

Australian Complementary Protection: A Step-By-Step Approach

Jane McAdam*

Abstract

The passage of the *Migration Amendment (Complementary Protection) Act 2011* (Cth) in September 2011 has brought significant and welcome changes to the *Migration Act 1958* (Cth) (*'Migration Act'*). By implementing a system of 'complementary protection' in domestic law, it gives effect to Australia's international human rights law obligations not to return people to places where they face a real risk of arbitrary deprivation of life, the death penalty, or cruel, inhuman or degrading treatment or punishment. However, the legislation makes the Australian system of complementary protection far more complicated, convoluted and introverted than it needs to be. This is because it conflates tests drawn from international and comparative law, formulates them in a manner that risks marginalising an extensive international jurisprudence on which Australian decision-makers could (and ought to) draw, and in turn risks isolating Australian decision-making at a time when greater harmonisation is being sought.

I Introduction

The *Migration Amendment (Complementary Protection) Act 2011* (Cth) makes welcome changes to the *Migration Act 1958* (Cth) by creating a system of 'complementary protection' in Australia. 'Complementary protection' is international human rights law-based protection against *refoulement* (removal), which is additional to that provided by the Refugee Convention.¹ The legislation represents an attempt to codify Australia's responsibilities not to return people to

* BA (Hons) LLB (Hons) (*Syd*), DPhil (*Oxf*); Professor, Faculty of Law, University of New South Wales; Research Associate, Refugee Studies Centre, University of Oxford. Thank you to Matthew Albert for his assistance in locating Australian jurisprudence relating to terms in the amending legislation.

¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) read together with the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('Refugee Convention').

face torture and other serious forms of harm pursuant to the Convention against Torture, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.² In doing this, it also aligns Australia's statutory regime with comparable provisions in the European Union (EU),³ Canada,⁴ the United States (US),⁵ New Zealand,⁶ Hong Kong⁷ and Mexico.⁸ It follows a series of recommendations in Australian parliamentary reports,⁹ as well as

² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *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); *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*, adopted 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). See also *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR'). The *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, GA Res 61/177, UN Doc A/Res/61/177, art 16(1) expressly precludes the *refoulement* of a person 'where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.' Australia has not yet ratified this treaty.

³ *Council Directive 2004/83/EC 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, arts 2(e), 15 ('*Qualification Directive*').

⁴ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 97.

⁵ *Immigration and Nationality Act*, 8 CFR §§ 208.16, 208.17 (1952) (CAT-based protection only).

⁶ *Immigration Act 2009* (NZ) ss 130, 131.

⁷ CAT-based protection only; refugee status determination is conducted by UNHCR. See also Kelley Loper, 'Human Rights, *Non-refoulement* and the Protection of Refugees in Hong Kong' (2010) 22 *International Journal of Refugee Law* 404.

⁸ *Decreto por el que se expide la Ley sobre Refugiados y Protección Complementaria y se reforman, adicionan y derogan diversas disposiciones de la Ley General de Población [Law on Refugees and Complementary Protection]* (December 2010) <http://www.dof.gob.mx/nota_detalle.php?codigo=5175823&fecha=27/01/2011>.

Mexico is the first country in Latin America to grant complementary protection: News, 'UNHCR Welcomes Breakthrough Mexico Legislation on Protection' (Online), 10 December 2010, UNHCR <<http://www.unhcr.org/4d025a8a6.html>>.

⁹ 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; Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000); 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) 10. See also Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 3, 131–4; UNHCR Regional Office (Australia, New Zealand, Papua New Guinea and the South Pacific), 'Discussion Paper: Complementary Protection' (No 2,

international reports and instruments,¹⁰ that Australia adopt a system of complementary protection.

The absence of a codified system of complementary protection in Australia has meant that, for many years, Australia has been unable to guarantee that people who do not meet the refugee definition in the Refugee Convention, but who nonetheless face serious human rights abuses if returned to their country of origin or habitual residence, are granted protection. There has been no mechanism for having claims based on a fear of return to torture, a threat to life, or a risk of cruel, inhuman or degrading treatment or punishment, assessed, except via the 'public interest' power of the Minister for Immigration and Citizenship under s 417 of the *Migration Act 1958* (Cth) (known as ministerial intervention). The s 417 process is lengthy and inefficient, accessible only once an unsuccessful appeal has been made to the Refugee Review Tribunal. Furthermore, whether or not a claim is considered, and whether or not a visa to remain in Australia is granted, is wholly discretionary and non-reviewable. The s 417 mechanism is appropriate for purely humanitarian and compassionate cases, but not for those engaging Australia's *non-refoulement* obligations under international law.

The changes enacted by the amending legislation are therefore very important because they will align domestic law with Australia's international obligations. They will ensure that all protection applicants who do not meet the refugee definition automatically have their human

2005) <http://www.unhcr.org.au/pdfs/UNHCR_Newsletter2005_000.pdf>; Refugee Council of Australia and others, '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) <http://www.ncca.org.au/_data/page/993/Complementary_Protection_Fact_Sheet_2007.pdf> at 20 June 2007; Migration Legislation Amendment (Complementary Protection Visas) Bill 2006 (Cth).

¹⁰ UNHCR, *Agenda for Protection* (3rd ed, 2003) <<http://www.unhcr.org/refworld/docid/4714a1bf2.html>>; UNHCR Executive Committee Conclusion No 103 (LVI) 'The Provision of International Protection including through Complementary Forms of Protection' (2005); Committee against Torture, Concluding Observations of the Committee against Torture – Australia, UN Doc CAT/C/AUS/CO/3 (22 May 2008) [15] ('Executive Committee Conclusion No 103'); Human Rights Committee, *Concluding Observations of the Human Rights Committee – Australia*, UN Doc A/55/40 (24 July 2000) [498]–[528]; Human Rights Committee, *Concluding Observations of the Human Rights Committee – Australia*, UN Doc CCPR/C/AUS/CO/5 (2 April 2009); Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism – Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (14 December 2006) 21, [62]. For a detailed analysis, see Michelle Foster and Jason Pobjoy, Submission No 9 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 28 September 2009 ('Senate Committee').

rights-based claims assessed at the outset — in a single determination procedure¹¹ — against Australia's *non-refoulement* obligations under international law. If found to have a complementary protection need, such people will be granted the same legal status as a Convention refugee — an outcome that is particularly welcome from the perspective of human rights law.¹² According to the Explanatory Memorandum to the amending legislation, complementary protection will 'introduce greater efficiency, transparency and accountability' into the system.¹³

However, without wanting to downplay the significance of the new complementary protection regime, a number of provisions require redress if it is to fulfil its objectives and sit comfortably within the broader international and comparative jurisprudence.¹⁴ The legislation makes the Australian system of complementary protection far more complicated, convoluted and introverted than it needs to be. This is because it conflates tests drawn from international and comparative law, formulates them in a manner that risks marginalising an extensive international jurisprudence on which Australian decision-makers could (and ought to) draw, and in turn risks isolating Australian decision-making at a time when greater harmonisation is being sought.¹⁵ It

¹¹ Decision-makers should be required to provide written reasons explaining why they find a person is not a Convention refugee but a beneficiary of complementary protection: UNHCR, 'Draft Complementary Protection Visa Model: Australia: UNHCR Comments' (January 2009) <<http://www.unhcr.org.au/pdfs/UNHCRPaper6Jan09.pdf>>, endorsed by Refugee Advice and Casework Service ('RACS') and Immigration Advice and Rights Centre ('IARC'), Submission No 24 to Senate Committee, above n 10, 10. In NZ law, a decision is required on each potential ground (Convention refugee or protected person): *Immigration Act 2009* (NZ) s 137.

¹² For the rationale, see Jane McAdam, 'Status Anxiety: The New Zealand Immigration Bill and the Rights of Non-Convention Refugees' [2009] *New Zealand Law Review* 239. UNHCR also welcomed this approach: UNHCR, Submission No 20 to Senate Committee, above n 10, 7 [31].

¹³ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) 1. The Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2009 (Cth) 1 stated that it would 'introduce greater fairness, integrity and efficiency'.

¹⁴ The Senate Committee noted that many submitters shared this view with the present author: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Migration Amendment (Complementary Protection) Bill 2009 (2009) [3.7]. To present a unified position on the key amendments needed, a group of refugee law scholars, lawyers and academics subsequently submitted a joint Briefing Note to Parliamentarians to the Minister for Immigration in November 2010, and a revised Briefing Note to a wider group of MPs following the introduction of the 2011 Bill into Parliament (copies on file with author).

¹⁵ See eg, the creation of a Common European Asylum System; Hélène Lambert, 'Transnational Judicial Dialogue, Harmonization, and the Common European Asylum System' (2009) 58 *International and Comparative Law Quarterly* 519; Anthony M North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial

invites decision-makers to ‘reinvent the wheel’, rather than encouraging them to draw on the wealth of jurisprudence that has been developed around these human rights principles internationally. Since the purpose of the amending legislation is to implement Australia’s international human rights obligations based on the expanded principle of *non-refoulement*, it seems only sensible that Australian law reflect the language and interpretation of these obligations as closely as possible. This would also enhance the international value of Australian complementary protection jurisprudence. If such amendments are not made, however, then it will fall to decision-makers to interpret them in a manner that is harmonised with international ‘best practice’.

