comply with Australia's protection obligations under international law. Although international treaties do not prescribe the form in which States are to give effect to their obligations, it is apparent that any provision that contains a discretionary decision-making power is at odds with Australia's duty to respect the principle of *non-refoulement* under international human rights law.

As a means of implementing Australia's *non-refoulement* obligations under human rights law, section 417 was deficient in at least six respects. First, since the Minister's discretion could only be triggered following a negative decision by the RRT,[126] there may have been cases that never reached this stage. In such cases, individuals may have been removed contrary to Australia's human rights-based *non-refoulement* obligations.[127]

---

122 Ministerial Guidelines of 14 September 2009, above n 121, [11]. Other matters include cases where people may be subjected to 'a systematic program of harassment or denial of basic rights' not amounting to 'persecution'; former refugees whose considerable subjective fear would make it 'inhumane to return them to their country of origin'; cases where a person is unable to be returned to his or her country owing to circumstances outside his or her control; unanticipated or unreasonable consequences of legislation; strong compassionate circumstances which, if ignored, would result in 'in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit'; exceptional benefit to Australia; the length of time a person has spent in Australia; and a person's age, health and psychological state.

123 Ibid.

124 PAM3 of 14 September 2009, above n 121, [15.2].

125 Ibid.

126 Ministerial Guidelines of 14 September 2009, above n 121, [3].

127 As Amnesty International observed: 'This system is especially concerning due to the fact that individuals with genuine non-Refugee Convention protection claims are not only forced to waste time applying to the RRT, but then forced to pay the Australian Government [A]$1400 when the RRT (which only assesses claims based on the Refugee Convention) inevitably rejects their application'. See Amnesty International, Submission 25, 4 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Migration Amendment (Complementary Protection) Bill 2009 (2009). Related to this is the fact that, as a consideration that operates at the

Second, by contrast to countries in which complementary protection could be applied for and a legal status granted, section 417, as a residual discretion, could result in the grant of *any* (or no) visa by the Minister.[128] The Minister could choose not to exercise the discretion at all (without needing to provide reasons), or he or she could choose to consider the claim, but decline to grant a visa. The Minister could also choose to grant any type of visa, even if the applicant's particular circumstances bore no relation to the visa criteria.

Ironically, although it was Minister Ruddock who introduced references in the Guidelines to Australia's extended *non-refoulement* obligations under human rights law, he radically reduced the number of protection visas granted under section 417 during his period as Immigration Minister. Whereas Senator Bolkus had exclusively granted protection visas in cases where he exercised his discretion in the applicant's favour, Ruddock increasingly selected up to 30 different visa subclasses, including those normally reserved for the offshore humanitarian programme. Between February 1999 and August 2002, the majority of visas granted under section 417 were temporary spouse visas (820), with grants of protection visas dropping to only one in 25 cases.[129] This underscored practitioners' evidence that the Minister was most favourably inclined to grant a visa in cases where the applicant already had a demonstrated link to Australia. They argued that the most typical 'profile' for a successful section 417 claim was a temporary spouse visa granted on the basis of then Guideline 4.2.8 to an applicant living within the community (that is, not in immigration detention) with an Australian citizen child and Australian citizen or permanent resident partner.[130] One might also speculate that Minister Ruddock's disinclination in granting protection visas was in part been an attempt to construe the section 417 discretion as an exercise in compassionate 'goodwill', rather than based on international protection needs.[131]

Third, the Ministerial Guidelines are not legally binding and, given the absence of formal, reasoned decisions by the Minister, it is difficult to ascertain how they inform decision-making. This combined lack of: (a) transparency in the decision-making process; and (b) legal standards against which to assess the Minister's findings mean that decisions cannot be monitored for consistency, and review on either the merits or an error of law is impossible. In the context of claims based on international treaty obligations, this was

---

very end of the process, people may be held in detention for considerable periods of time before a claim can be considered (even if this was the only possible basis for the protection claim in the first place).

128 Between 2000–03 the most frequent visas granted in intervention requests were spouse, close ties and family visas: *Ministerial Discretion Report*, above n 3, 39, [3.44].