This article evaluates four fundamental elements of the complementary protection legislation: the complementary protection grounds; the exceptions to complementary protection; the standard of proof (or ‘threshold’ requirements for triggering complementary protection); and exclusion from complementary protection. It begins with a brief overview of the background to the amending legislation and its components.

II Legislative Background

In September 2009, the Migration Amendment (Complementary Protection) Bill 2009 (Cth) was introduced into Parliament. It followed and reflected a series of recommendations in Australian parliamentary and international reports,¹⁶ as well as Conclusions of the Executive Committee of the United Nations High Commissioner for Refugees (‘UNHCR’),¹⁷ that Australia should adopt a system of complementary protection.

Though it had taken many years of lobbying for the Bill to emerge, once it was before Parliament, progress was initially very rapid. Within the space of five weeks, it had been evaluated by the Senate Legal and Constitutional Affairs Legislation Committee and reported on.¹⁸ Indeed, the swift timetable for its enactment was used by the Senate to justify its inability to investigate certain concerns about the Bill.¹⁹ However, following the Committee’s report in mid-October 2009, progress stalled. Presumably, this was because of the political fallout from the Oceanic Viking incident (which occurred in mid-October), and the subsequent increase in the number of boat arrivals in

Commission for Refugees’ in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, 2008) 225.

¹⁶ See references, above n 9 and n 10.

¹⁷ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2009 (Cth) 2. See UNHCR Executive Committee Conclusions (1999) 87(f) and (2000) 89 recitals; Executive Committee Conclusion No 103, above n 10.

¹⁸ Senate Committee Report, above n 14.

¹⁹ *Ibid* 19 [3.36].

Australia, which did not provide a particularly receptive climate for reintroduction of the Bill into Parliament. The Bill lapsed at the prorogation of the Parliament in July 2010. However, in September 2010, the new Immigration Minister, Senator Chris Bowen, stated that the Government would proceed with the Bill: ‘I see it as an important measure. Out of the immigration legislation that is outstanding, I see that as the most important.’²⁰

On 24 February 2011, a revised Bill — the Migration Amendment (Complementary Protection) Bill 2011 (Cth) — was introduced into Parliament. Though it reflects some of the changes that were recommended by the Senate Committee, submissions to that inquiry and in subsequent submissions to the Minister for Immigration,²¹ it still contains a number of provisions that risk creating an Australian system of complementary protection that is out of step with international law and comparable systems in the EU, New Zealand, the US and Canada.

Parliamentary debates about the Bill²² revealed the entrenched polarised politicisation of the refugee issue,²³ particularly around border security, and misunderstandings by the Opposition as to the Bill’s nature and purpose. As the Government Whip observed, such commentary is about ‘play[ing] party politics, particularly when it comes to the issues of refugees, because that is where we think we score political points.’²⁴

The substance of the Opposition’s criticism was that the ministerial intervention process adequately implements Australia’s

²⁰ Yuko Narushima, ‘ALP Push to Widen Asylum’, *The Age* (Melbourne), 22 September 2010, <<http://www.theage.com.au/national/alp-push-to-widen-asylum-20100921-151f4.html>>.

²¹ 2010 Briefing Note, above n 14.

²² See Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1356–9; 11 May 2011, 3649–59; 12 May 2011, 3819–45, 3901–3; Senate, 14 June 2011, 2586–9; 19 September 2011, 6333–43.

²³ See eg, claims that the complementary protection regime ‘will put another product on the people smugglers’ shelf’: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2011, 3651 (Scott Morrison); arguments that the Government has ‘completely, utterly, totally failed to protect our borders’: (Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2011, 3820 (Stuart Robert); see also 3833 (Don Randall); 3827 (Alex Hawke).

²⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2011, 3823 (Chris Hayes). The tenor of the debate was perhaps best encapsulated by Government MP, Laura Smyth, who stated: ‘In any other circumstance it really has to be said that a discussion in this place about improving the consistency and the efficiency of the administration of justice and our system of law would be met rationally—in any other circumstance. But, when it comes to this particular issue and the particular people who are being made the subject of this issue, this is simply another opportunity for the opposition to chant, “Stop the boats”’ (Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2011, 3829 (Laura Smyth)).

non-refoulement obligations.²⁵ However, since such powers are non-compellable, non-reviewable, and are only enlivened at the end of a lengthy asylum process, it cannot be guaranteed that all people with a complementary protection need will necessarily have such protection claims considered (especially since some may never reach the end of that process). As members of the Government explained, the present process is a ‘ludicrous charade’²⁶ because it is ‘inefficient and time-consuming’, ‘adds stress to the applicants’, and ‘causes excessive uncertainty and delays’.²⁷ Despite these objections, the Bill was passed by the Senate on 19 September 2011. It received royal assent on 14 October 2011 and will take effect within six months from that date.

III Legislative Overview

The *Migration Amendment (Complementary Protection) Act 2011* (Cth) amends the *Migration Act* by creating a new group of people to whom a protection visa may be granted. Section 36(2) provides that a protection visa is to be granted not only to non-citizens to whom Australia has protection obligations under the Refugee Convention, but also to non-citizens with respect to whom:

the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.²⁸

‘Significant harm’²⁹ — in other words, the complementary protection grounds — includes arbitrary deprivation of life; the death penalty; torture; cruel or inhuman treatment or punishment; and

²⁵ The Shadow Immigration Minister, Scott Morrison, described this obligation as arising not only under the *Refugee Convention* and other human rights treaties, but also as ‘an established principle of international law more broadly, and that is a good thing’: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2011, 3650 (Scott Morrison).

²⁶ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 12 May 2011, 3836 (Andrea Mitchell).

²⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2011, 3657 (Andrew Leigh); Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1357 (Chris Bowen).

²⁸ Section 36(2)(aa). As for refugees, protection is also extended to members of the same family unit: s 36(2)(c). The 2009 Bill had referred to ‘irreparable harm’ instead of ‘significant harm’. For a useful overview of the new law, see Elibritt Karlsen, ‘Bills Digest No 79 2010–11, Migration Amendment (Complementary Protection) Bill 2011’ (11 March 2011).

²⁹ Section 5(1).

degrading treatment or punishment.³⁰ The newly introduced s 36(2B) provides that there is no ‘real risk’ of significant harm if there is an internal flight alternative available; an authority within the country can provide protection; or the risk is faced by the population generally and not by the non-citizen personally. The newly-introduced s 36(2C) sets out exclusion clauses.

Complementary protection does not supplant or compete with the Refugee Convention. By its very nature, it is *complementary* to refugee status determination done in accordance with the Refugee Convention. This means that Australian decision-makers will continue to assess protection claims in the same way that they have always done, constantly mindful of the evolving scope of the notion of ‘persecution’ and cognisant of the way in which developments in human rights law inform and expand its meaning. The complementary protection grounds are only considered following a comprehensive evaluation of the applicant’s claim against the Refugee Convention definition, and a finding that the applicant is not a refugee. In addition, purely humanitarian or compassionate cases can still be referred to the Minister under s 417 of the *Migration Act*.

IV The Complementary Protection Grounds: s 36(2A)

The amending legislation provides for five grounds of complementary protection: (a) arbitrary deprivation of life; (b) death penalty; (c) torture; (d) cruel or inhuman treatment or punishment; and (e) degrading treatment or punishment. At first glance, this seems more extensive than complementary protection regimes in other jurisdictions, but this is not the case. The Australian legislation expands a number of grounds that are bundled together in the international human rights instrument on which they are based (the ICCPR), as well as in comparable legislation in the EU, Canada and New Zealand.

As a general observation, the simplest means of incorporating Australia’s treaty obligations into domestic law would be to do so directly, as New Zealand has done.³¹ Instead, the amending legislation narrows the scope of the obligations that Australia has assumed under the CAT and the ICCPR, which is not only ‘disingenuous’ but could ‘lead to considerable difficulties in interpretation’.³²

³⁰ Section 36(2A). The terms are defined in s 5. The 2009 Bill had included a ground (b) that ‘the non-citizen will have the death penalty imposed on him or her and it will be carried out’. See discussion in Section IV.B.

³¹ Foster and Pobjoy, above n 10, 13 also endorse this approach. See *Immigration Act 2009* (NZ) ss 130, 131.

³² Foster and Pobjoy, above n 10, 14.

A *Arbitrary Deprivation of Life: s 36(2A)(a)*

This section is based on Australia's obligations in art 6 ICCPR not to expose anyone to arbitrary deprivation of life. It accords with comparable provisions in art 2 ECHR,³³ s 97(1)(b) of the Canadian *Immigration and Refugee Protection Act*, and s 131 of the New Zealand *Immigration Act 2009*.

The right not to be arbitrarily deprived of life is also contained in s 9 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). While it remains to be judicially considered, the Victorian Department of Justice has provided extensive guidance on its meaning. It defines 'arbitrary' as being 'based on a decision unrelated to any test laid down by law or recognised at law.'³⁴

International bodies have made numerous statements as to what constitutes 'arbitrary' conduct. In *C v Australia*, the UN Human Rights Committee held that mandatory detention of asylum seekers in Australia constituted 'arbitrary' treatment, since its duration 'continued beyond the period for which the State party can provide appropriate justification'.³⁵ The Committee also found that the lack of a chance of substantive judicial review of such detention amounted to arbitrary conduct.