129 Johanna Stratton, 'Humanitarian Intervention in the Public Interest?: A Critique of the Recent Exercise of s 417 Migration Act 1958 (Cth)', Submission No 10 to the Senate Select Committee on Ministerial Discretion in Migration Matters: *Ministerial Discretion Report*, above n 3, 21–2. Stratton studied all Statements to Parliament from September 1994 to August 2002 to ascertain the number of times the Minister exercised his discretion and the type of visa granted. Copies of tabled statements were requested from the Senate Tabling Office in Parliament House. Stratton notes that prior to February 1999, protection visas had been granted in 90 per cent of cases.

130 Ibid 23: Interviews with or emails from Lillian Ajuria, Karyn Anderson, David Bitel, Guy Coffey, Michael Clothier, Paul Fisher, Paul Hense, Libby Hogarth, Con Karapanagiotidis, Mary Anne Kenny, Dana Krause, Marion Le, Anne O'Donoghue, Kerry Murphy, Alison Ryan, Michael Thornton.

131 For example, in a 2005 publication, the Immigration Department stated: 'There is no indication that there are significant numbers of persons entitled to CAT, ICCPR or CROC protection against return who do not also meet the Refugees Convention definition of a refugee': Department of Immigration, Multicultural and Indigenous Affairs, 'Complementary Protection and Australian Practice' in UNHCR Discussion Paper, above n 3, 8. Another factor in Ruddock's choice of visa subclasses may have been to avoid using up the total refugee/humanitarian quota, given the pressures from boat arrivals at the time. I am grateful to Kerry Murphy for this suggestion.

especially concerning since the Minister's consideration of the claim was likely to have been the first time it had been assessed against relevant criteria.[132] Furthermore, the lack of disclosure made it easy for the Government to deny that decisions were based on international protection needs, as opposed to general compassionate considerations. This situation led the Refugee Council of Australia to argue that 'no actual decision on humanitarian status is actually taken'.[133]

Fourth, given that section 417 is a 'public interest' power — an inherently subjective and malleable concept that focuses on the general public, rather than the applicant's protection needs — matters such as national security concerns, and the applicant's character and conduct, are taken into account. This is at odds with the absolute prohibition on *refoulement* under human rights law, which has been affirmed consistently in other jurisdictions.[134] Australia would be in violation of its international law obligations if it returned a person to face the death penalty; torture; cruel, inhuman or degrading treatment or punishment; or arbitrary deprivation of life.

Fifth, during the Senate Committee hearings into the exercise of ministerial discretion, witnesses expressed concerns about the non-reviewable nature of section 417 decisions. They argued that the absence of review did not conform to accepted principles of administrative law;[135] that the discretion was not transparent[136] and, accordingly, failed to meet the need for legal certainty, fairness and judicial scrutiny of executive decisions;[137] and that the absence of 'checks and balances' cast doubt on the quality of the decision-making, particularly since the high number of section 417 requests places an enormous burden on the Minister's office.[138] Additionally, although any decision to exercise the discretion had to be tabled in Parliament, the Minister was under no obligation to justify a decision *not* to exercise the discretion.

Finally, one mechanism for referring a case raising complementary protection issues to the Minister was via an RRT decision.[139] When the RRT was first constituted, it was not uncommon for members to alert the Minister to cases involving 'substantial questions of law which also raise consequential humanitarian issues'.[140] However, Stratton's study of the exercise of ministerial discretion up to 2002 revealed conflicting signals from the Minister and the RRT Members' Guide about how and when such recommendations should be made,[141] such that 'the current system of discretionary, indirect referrals from RRT members is unreliable and inadequate. Not only are the value, frequency and efficacy of the recommendation ill-defined and uncertain, the procedure is open to inconsistent application'.[142]

---

132 Refugee Council of Australia, Position on Complementary Protection (2002) <http://www.refugeecouncil.org.au/docs/resources/ppapers/pp-compprot.pdf>.

133 Ibid.

134 *Chahal v United Kingdom* (1996) 23 EHRR 413, [79]–[80]; *Saadi v Italy* (2008) 24 BHRC 123, [127].

135 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, above n 3, 61, [2.67] referring to Submission No 40 (Legal Aid Western Australia) 370–1.