In Europe, case law on 'arbitrary deprivation of life' has focused on issues relating to medical treatment, law enforcement and actions by police in the domestic context. It has not been relied upon in non-removal cases, predominantly because the analysis tends to get subsumed in art 3 ECHR questions (inhuman or degrading treatment). With regard to medical treatment, the European Court of Human Rights has recognised that a state may breach the right to life if it denies an individual health care which it has undertaken to provide to the population generally.³⁶ It has also held that the prohibition on arbitrary deprivation of life may be breached by the authorities taking inadequate precautions against suicide in detention.³⁷

³³ For discussion of the application of art 2 ECHR in non-removal cases, see McAdam, above n 9, 147–9.

³⁴ Government of Victoria, Department of Justice, Human Rights Unit, *Charter of Human Rights and Responsibilities; Guidelines for Legislation and Policy Officers in Victoria* (July 2008) 60.

³⁵ Human Rights Committee, *C v Australia*, Comm No 900/1999, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) [8.2] ('*C v Australia*').

³⁶ *Cyprus v Turkey* (European Court of Human Rights, Grand Chamber, Application No 25781/94, 10 May 2001) [219].

³⁷ *Keenan v United Kingdom* (2001) 33 EHRR 38.

B *Death Penalty: s 36(2A)(b)*

This section is based on Australia's obligations under the Second Optional Protocol to the ICCPR, as well as the approach of the UN Human Rights Committee.³⁸ There are comparable provisions in EU and Canadian law.³⁹ However, it imposes a higher evidentiary burden by requiring not only that a person face a real risk of being subjected to the death penalty, but a real risk that the death penalty 'will be carried out'.

Recommendation 3 of the Senate Committee's report stated that the provision should be 'amended to substitute "and it will be carried out" with "and it is likely to be carried out"', since the provision is at odds with the general prohibition on return to the death penalty that has been developed in international and comparative law.⁴⁰

Presumably, its purpose is to permit return to states that may impose but never carry out the death penalty.⁴¹ For example, some states have a long-standing moratorium on the death penalty,⁴² some leave open the possibility of late pardons while others permit the payment of 'blood money' to have a death sentence commuted.⁴³ Rather than including this within the legislation, however, it would be better addressed by seeking reliable diplomatic assurances in such cases that a person will not be subjected to the death penalty if removed, which is generally accepted state practice.⁴⁴ Indeed, this already seems to be envisaged by s 36(2B)(b), which provides that complementary protection will not be granted where 'the non-citizen could obtain, from

³⁸ Human Rights Committee, *Judge v Canada*, Comm No 829/1998, UN Doc CCPR/C/78/D/829/1998 (13 August 2003) [10.4] ('*Judge v Canada*'): A State that has abolished the death penalty 'may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out'.

³⁹ *Qualification Directive* [2004] OJ L304/12, art 15(a); *Immigration and Refugee Protection Act*, SC 2001, c 27, s 97(1)(b).

⁴⁰ See eg, *Soering v United Kingdom* (1989) 11 EHRR 439; *Judge v Canada*, UN Doc CCPR/C/78/D/829/1998; *Qualification Directive* [2004] OJ L304/12, art 15(a); *Immigration and Refugee Protection Act*, SC 2001, c 27, s 97(1)(b). For discussion of the European context, see McAdam, above n 9, 66–8.

⁴¹ This may explain the deletion of the wording in the 2009 Bill that 'the non-citizen will have the death penalty imposed on him or her and it will be carried out'.

⁴² See eg, *Human Rights Committee Reports on Togo*, ICCPR, UN Doc A/58/40 vol I (2002) 36, [78(10)] or Mali, ICCPR, UN Doc A/58/40 vol I (2003) 47, [81(5)].

⁴³ See eg, *Human Rights Committee Report on Yemen*, ICCPR, A/57/40 vol I (2002) 73, [83(15)].

⁴⁴ However, diplomatic assurances are *never* appropriate in cases relating to torture or cruel, inhuman or degrading treatment since this violates the absolute nature of States' *non-refoulement* obligations in such circumstances. This is discussed further in Section IV.J.(a) below.

an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm’.

C *Torture: s 36(2A)(c)*

The definition of ‘torture’ is based on art 1 CAT, but in line with the broader international human rights jurisprudence, it does not limit acts of torture to those committed in an official capacity. This is recognised in the Explanatory Memorandum.⁴⁵ As the UN Human Rights Committee has stated, the aim of art 7 ICCPR is ‘to protect both the dignity and the physical and mental integrity of the individual’ from acts prohibited by that provision, ‘whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.’⁴⁶ Australian decision-makers will need to be alert to this difference when considering decisions of the Committee against Torture. Similarly, Australian court decisions in the extradition context are not directly relevant to complementary protection since they rely on a definition of torture that has an ‘official capacity’ requirement.⁴⁷

There are some other small, but potentially significant, differences between the definition of ‘torture’ in article 1 CAT and in s 5(1) of the Act. In art 1 CAT, the words ‘for such purposes as’ suggest that the matters that follow (reflected in paragraphs (a)–(c) and (e) of the legislation) are an illustrative rather than exhaustive list of reasons for torture.⁴⁸ By contrast, the legislation provides an exhaustive

⁴⁵ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) [52].

⁴⁶ UN Human Rights Committee, ‘General Comment No 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)’ (10 March 1992) [2] (*UN Human Rights Committee General Comment No 20*).

⁴⁷ In *De Bruyn v Minister for Justice and Customs* (2004) 143 FCR 162, 174, [55] the Federal Court held that: ‘the reference to torture in the Act is directed to institutionalised conduct by government authorities for the purpose of punishment, intimidation or coercion’. Spender J stated that conduct between inmates in a gaol did not fall within this definition even if ‘corrupt wardens ignore or even encourage it’. This was relied upon by the Commonwealth Minister in *Rivera v Minister for Justice and Customs* [2006] FCA 1784, where Moore J found that there was no substance to the applicant’s claims ‘that even though abuse by one prisoner of another may not constitute torture, if government authorities had engaged in threats and acts which caused that abuse, then that conduct can amount to institutionalised torture’: [61]. There are also references to ‘torture’ in the *Crimes Act 1914* (Cth) (introduced by the *Crimes (Torture) Act 1988* (Cth)) and the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2010 (Cth).

⁴⁸ Although the principle of legality requires the matters in art 1 CAT to be understood as being exhaustive for the purposes of international criminal law, it is appropriate that they be viewed as merely illustrative for the purposes of international protection, given its humanitarian function. Just as the international crime of ‘persecution’ in the *Rome Statute* embodies a more exacting test than ‘persecution’ in international

definition.⁴⁹ Even though paragraph (d) of the legislation is presumably intended to open up the way for other acts to constitute torture, by including acts ‘for a purpose related to a purpose mentioned in paragraph (a), (b) or (c)’, this is in fact more limited than art 1 CAT. This is because paragraph (d) expressly restricts other acts of torture to those with a purpose *related to* one of the enumerated acts, whereas the formulation in art 1 CAT leaves open the potential scope for development.

Ideally, the reference to ‘discrimination’ would also replicate the language of art 1 CAT (both here and in the legislation’s definition of ‘cruel or inhuman degrading treatment or punishment’) by including the words ‘of any kind’. It is important to recall that art 2 ICCPR prohibits discrimination on the basis of *any* status, not just those expressly enumerated in that provision. It would have been preferable for the legislation to refer to ‘Australia’s international human rights obligations’ generally, in order to clarify that the provision encompasses discrimination under other human rights treaties as well.

There is considerable jurisprudence on the meaning of ‘torture’ which goes beyond the scope of this article. However, there are two aspects of the torture definition incorporated in the definitions of ‘cruel or inhuman treatment or punishment’ (s 36(2A)(d)) and ‘degrading treatment or punishment’ (s 36(2A)(e)) that require examination. These are dealt with separately below: the ‘intentionally inflicted’/‘intended to cause’ requirement, and the ‘lawful sanctions’ exception.

D Intent Requirement: ss 36(2A)(c), (d), (e)

Whereas the definition of ‘torture’ in art 1 CAT requires evidence of intent,⁵⁰ this is not a requirement of the other ill-treatment grounds. Requiring applicants to demonstrate ‘intent’ in complementary protection cases is therefore inconsistent with Australia’s human rights obligations under international law.⁵¹ It is also not part of

refugee law, there is scope for different meanings in different international law contexts: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (*‘Rome Statute’*) art 7(2)(g).

⁴⁹ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), [48].

⁵⁰ However, Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000), with respect to the parallel provision in the ECHR argue that: ‘In view of the absolute nature of Article 3 [of the ECHR], it seems unlikely that this makes any difference in practice; if treatment amounts to very serious and cruel suffering it will be found to be torture, whether or not there is “intent”’: [8.22].

⁵¹ This argument is also made strongly by Foster and Pobjoy, above n 10, 20.

demonstrating a well-founded fear of persecution in refugee law,⁵² and there is a risk that its inclusion here could complicate the assessment of claims in single determination procedure.