136 Ibid, referring to Submission No 18 (Refugee Council of Western Australia) 97.

137 Ibid, referring to Submission No 36 (Kingsford Legal Centre, University of NSW) 306.

138 Ibid, referring to Submission No 40 (Legal Aid Western Australia) 370–1.

139 For numbers of cases referred by RRT from 1999 to 2003, see Migration Review Tribunal and Refugee Review Tribunal Submission to the Senate Select Committee on Ministerial Discretion in Migration Matters, above n 3, 5 <http://www.aph.gov.au/Senate/committee/minmig_ctte/submissions/sub11.doc>.

140 RRT Reference: N94/4596 (16 August 1994) 18, as cited in Stratton, above n 129, 11.

141 Stratton, above n 129, 13.

142 Ibid 15.

VI Concluding remarks: Introducing complementary protection into Australian law

The Howard Government (1996–2007) consistently rejected the reintroduction of any type of humanitarian visa or system of complementary protection in Australia, arguing that judicial review might broaden the scope of the class beyond intended narrow parameters; abuses of the refugee system might transfer to the new class; and the new class would enable applicants to extend their stay in Australia, adding another layer to the current process.[143] It also suggested that the reintroduction of a humanitarian category after almost a decade would be a 'significant shift' from the policy of previous governments,[144] and that section 417 was already sufficient to ensure that Australia's international obligations were met.[145]

Shortly after becoming Immigration Minister in late 2007, Senator Chris Evans expressed his concern at the inefficiency, inequity and subjectivity of the section 417 mechanism. Describing himself as 'playing God',[146] he lamented that:

> there are no strict guidelines for the exercise of ministerial discretion. There is no way of really knowing what factors influence the minister's decision in individual cases. And there is no avenue of appeal from a bad decision, and no way to prevent an abuse of power. There is no consistency in the decision making because different ministers have different personalities and different ways of thinking.[147]

This struck him as particularly concerning in light of the 'massive increase' of section 417 claims being made. By 2006–07, over 4000 requests were being received annually, compared to the 81 requests handled by Minister Gerry Hand, the 311 considered by Senator Nick Bolkus in a three-year period, and the 2513 interventions by Minister Philip Ruddock between 1996 and October 2003.[148]

A report subsequently commissioned by Minister Evans recommended the introduction of a system of complementary protection, noting that it would have 'the advantage of transparency, efficiency, accountability and, for the applicant, gives more certainty and reduces the time involved in the processing'.[149] It suggested that 'the [G]overnment give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR'.[150] This echoed a series of prior recommendations in Australian parliamentary and international UN reports.[151] For example, the 2004 Senate Committee report on ministerial discretion recommended that it be 'a last

---

143 Joint Standing Committee on Migration, Parliament of Australia, *Review of Migration Regulation 4.31B* (1999) [2.89].

144 Ibid, [2.90] citing DIMA Submissions S122.

145 See also comments by the Department in UNHCR Discussion Paper, above n 3.

146 Senator Chris Evans, Minister for Immigration and Citizenship (Address to the 2008 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal, Melbourne, 29 February 2008) <http://www.minister.immi.gov.au/media/speeches/2008/ce08-29022008.htm>.

147 Ibid.

148 Ibid.

149 Elizabeth Proust, *Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Migration Regulations* (2008) ('*Proust Report*') 10.

150 Ibid 19, Recommendation 19.

151 See above n 3.

resort to deal with cases that are truly exceptional or unforeseeable'.[152] Similarly, the UN Committee against Torture had expressed concern that:

> the prohibition of non-refoulement is not enshrined in the State party's [Australia's] legislation as an express and non-derogable provision, which may also result in practices contrary to the Convention [against Torture]. The Committee also notes with concern that some flaws related to the non-refoulement obligations under the Convention may depend on the exclusive use of the Minister's discretionary powers thereto. … The State party should explicitly incorporate into domestic legislation, both at Federal and States/Territories levels the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture (non-refoulement), and implement it in practice. The State party should also implement the Committee's previous recommendations formulated during the consideration of the State party's second periodic report to adopt a system of complementary protection ensuring that the State party no longer solely relies on the Minister's discretionary powers to meet its non-refoulement obligations under the Convention.[153]