Indeed, the intent requirement for ‘torture’ has been relied on by the UN General Assembly and, in turn, the European Court of Human Rights to *distinguish* ‘torture’ from other forms of inhuman treatment: it is ‘an aggravated *and deliberate* form of cruel, inhuman or degrading treatment or punishment’.⁵³ Similarly, in *Ireland v United Kingdom*, the court stated that the distinction between ‘torture’ and ‘inhuman treatment’ was that to torture attaches ‘a special stigma to *deliberate* inhuman treatment causing very serious and cruel suffering’.⁵⁴ The New Zealand Supreme Court has affirmed that there is no intent requirement for cruel, inhuman or degrading treatment or punishment. It requires an objective assessment.⁵⁵

While intention may be relevant in some cases to bolstering a claim based on cruel, inhuman or degrading treatment or punishment, it is not a formal component of establishing that ill-treatment.⁵⁶ Thus, international and comparative jurisprudence consistently focuses on the nature of the alleged violation on the individual concerned, rather than the intention of the perpetrator. As the European Court of Human Rights observed in *Labita v Italy*, ‘[t]he question whether the purpose

⁵² Although the *Rome Statute*, art 7(2)(g) defines ‘persecution’ as requiring the ‘intentional and severe deprivation of fundamental rights’, this definition operates exclusively in an international criminal law context where it is necessary to establish *mens rea*. In the different context of protection, ‘[n]o asylum seeker is required to show that the crime of persecution has been or is likely to be committed, and certain of the elements of the crime, for example, in relation to “intent”, engage evidential issues far beyond the requirements of the well-founded fear test’: Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 96. Indeed, ‘conscious, individualized direction ... is often conspicuously absent in the practices of mass persecution’: 102. See generally 100–2.

⁵³ *Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 3452 (XXX), UN GAOR, 30th sess, UN Doc A/Res/3452 (9 December 1975) cited also in *Ireland v United Kingdom* (1979–80) 2 EHRR 25, [167]. The UN Special Rapporteur on Torture, Manfred Nowak, has stated that ‘the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted’, is a decisive criteria for distinguishing what amounts to torture: Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc E/CN.4/2006/6 (23 December 2005) [39].

⁵⁴ *Ireland v United Kingdom*, (1979–80) 2 EHRR 25, [167] (emphasis added).

⁵⁵ *Taunoa v Attorney-General* [2008] 1 NZLR 429, [64], [69] (Elias CJ); [171] (Blanchard J) (‘*Taunoa*’).

⁵⁶ *D v United Kingdom* (1997) 24 EHRR 423 was the first case where the European Court of Human Rights found a violation of art 3 in the absence of intentionally inflicted harm. In *Peers v Greece* (2001) 33 EHRR 1192, [74], the court said there does not need to be any intention to humiliate (relying also on *V v United Kingdom*, (European Court of Human Rights, Application No 24888/94 16 December 1999) [71].

of the treatment was to humiliate or debase the victim is a further factor to be taken into account ... *but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3*'.⁵⁷

Indeed, as has been noted (and is generally accepted) in the refugee context,

[p]roof of legislative or organizational intent is notoriously hard to establish and while evidence of such motivation may be sufficient to establish a claim to refugee status, it cannot be considered a *necessary* condition. Nowhere in the drafting history of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status. ... Of course, intent is relevant; indeed, evidence of persecutory intent may be conclusive as to the existence of well-founded fear, but its absence is not necessarily conclusive the other way. ... The *travaux préparatoires* suggest that the only relevant intent or motive would be that, not of the persecutor, but of the refugee or refugee claimant: one motivated by personal convenience, rather than fear, might be denied protection ... Otherwise, the governing criterion remains that of a serious possibility of persecution, not proof of intent to harm on the part of the persecutor.⁵⁸

The 'intent' requirement in the definition of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' contained in ss 36(2A)(d) and (e) therefore imposes a higher test than international law and comparative jurisprudence in the European Court of Human Rights, EU Member States and Canada.⁵⁹ Constraining the meaning of these forms of serious harm means that Australia cannot be said to be in full compliance with its obligation under art 7 ICCPR not to expose people to such treatment.

In terms of the intent requirement in art 1 CAT, though, does it relate to the intention to commit an act or omit to do something, or intent to cause pain and suffering (which is arguably a more demanding test)? Commentators suggest that because the definition of torture in art 1 CAT refers several times to 'pain and suffering', 'it seems that the relevant intention is to cause, or at least be recklessly indifferent to the possibility of causing, that pain and suffering. Thus, "negligent" infliction of pain and suffering, which is not as morally culpable as

⁵⁷ *Labita v Italy* (European Court of Human Rights, Application No 26772/95 6 April 2000), [120] (emphasis added).

⁵⁸ Goodwin-Gill and McAdam, above n 52, 100–2 (fn omitted).

⁵⁹ US law does not contain a comparable provision.

intentional infliction, does not constitute “torture”.⁶⁰ It would make little sense if omissions were not also encompassed in the notion of torture, since withholding certain resources, such as food, from a person, may amount to an extreme form of ill-treatment and would be contrary to the CAT’s object and purpose.⁶¹

E *Lawful Sanctions: ss 36(2A)(c), (d), (e)*

A second element of the definition of ‘torture’ in article 1 CAT that has been transposed through s 5(1) to ‘cruel, inhuman or degrading treatment or punishment’ is the exclusion of harm arising from lawful sanctions. The CAT neither defines ‘lawful sanctions’ nor indicates whether the term refers to an international standard or the domestic laws of each state party. However, the legislation’s reference to ‘lawful sanctions that are not inconsistent with the Articles of the Covenant’ suggests that they are to be assessed against international human rights law standards.⁶² This is in line with case law from the European Court of Human Rights, which has held, for example, that stoning is not considered a lawful sanction in Europe, and thus return to it would amount to a breach of the prohibition on torture.⁶³ Similarly, the Committee against Torture has held that death by stoning is contrary to CAT, even if it is sanctioned by law in a particular country.⁶⁴ The Human Rights Committee has found that ‘execution by [cyanide] gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of article 7 of the Covenant’, even though it was also a lawful sanction in the country concerned.⁶⁵ Although death by lethal injection was found not to be a breach of the ICCPR in the 1993 decision of *Kindler v Canada* (among others),⁶⁶ the Committee against Torture has more recently stated that, in light of recent

⁶⁰ Sarah Joseph, Jenny Schulz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2nd ed, 2004) 197, referring also to J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 118.

⁶¹ On this point, see Joseph, Schulz and Castan, above n 60, 197; Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Kluwer Academic, 1999) 15.

⁶² In NZ law, this is made clear in relation to cruel, inhuman or degrading treatment or punishment claims: *Immigration Act 2009* (NZ) s 131.

⁶³ *Jabari v Turkey* (European Court of Human Rights, Application No 40035/98, 11 July 2000).

⁶⁴ Committee against Torture, *AS v Sweden*, Comm No 149/1999, UN Doc CAT/C/25/D/149/1999 (, 24 November 2000).

⁶⁵ Human Rights Committee, *Ng v Canada*, Comm No 469/1991, UN Doc CCPR/C/49/D/469/1991(5 November 1993) [16.1].

⁶⁶ Human Rights Committee, *Kindler v Canada*, Comm No 470/1991, UN Doc CCPR/C/48/D/470/1991 (30 July 1993) (*‘Kindler v Canada’*).

evidence, it may now be contrary to the prohibition on torture in CAT.⁶⁷

This also underscores the importance of looking to contemporary jurisprudence in any complementary protection claims — since human rights treaties are ‘living instruments’,⁶⁸ forms of harm that were once considered not to constitute prohibited ill-treatment may subsequently be found to do so.

F ‘Cruel or Inhuman Treatment or Punishment’:

s 36(2A)(d)⁶⁹

It is unclear why the amending legislation separates out ‘cruel or inhuman treatment or punishment’ from ‘degrading treatment or punishment’. The standard approach internationally is to regard these forms of harm as part of a sliding scale, or hierarchy, of ill-treatment, with torture the most severe manifestation.⁷⁰ The distinction between torture and inhuman treatment is often one of degree. Courts and tribunals are therefore generally content to find that a violation falls somewhere within the range of proscribed harms, without needing to determine precisely which it is. Indeed, the UN Human Rights Committee considers it undesirable ‘to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied’.⁷¹ For that reason, the Human Rights Committee commonly fails to determine precisely which aspect of art 7 ICCPR has been violated, and there is accordingly very little jurisprudence from that body about the nature of each type of harm. For that reason, decisions of the European Court of Human Rights on the parallel regional provision, art 3 ECHR, provide a useful resource.⁷²

Although the European Court of Human Rights tends to examine the distinctions more carefully, it mainly does so in order to

⁶⁷ *Report of the Committee Against Torture*, UN GAOR, 61st sess, UN Doc A/61/44 (2006) [37(31)] (Concluding Observations of the US).

⁶⁸ *Tyrer v United Kingdom* (1979–80) 2 EHRR 1 (*‘Tyrer’*), [31]; see also *Soering v United Kingdom* (1989) 11 EHRR 439, [102].

⁶⁹ See also Section IV.D on ‘intent’.

⁷⁰ *Ireland v United Kingdom* (1979–80) 2 EHRR 25, [167]; Deborah E Anker, *Law of Asylum in the United States* (Refugee Law Center, 3rd ed, 1999) 465, 482, 485; Walter Suntinger, ‘The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?’ (1995) 49 *Austrian Journal of Public International Law* 203, 212.

⁷¹ *UN Human Rights Committee General Comment No 20* (10 March 1992), [4].

⁷² That provision does not include a reference to ‘cruel’ treatment or punishment, so the discussion is about the meaning of ‘inhuman’. For a detailed discussion of all terms, see McAdam, Submission No 21 to Senate Committee, above n 10.

distinguish ‘torture’ from the other types of ill-treatment, rather than to distinguish ‘inhuman’ and ‘degrading’ from each other.⁷³ The considerable jurisprudence on the meaning of ‘torture’, and the fact that it is defined in art 1 CAT may explain why it is dealt with separately in the legislation (despite the legislation’s acknowledgement of its broader meaning under general international human rights law, which does not require the involvement of a public official). However, there is no clear rationale for distinguishing between the other forms of serious harm. Furthermore, the Human Rights Committee and the European Court of Human Rights have both explained that these terms cannot be defined, especially since their meaning will evolve over time.⁷⁴

However, the Explanatory Memorandum for the Bill makes clear that the terms are ‘exhaustively defined’ in the legislation.⁷⁵ Indeed, the separate provisions in the legislation — ss 36(2A)(c), (d) and (e) — mean that Australian decision-makers will need to determine precisely what kind of ill-treatment has been suffered and why. This imposes a higher level of scrutiny than is required under international human rights law and in comparative complementary protection schemes, and risks shifting the focus of the inquiry away from recognition that the treatment is inhuman *or* degrading, and thus gives rise to a protection obligation, to a technical justification of which form it is, arguably increasing the level of complexity in decision-making and reducing efficiency. It is a procedure that focuses on technicalities, rather than the human rights protection intended to be accorded.

Indeed, Elias CJ in the New Zealand Supreme Court expressed ‘distinct reservations’ about such an approach: ‘It seems to me unduly refined to conduct three distinct inquiries in applying the phrase’,⁷⁶ or to spend time ‘dwelling on precise classification of treatment as cruel or degrading’.⁷⁷ She instead preferred to regard the concept of ‘cruel, inhuman or degrading treatment or punishment’ as the ‘compendious expression of a norm’,⁷⁸ ‘proscribing any treatment that is incompatible with humanity’.⁷⁹ She concluded: ‘In most cases treatment which is incompatible with the dignity and worth of the human person will be all

⁷³ For example, in *Selmouni v France* (1999) 29 EHRR 403, [99] (refs omitted), the court stated: ‘The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading’. ‘Cruel’ treatment or punishment is not an element of art 3 ECHR.

⁷⁴ *Selmouni v France*, *ibid* [101]; *UN Human Rights Committee General Comment No 20* (10 March 1992), [4]. See also *Taunoa* [2008] 1 NZLR 429, [81], [93] (Elias CJ).

⁷⁵ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), [15], [21].

⁷⁶ *Taunoa* [2008] 1 NZLR 429, [82], [82] (Elias CJ).

⁷⁷ *Ibid* [83].

⁷⁸ *Ibid* [82], referring to *Miller v R* [1977] 2 SCR 680, 690 (Laskin CJ).

⁷⁹ *Ibid*.

three. And, even if separately classified, I think they are properly regarded as equally serious.’⁸⁰

The 2009 Bill mirrored the ‘torture’ definition in its provisions on ‘cruel or inhuman treatment or punishment’. The stated rationale was to ensure that the provision encompassed ‘an act or omission that would normally constitute an act of torture but which is not inflicted for one of the purposes or reasons stipulated under the definition of torture’,⁸¹ or because it ‘inflict[ed] pain or suffering but not at the level of severity required to be met under the definition of torture’.⁸² The rationale for paragraphs (b)(iv) and (c) was to cover ‘any other acts or omissions that violate Article 7 of the Covenant and have not been explicitly outlined in this definition.’⁸³ Although the purpose was to help clarify the meaning of those terms, rather than to restrict them,⁸⁴ this aim was not fulfilled. In the absence of legislative guidance that the definition was intended to be illustrative only, there was a significant chance that (in accordance with principles of statutory interpretation) decision-makers would seek to interpret the words in their context and draw inferences from what is included as well as excluded from the definition.

The revised 2011 Bill simplified the definition by removing references to the ‘purposes’ for which cruel or inhuman treatment might be inflicted. While this is a positive development, it does not address the broader critique — that the terms are defined at all.

Paragraph (c) is also superfluous. It states that ‘cruel or inhuman treatment or punishment’ does not include an act or omission ‘that is not inconsistent with Article 7 of the Covenant’.⁸⁵ Similarly, the line in paragraph (b) that ‘the act or omission could reasonably be regarded as cruel or inhuman in nature’ is also unnecessary. This is because whether or not treatment is covered by art 7 is part of the decision-maker’s initial assessment: it is a threshold question of classification. In other words,

treatment which may be perfectly justifiable in some circumstances may, in different circumstances, be unlawful. The clearest case is of criminal punishment. A

⁸⁰ Ibid [83].

⁸¹ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2009 (Cth), [16]. This is similar to having a provision that provides for protection on account of ‘persecution’ without a need to link it to one of the five *Refugee Convention* grounds.

⁸² Ibid [17].

⁸³ Ibid [18].

⁸⁴ See also *ibid* [19]: This is also suggested by the following explanation: ‘The purpose of expressly stating what “cruel or inhuman treatment or punishment” does not include is to confine the meaning of “cruel or inhuman treatment or punishment” to circumstances that engage a *non-refoulement* obligation.’

⁸⁵ In terms of drafting, the multiple negatives make this provision confusing to read.

penalty which might be justified for a serious crime could constitute inhuman treatment or punishment if imposed for a petty offence.⁸⁶

For example, the European Court of Human Rights has held that forced feeding and forcible medical treatment is not inhuman or degrading treatment where it is therapeutically necessary,⁸⁷ the crucial factor being whether ‘a medical necessity has been convincingly shown to exist’.⁸⁸ Thus, prison conditions that might otherwise be regarded as ‘degrading’ may not reach that threshold if necessary to prevent suicide or escape (again, provided the necessity test can be made out).⁸⁹ There is, accordingly, an inherent limiting mechanism in determining what constitutes cruel or inhuman treatment in a particular case. As in refugee determinations, what is central to the decision-maker’s reasoning is the particular circumstances of the individual in question, and the particular treatment that he or she is likely to face if removed.

G ‘Degrading Treatment or Punishment’: s 36(2A)(e)

Degrading treatment is that which is humiliating or debasing—an affront to human dignity. Whereas the distinction between torture and inhuman treatment is often one of degree, ‘degrading’ treatment generally requires gross humiliation before others or being driven to act against one’s will or conscience.⁹⁰ It needs to be severe, but there does not need to be any *intention* to humiliate.⁹¹ Nevertheless, the European Court of Human Rights has held that humiliation, rather than actual pain or suffering, is key.⁹² In *Pretty v United Kingdom*, the court stated that ‘degrading treatment’ occurs

⁸⁶ Clare Ovey and Robin C A White, *Jacobs and White: The European Convention on Human Rights* (Oxford University Press, 5th ed, 2006) 173; see also *Kröcher and Möller v Switzerland* (1982) 26 Eur Comm HR 24 (‘Kröcher’), where the Commission stated that conditions of detention that might otherwise be considered inhuman were justified where the prisoner posed a particularly high risk.

⁸⁷ See *Herczegfalvy v Austria* (1992) 15 EHRR 437, [82]; *Nevmerzhitskiy v Ukraine* (2006) 43 EHRR 645, [96]–[106], cited in Javan Herberg and David Pievsky, ‘Article 3: Prohibition of Torture and of Inhuman or Degrading Treatment or Punishment’ in Anthony Lester, David Pannick and Javan Herberg (eds), *Human Rights Law and Practice* (Lexis Nexis, 3rd ed, 2009) [4.3.3].

⁸⁸ *R (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545, [30] (Simon Brown LJ).

⁸⁹ *Kröcher v Switzerland* (1982) 26 Eur Comm HR 24.

⁹⁰ *Ovey and White*, above n 86, 173.

⁹¹ *Peers v Greece* (2001) 33 EHRR 1192; *Poltoratskiy v Ukraine* (European Court of Human Rights, Application No 33812/97, 29 April 2005) [131]; cf *Migration (Complementary Protection Act 2011)* (Cth), s 5(1).

⁹² See *Tyrer* (1979–80) 2 EHRR 1, [32]. A lack of intent to humiliate will not conclusively rule out a violation of art 3: *Peers v Greece* (2001) 33 EHRR 1192, [74].

[w]here treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.⁹³

Degrading treatment can also encompass racial discrimination,⁹⁴ which, in the context of complementary protection, would mean treatment less severe than persecution for reasons of race. The denial of basic services necessary for a dignified existence might also amount to degrading treatment (or, in certain cases, to arbitrary deprivation of life or inhuman treatment). This could include an inability to access healthcare, shelter, social security or protection, provided that a minimum level of severity is met.⁹⁵

H *Exceptions to Complementary*

Protection: s 36(2B)

Section 36(2B) sets out three exceptions to complementary protection: where the applicant may relocate within the country of origin to avoid the risk of harm; where an authority can guarantee the applicant's safety; or where the applicant faces a general risk. Lawful sanctions have already been discussed above, since they are not exceptions to a grant of complementary protection, but rather alter the character of treatment such that it is not considered to be torture or cruel, inhuman or degrading treatment or punishment in the circumstances.