These findings prompted the Labor Government to introduce the Migration Amendment (Complementary Protection) Bill in September 2009. As its Second Reading speech made clear, the section 417 process was out of step with international law and comparative practices in other countries, administratively inefficient, and did 'not provide a sufficient guarantee of fairness and integrity for decisions in which a person's life may be in the balance'.[154]

The Bill represented a fundamental step forward in ensuring that Australia's *non-refoulement* obligations were respected. Many of the underlying premises of the complementary protection regime it proposed, and which were ultimately adopted in 2011,[155] were sound and principled, such as the single legal status for Convention refugees and beneficiaries of complementary protection and the derivative status for family members of beneficiaries of complementary protection.

However, a key concern with the legislation as it currently stands is the threshold test, or 'standard of proof', which complementary protection claimants must meet. The test outlined in the 2009 Bill was based on the test in the Ministerial Guidelines.[156] It stated that to be eligible for complementary protection, there must be:

---

[152] *Ministerial Discretion Report*, above n 3, xvii.

[153] UN Doc CAT/C/AUS/CO/3, above n 3, [15].

[154] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8988 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services) 3; see generally 8987–89; Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1977, 1713–16 (Hon Michael Mackellar MP, Minister for Immigration and Ethnic Affairs).

[155] See the *Migration Amendment (Complementary Protection) Act 2011* (Cth).

[156] The Ministerial Guidelines of 14 September 2009, above n 121, [11] state:

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

The same formulation was contained in MSI 225, above n 120, [4.2.4].

> substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will be irreparably harmed because of a matter mentioned in subsection (2A).[157]

This was reformulated in the 2011 Bill as follows:

> 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.[158]

While this test is preferable, since it removes the element of irreparable harm,[159] it still exceeds requirements in other jurisdictions because it requires a cumulative assessment of criteria that were never intended to be assessed separately. For example, the notion of 'necessary and foreseeable consequence', which derives from the UN Human Rights Committee's views, was never intended to comprise an independent component of a test for non-removal; rather, it was used it to explain the meaning of 'real risk'. In other words, 'necessary and foreseeable consequence' does not form an additional element of the 'real risk' test, but is a way of *understanding* that test by asking whether the alleged harm is a necessary and foreseeable consequence of removal.[160]

While the misapplication of the UN Human Rights Committee's approach is problematic in the Ministerial Guidelines, it is even more so in a legislative context. In the Guidelines, the test helps to *guide* the Minister in the exercise of a *personal* discretion, whereas in the legislation, it codifies a legal test that has to be applied consistently by a variety of different decision-makers.

Certainly, the introduction of codified complementary protection in Australia is a welcome step. However, as it presently stands, it is more complicated, convoluted and introverted than it needs to be.[161] This is on account of its conflation of tests drawn from international and comparative law, formulated in a manner that risks marginalising the extensive international jurisprudence on which Australian decision-makers could (and ought to) draw. The danger is that Australian jurisprudence on complementary protection could become isolated at a time when greater harmonisation is being sought.[162] One would, therefore, hope that decision-makers will look outwards when they start to apply the new law, thereby also making Australian complementary protection a rich and important component of the wider international jurisprudence on this subject.

---

157 Migration Amendment (Complementary Protection) Bill 2009, proposed s 36(2)(aa).

158 Section 36(2)(aa).

159 For a critique of this element, see the submissions referred to in Senate Legal and Constitutional Affairs Legislation Committee, above n 127, [3.9]. The Senate Committee recommended the deletion of this element: Recommendation 1.

160 See, eg, *ARJ v Australia*, Comm No 692/1996, UN Doc CCPR/C/60/D/692/1996 (11 August 1997) [6.8] (emphasis added).

161 'The great majority of submitters criticise the complexity of the test and/or the difficulty in meeting it': Senate Legal and Constitutional Affairs Legislation Committee, above n 127, [3.9]. For further analysis, see McAdam, above n 6.

162 See, eg, Hélène Lambert, 'Transnational Judicial Dialogue, Harmonization, and the Common European Asylum System' (2009) 58 *International and Comparative Law Quarterly* 519; Hélène Lambert and Guy S Goodwin-Gill (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010); Anthony M North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, 2008) 225.