In their submission to the Senate Committee, Dr Michelle Foster and Jason Pobjoy argued strongly for the deletion of these exceptions. Since the exceptions are only relevant once a decision-maker has already determined that the applicant meets one (or more) of the five complementary protection grounds,

it is unprincipled to exclude categories of persons who may be owed international protection obligations from the ambit of legislative criteria seeking to incorporate those very same obligations. Just as limiting the incorporation of international protection obligations by legislative drafting

⁹³ *Pretty v United Kingdom* (2002) 35 EHRR 1, [52]; see also *Ireland v United Kingdom* (1979-80) 2 EHRR 25, [167].

⁹⁴ *East African Asians v United Kingdom* (1973) 3 EHRR 76.

⁹⁵ Nicholas Blake and Raza Husain, *Immigration, Asylum and Human Rights* (Oxford University Press, 2003), [2.97]; Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 *American Journal of International Law* 848, 851. See also *Sufi v United Kingdom* (European Court of Human Rights, Application Nos 8319/07 and 11449/07, 28 June 2011); *MSS v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

does not in any way limit the obligations under international law, the express exclusion of a particular category of person does not obviate Australia's international protection obligations to the individuals falling within the category.⁹⁶

It is true that some other jurisdictions carve out similar exceptions,⁹⁷ but as Foster and Pobjoy note, international law itself does not. Indeed, they correctly argue that the proper place for assessment of risk of harm is in the standard of proof — whether the applicant faces a ‘real risk’ of significant harm.⁹⁸

In order to avoid interpretations of the exceptions that would clearly infringe Australia's international law obligations, the following sections set out a number of important considerations decision-makers will need to take into account.

I *Internal Flight Alternative: s 36(2B)(a)*

In refugee law, the High Court of Australia has accepted the general proposition that it may sometimes be reasonable for an applicant to relocate elsewhere in his or her country of origin where there is no appreciable risk of the feared persecution manifesting there (because it is localised). What is reasonable will depend on the precise circumstances of each case and the impact on the individual of having to relocate within his or her country.⁹⁹

For present purposes, my remarks here do not examine the concept or application of the internal flight alternative generally, but rather assess its codification in s 36(2B)(a) with respect to beneficiaries of complementary protection. I would, however, note the caveats expressed by UNHCR, academic commentators and courts as to the appropriateness and applicability of the internal flight alternative.¹⁰⁰

⁹⁶ Foster and Pobjoy, above n 10, 24.

⁹⁷ See eg, *Qualification Directive* [2004] OJ L304/12, art 8 (internal protection), recital 26 (with respect to general risk); *Immigration and Refugee Protection Act*, SC 2001, c 27, s 97(1)(b) (general risk, lawful sanctions, health/medical care); *Immigration Act 2009* (NZ) s 131 (lawful sanctions, health/medical care).

⁹⁸ Foster and Pobjoy, above n 10, 24.

⁹⁹ *SFATV v Minister for Immigration and Citizenship* (2007) 223 CLR 18 (*'SFATV v MLAC'*). For detailed consideration of Australian case law on the internal flight alternative, see Refugee Review Tribunal, *A Guide to Refugee Law in Australia* (2010) ch 6 <<http://www.mrt-rrt.gov.au/Conduct-of-reviews/Guide-to-Refugee-Law/Guide-to-Refugee-Law-in-Australia/default.aspx>> current as at February 2010.

¹⁰⁰ See eg, *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426; *SFATV v MLAC* (2007) 223 CLR 18, especially [53]ff (Kirby J); UNHCR, ‘Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees’, UN Doc HCR/GIP/03/04 (23 July 2003); *Salah*

In particular, UNHCR has expressed the view that rather than establishing a legislative basis for assessing an internal flight alternative, ‘it [is] preferable for a proper analysis and assessment of an applicant’s international human rights to evolve through jurisprudence rather than through specific legislative provision.’¹⁰¹

While the European Court of Human Rights has recognised that art 3 ECHR:

does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual’s claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision,

it has emphasised certain preconditions for its application:

the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 [ECHR] may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment.¹⁰²

Presumably the inclusion of an internal relocation principle for beneficiaries of complementary protection is to parallel the jurisprudence that has developed in relation to Convention refugees, and make clear that it should also apply here.¹⁰³ However, there is a danger that codification for one group only may lead to the development of different tests, which would be highly undesirable. Furthermore, given the absolute prohibition on return to treatment proscribed by art 7 ICCPR, it is imperative that any internal flight alternative for complementary protection claims is very carefully scrutinised.

Sheekh v The Netherlands (European Court of Human Rights, Application No 1948/04, 11 January 2007), [141]; Goodwin-Gill and McAdam, above n 52, 123–6.

¹⁰¹ UNHCR, Submission No 20 to Senate Committee, above n 10, [47], referring to the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/Rev.1 (2nd ed, 1992) [91].

¹⁰² *Salah Sheekh* (European Court of Human Rights, Application No 1948/04, 11 January 2007), [141]; Goodwin-Gill and McAdam, above n 52, 123–6.

¹⁰³ See eg, *Qualification Directive* [2004] OJ L304/12, art 8; UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive* (UNHCR, Brussels, 2007) 3.4.3ff (‘UNHCR Study’).

J *Protection from an Authority: s 36(2B)(b)*

Presumably this provision is intended to deal with situations where the feared harm emanates from a non-state actor, but the applicant can obtain protection from the state. As the House of Lords has explained,

any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection. If someone is beaten up and seriously injured by a criminal gang, the member state will not be in breach of article 3 unless it has failed in its positive duty to provide reasonable protection against such criminal acts.¹⁰⁴

Indeed, as that statement indicates, the question whether an individual can obtain protection from an authority in the country to which return is contemplated goes to the heart of whether he or she will suffer a real risk of serious harm if removed. Once again, the legislation separates out matters that comparative jurisprudence regards as being inherent in assessing the risk of harm itself. While the intention behind this provision may be simply to guide decision-makers, there is a risk that it could be interpreted as requiring an additional, independent test.

(a) *Diplomatic Assurances*

It is possible that this provision is also intended to encompass diplomatic assurances. As discussed in Section IV.B above, a number of states accept the conditional extradition of individuals on the receiving state's assurance that they will not be subjected to the death penalty (even though the domestic law permits it). States regard this as enabling extradition within the framework of their human rights obligations, since (in the absence of evidence to the contrary) they would no longer be violating the principle of *non-refoulement*.¹⁰⁵ In the context of the legislation, this would be a more appropriate way of dealing with the caveat in s 36(2)(a) that the death penalty 'will be carried out', thereby enabling the deletion of those words from the provision.

The extension of this practice to cases involving assurances that a person will not be subjected to torture or cruel, inhuman or degrading treatment or punishment has been strongly criticised, however, on the

¹⁰⁴ *Bagdanavicius v Secretary of State for the Home Department* [2005] 2 AC 668; [2005] UKHL 38, [24].

¹⁰⁵ Many states that have abolished capital punishment preserve the right to deny extradition in death penalty cases, and some bilateral extradition treaties between the US and other countries explicitly state that extradition may be conditional on the US not imposing the death penalty if an extradition request is fulfilled: Michael J Garcia and Charles Doyle, 'Extradition To and From the United States: Overview of the Law and Recent Treaties', Congressional Research Service paper (17 March 2010) 9.

grounds that this violates the absolute nature of states' *non-refoulement* obligations under art 3 CAT, art 3 ECHR and art 7 ICCPR.¹⁰⁶ Furthermore, whereas diplomatic assurances regarding the death penalty can generally be publicly monitored, this is not the case for assurances regarding torture and other forms of serious harm, which are acts that can be carried out in a clandestine manner.

The UN Commission on Human Rights Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has expressed concern that diplomatic assurances and memoranda of understanding are being used by states to circumvent the absolute prohibition on torture under international law. He has noted that bilateral agreements are contrary to CAT and undermine the monitoring system provided by the UN treaty bodies. That such agreements are sought 'is already an indicator of the systematic practice of torture in the requested States', and yet assurances seek only to ensure that particular individuals are not tortured, rather than condemning the system of torture as a whole.¹⁰⁷

In *Agiza v Sweden*, the Committee against Torture found that Sweden had violated art 3 CAT when it removed an individual to Egypt, despite diplomatic assurances that he would not be subjected to torture, since

it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. ... The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.¹⁰⁸

¹⁰⁶ Goodwin-Gill and McAdam, above n 52, 261, referring to European Council on Refugees and Exiles, 'Comments on the Commission Working Document on the Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments' (May 2002) [2.3.2]; see also *Kindler v Canada*, UN Doc CCPR/C/48/D/470/1991, [6.7]; Sibylle Kapferer, 'The Interface between Extradition and Asylum', UNHCR Legal and Protection Policy Research Series, PPLA/2003/05 (November 2003) 49 [134]–[137], [241]. For political vis-à-vis legal considerations, see *Youssef v Home Office* [2004] EWHC 1884 (QB); Guy S Goodwin-Gill and Raza Husain, 'Diplomatic Assurances and Deportation' (Paper presented at the JUSTICE/Sweet and Maxwell Conference on Counter-Terrorism and Human Rights, 28 June 2005).

¹⁰⁷ UN News Centre, 'Bilateral Deportation Agreements Undermine International Human Rights Law—UN Expert' (26 October 2005); see also UN News Centre, 'United Kingdom Must Not Deport People to Countries with Risk of Torture — UN Rights Expert' (23 August 2005). See also the concern expressed by the Committee against Torture, Concluding Observations on the US, above n 67, [21].

¹⁰⁸ Committee against Torture, *Agiza v Sweden*, Comm No 233/2003, UN Doc CAT/C/34/D/233/2003 (20 May 2005) [13.4] (fn omitted) ('*Agiza*'). See also the UN

The UN High Commissioner for Human Rights has similarly stated that ‘diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment, nor do they, by any means, nullify the obligation of non-refoulement.’ They are only sought when ‘there is a risk of torture in the receiving State’, and they ‘cannot replace a State’s obligation of non-refoulement in these circumstances, either in fact or in law.’ Monitoring mechanisms are ‘unlikely to be an effective means for prevention.’¹⁰⁹ The UN Special Rapporteur on Human Rights and Counter-Terrorism has also observed:

that there is widespread agreement that diplomatic assurances do not work in respect of the risk of torture or other ill-treatment, as has been stated in a number of individual cases considered by international human rights bodies.¹¹⁰

K General Risk: s 36(2B)(c)

This provision states that there is no ‘real risk’ of significant harm warranting complementary protection if ‘the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally’. In other words, the provision recognises that a real risk of significant harm exists, but protection is not forthcoming if it is faced by the population generally.

A similar exception was removed from New Zealand’s complementary protection legislation before it was passed. The Refugee Status Appeals Authority had argued that it was ‘unprincipled, unnecessary and fail[ed] to meet New Zealand’s international obligations’, and the New Zealand Human Rights Commission had recommended that the provision be ‘redrafted to ensure that it cover[ed] indiscriminate or generalised risk of violence in a person’s country of origin’.¹¹¹

Human Rights Committee case *Alzery v Sweden*, Comm No 1416/2005, UN Doc CCPR/C/88/D/1416/2005 (10 November 2006) [11.4]–[11.5] (*‘Alzery’*).

¹⁰⁹ UN High Commissioner for Human Rights, ‘Statement by the High Commissioner’ (Louise Arbour), Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism (29–31 March 2006).

¹¹⁰ Martin Scheinin, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: Addendum: Mission to Spain’, UN Doc A/HRC/10/3/Add.2 (16 December 2008) [40], referring to *Agiza*, UN Doc CAT/C/34/D/233/2003 and *Alzery*, UN Doc CCPR/C/88/D/1416/2005.

¹¹¹ Human Rights Commission, Submission to the Transport and Industrial Relations Committee, Parliament of New Zealand, Immigration Bill (2 November 2007) 21 [11.6]. See also commentary accompanying the Immigration Bill by the Transport and Industrial Relations Committee: Commentary on the Immigration Bill 2007 (No

A number of submissions to the Senate Committee reviewing the 2009 Australian Bill expressed concern that the provision, as currently worded, may not serve to protect women fleeing genital mutilation or culturally accepted domestic violence.¹¹² This was of particular concern given express references in the Second Reading Speech to the role of complementary protection in protecting those at risk of female genital mutilation or honour killings.¹¹³ The Senate Committee accordingly recommended (Recommendation 2) that the provision be reviewed ‘with a view to ensuring it would not exclude from protection people fleeing genital mutilation or domestic violence from which there is little realistic or accessible relief available in their home country’, but there was no change to the provision in the legislation that was ultimately passed.

This exception seems intended to ‘close the floodgates’ of potential claims in situations of generalised violence. Certainly, it has no legal rationale, since international human rights law is not premised on exceptionality of treatment but proscribes any treatment that contravenes human rights treaty provisions. Indeed, a key purpose of human rights law is to improve national standards and not only the situation of the most disadvantaged in a society. At its most extreme, it could be argued that this provision would permit return even where a whole country were at risk of genocide, starvation or indiscriminate violence, which would run contrary to the fundamental aims and principles of human rights law.

As Dr Ben Saul noted in his submission to the Senate Committee, if the purpose of the exception is to limit access to complementary protection in mass influx situations, then the regime should ‘respond to the exceptional case if and when it ever arises’, rather than ‘exclud[ing] protection ab initio’.¹¹⁴

It is important to recall that in the assessment of ‘torture’, art 3(2) CAT expressly requires decision-makers to ‘take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’ In other words, widespread violations of human rights can help to substantiate the existence of torture, rather than deny it on the grounds that such violations are faced by the population generally. However, the existence of such a pattern:

132-2) as reported from the Transport and Industrial Relations Committee on 17 July 2008

¹¹² See eg, Refugee Council of Australia, Submission No 10 to Senate Committee, above n 10, 5; Amnesty International, Submission No 25 to Senate Committee, above n 10, 7.

¹¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8992 (Laurie Ferguson); Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1356 (Chris Bowen).

¹¹⁴ Ben Saul, Submission No 23 to Senate Committee, above n 10, 2.

does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.¹¹⁵

(a) *Comparative Jurisprudence*

The question of how personal this risk needs to be has been the subject of extensive jurisprudence in Europe.¹¹⁶ The European Court of Justice has now clarified that an applicant does not have to ‘adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances’.¹¹⁷ Rather, the threshold is met where the indiscriminate violence feared ‘is so serious that it cannot fail to represent a likely and serious threat to that person.’¹¹⁸ In other words,

the more the person is individually affected (for example, by reason of his membership of a given social group), the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself. Likewise, the less the person is able to show that he is individually affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed.¹¹⁹

¹¹⁵ Committee against Torture, *Elmi v Australia*, Comm No 120/1998, UN Doc CAT/C/22/D/120/1998 (14 May 1999) [6.4]. See also Committee against Torture, *Chipana v Venezuela*, Comm No 110/1998, UN Doc CAT/C/21/D/110/1998 (10 November 1998) [6.3]; Committee against Torture, *TA v Sweden*, Comm No 226/2003, UN Doc CAT/C/34/D/226/2003 (27 May 2005) [7.2]. For an example of an individual being unable to demonstrate the personalised nature of risk in Sudan, see *Elmansoub v Switzerland*, Comm No 278/2005, UN Doc CAT/C/36/D/278/2005 (17 May 2006) [6.5]. Conversely, the absence of a pattern of gross, flagrant or mass violations of human rights does not mean that a person is not in danger of being subjected to torture in a specific case: *Elmi v Australia*, [6.4]; *Mutombo v Switzerland*, Comm No 13/1993, UN Doc CAT/C/12/D/13/1993 (17 April 1994), [9.3]; *Kisoki v Sweden*, Comm No 41/1996, UN Doc CAT/C/16/D/41/1996 (8 May 1996), [9.2]; *TA v Sweden*, [7.2].

¹¹⁶ See *Qualification Directive* [2004] OJ L304/12, art 15(c) and recital 26.

¹¹⁷ *Elgafaji v Staatssecretaris van Justitie*, Case C-465/07 (European Court of Justice, Grand Chamber, 17 February 2009), [45].

¹¹⁸ *Ibid* [42].

¹¹⁹ *Ibid* [37]. See also the approach in *AM & AM (Armed Conflict: Risk Categories) Somalia CG* [2008] UKAIT 00091, [110]; *Lukman Hameed Mohamed v Secretary of State for the Home Department* AA/14710/2006 (UK Asylum and Immigration Tribunal, unreported, 16 August 2007): ‘It would be ridiculous to suggest that if there were a real risk of serious harm to members of the civilian population in general by reason of indiscriminate violence that an individual Appellant would have to show a risk to himself over and above that general risk’, cited in UNHCR, ‘UNHCR Statement: Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence’ (January 2008) 6 (‘UNHCR Statement’). See also European Council on Refugees and Exiles (ECRE) and

Similarly, the Federal Court of Canada has held that while a claimant must establish a personal and objectively identifiable risk, this ‘does not mean that the risk or risks feared are not shared by other persons who are similarly situated.’¹²⁰

In the refugee context, to demand that an applicant is singled out ‘confuses the requirement to assess risk on the basis of the applicant’s particular circumstances with some erroneous notion that refugee status must be based on a completely personalized set of facts.’¹²¹ In claims based on generalised violence or oppression, ‘the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status.’¹²² In situations where large groups are seriously affected by the outbreak of uncontrolled communal violence, ‘it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual’.¹²³

For a consistent, protection-focused, human rights-based approach, the relevant question under s 36(2A)(c) should be whether the applicant faces a real risk of any of the proscribed forms of harm, irrespective of whether it is individually targeted.¹²⁴ Otherwise, there is an added evidentiary burden for complementary protection that goes beyond what is required under the Refugee Convention. This undermines it as a *complementary* form of protection.¹²⁵ Indeed, as the

European Legal Network on Asylum (ELENA), ‘The Impact of the EU Qualification Directive on International Protection’ (October 2008), 26–9.

¹²⁰ *Surajnarain v Canada (Minister of Citizenship and Immigration)* 2008 FC 1165, [11]. See also *Salibian v Canada (Minister of Citizenship and Immigration)* [1990] 3 FC 250, 259; *Sinnappu v Canada (Minister of Citizenship and Immigration)* [1997] 2 FC 791 (TD), [37]; *Prophète v Canada (Minister of Citizenship and Immigration)* 2008 FC 331; *Prophète v Canada (Minister of Citizenship and Immigration)* 2009 FCA 31; *Re WXY* [2003] RPDD No 81; see also *Re WVZ* [2003] RPDD No 106 (in relation to a Sri Lankan claimant).

¹²¹ James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 91–2 (citations omitted).

¹²² *Ibid* 97 (citations omitted). The US Asylum Regulations dispensed with the singling out requirement in 1990, instead requiring only that a applicant show ‘a pattern or practice ... of persecution of a group of persons *similarly situated* to the applicant’, and his or her ‘own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable’: *Immigration and Nationality Act*, 8 CFR §208.13(b)(2)(iii) — asylum (emphasis added); §208.16(b)(2) — withholding.

¹²³ Goodwin-Gill and McAdam, above n 52, 129. See the reference there in fn 364 to *R v Secretary of State for the Home Department, ex parte Jeyakumaran* (No CO/290/84, QBD, unreported, 28 June 1985).

¹²⁴ As UNHCR noted in the context of the *Qualification Directive*, provided that the risk is real, rather than remote, this should be sufficient to establish the individual requirement: UNHCR Statement, above n 119, 6.

¹²⁵ UNHCR has stressed the importance of a full and inclusive interpretation of the refugee definition in the Convention, including recognising its applicability in situations of generalised violence and armed conflict where a nexus to at least one of

European Court of Human Rights has observed in the context of art 3 ECHR, the effect of such a stringent individual requirement ‘might render the protection offered by that provision illusory if ... the applicant were required to show the existence of further special distinguishing features’.¹²⁶ The court has stated that in demonstrating a ‘real risk’ of inhuman or degrading treatment or punishment, an applicant does not have to establish ‘further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk.’¹²⁷

L *Standard of Proof s 36(2)(aa)*

Section 36(2)(aa) sets out the threshold which applicants for complementary protection must meet:

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.

This oddly-worded test derives from the ministerial guidelines relating to the exercise of the Minister’s discretion under s 417 of the *Migration Act*.¹²⁸ It sets out a much higher threshold than is required in international law (and reflected in state practice in the EU, Canada and NZ).¹²⁹ This is because the section combines a number of independent threshold tests — intended to explain each other, not be read together — into a single, cumulative test. This is problematic because if the threshold for obtaining complementary protection is set too high, there is a risk that people will be exposed to *refoulement*, contrary to

the five Convention grounds can be demonstrated: UNHCR Study, above n 10399; see also UNHCR Statement, above n 119, 5.

¹²⁶ *Salah Sheekh* (European Court of Human Rights, Application No 1948/04, 11 January 2007), [148]. This has been echoed by UNHCR in the specific context of the *Qualification Directive*: UNHCR Study, above n 103, 74.

¹²⁷ *Salah Sheekh* (European Court of Human Rights, Application No 1948/04, 11 January 2007), [148].

¹²⁸ Minister’s Guidelines on Ministerial Powers (s 345, s 351, s 391, s 417, s 454 and s 501J) (PAM3 of 14 September 2009) [11]: ‘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).’ Whereas the role of the test in the ministerial guidelines is to assist the Minister in the exercise of a personal discretion, its codification in s 36(2)(aa) mandates consistent application by a variety of decision makers, and its convoluted wording is therefore particularly problematic.

¹²⁹ See also Foster and Pobjoy, above n 10, 21–3.

Australia's international obligations, and thereby undermine the very protection that the legislation is intended to ensure.

As UNHCR noted in its submission to the Senate Committee,

there is no basis for adopting a stricter approach to assessing the risk of ill-treatment in cases of complementary protection than there is for refugee protection because of the similar difficulties facing claimants in obtaining evidence, recounting their experiences, and the seriousness of the threats they face.¹³⁰

This section provides a detailed examination of the elements of the threshold test as set out in the legislation. It does this to elucidate why it is inconsistent with international and comparative practices, and to explain how it will need to be interpreted (if not amended) in order to align with these approaches.

V 'Substantial Grounds for Believing'

A International standard under the Convention against Torture ('CAT')

The term 'substantial grounds for believing' appears in art 3 CAT: 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' The UN Committee against Torture's jurisprudence interprets 'substantial grounds' as involving a 'foreseeable, real and personal risk' of torture.¹³¹ The threat of torture does not have to be 'highly probable'¹³² or 'highly likely to occur', but must go 'beyond mere theory or suspicion' or 'a mere possibility of torture'.¹³³ The danger must be 'personal and present'.¹³⁴ 'Substantial grounds' may be based not only on acts committed in the country of origin prior to flight, but also on

¹³⁰ UNHCR, Submission No 20 to Senate Committee, above n 10, [34].

¹³¹ See eg. Committee against Torture, *EA v Switzerland*, Comm No 28/1995, UN Doc CAT/C/19/D/28/1995 (10 November 1997) [11.5]; *X, Y and Z v Sweden*, Comm No 61/1996, UN Doc CAT/C/20/D/61/1996 (6 May 1998) [11.5]; *ALN v Switzerland*, Comm No 90/1997, UN Doc CAT/C/20/D/90/1997 (19 May 1998) [8.7]; *KT v Switzerland*, Comm No 118/1998, UN Doc CAT/C/23/D/118/1998 (19 November 1999) [6.5]; *US v Finland*, Comm No 197/2002, UN Doc CAT/C/30/D/197/2002 (1 May 2003) [7.8].

¹³² *Report of the Committee against Torture*, UN GAOR, 53rd Session, Supp No 44, UN Doc A/53/44 (1998), Annex IX.

¹³³ Committee against Torture *EA v Switzerland*, No 28/1995, UN Doc CAT/C/19/D/28/1995 (10 November 1997), [11.3].

¹³⁴ *Report of the Committee against Torture* (1998), Annex IX.

activities undertaken in the receiving country.¹³⁵ Furthermore, ‘it is not necessary that all the facts invoked by the author [of the claim] should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable’.¹³⁶

Article 3(2) CAT requires attention to be paid to ‘all relevant considerations’, including the general human rights situation in the state to which return is contemplated. The Committee has emphasised that it will not allow doubts about the facts of the case to prevent it from ensuring the applicant’s security.¹³⁷ To this end, it has repeatedly acknowledged that inconsistencies in applicants’ stories are not material and should not cast doubt on ‘the general veracity of the author’s claims’, because ‘complete accuracy is seldom to be expected by victims of torture’¹³⁸ (especially where they are suffering from post-traumatic stress disorder¹³⁹).

The brevity of the Committee’s views in negative decisions, coupled with the formulaic conclusion that the facts alleged lack ‘the minimum substantiation that would render the communication compatible with article 22 of the Convention against Torture’,¹⁴⁰ provide little further assistance in determining how, and against what standards of authority and corroboration, evidence is tested.

B Comparative Jurisprudence

Article 2(e) of the EU *Qualification Directive* provides that the standard of proof for subsidiary protection is that ‘substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ... would face a real risk of suffering serious harm as defined in Article 15.’¹⁴¹

Whereas the Committee against Torture considers that ‘substantial grounds’ are met by a ‘foreseeable, real and personal risk’

¹³⁵ *Aemei v Switzerland*, Comm No 34/1995, UN Doc CAT/C/18/D/34/1995 (9 May 1997) [9.5].

¹³⁶ *Ibid* [9.6].

¹³⁷ *Mutombo v Switzerland*, Comm No 13/1993, UN Doc CAT/C/12/D/13/1993 (17 April 1994) [9.2]; *Khan v Canada*, Comm No 15/1994, UN Doc CAT/C/13/D/15/1994 (15 November 1994) [12.3].

¹³⁸ *Alan v Switzerland*, Comm No 21/1995, UN Doc CAT/C/16/D/21/1995 (8 May 1996) [11.3]; *Kisoki v Sweden*, Comm No 41/1996, UN Doc CAT/C/16/D/41/1996 (8 May 1996) [9.3]; *Tala v Sweden*, Comm No 43/1996, UN Doc CAT/C/17/D/43/1996 (15 November 1996) [10.3].

¹³⁹ *Tala v Sweden*, Comm No 43/1996, UN Doc CAT/C/17/D/43/1996 (15 November 1996), [10.3].

¹⁴⁰ *X v Switzerland*, Comm No 17/1994, UN Doc CAT/C/13/D/17/1994 (17 November 1994) [4.2]; *X v Switzerland*, Comm No 18/1994, UN Doc CAT/C/13/D/18.1994 (23 November 1994) [4.2].

¹⁴¹ *Qualification Directive* [2004] OJ L304/12, art 2(e).

— in other words, the focus of the inquiry is whether a ‘real risk’ exists — the *Qualification Directive*, on a literal reading, requires a foreseeable, real, and personal risk of a real risk. The risk of attempting to clarify concepts that are essentially embedded in the Committee against Torture’s jurisprudence risks complicating and confusing the test, rather than clarifying it.¹⁴²

Importantly, the UK takes the view that the ‘substantial grounds’ test in art 2(e) of the *Qualification Directive* is intended to replicate the ‘well-founded fear’ standard under the Refugee Convention.¹⁴³ In *Sivakumaran*, the House of Lords said that the well-founded fear standard implies ‘a reasonable degree of likelihood’,¹⁴⁴ which generally falls somewhere lower than the ‘balance of probabilities’. As the UK Asylum and Immigration Tribunal stated in *Kacaj*:

The link with the Refugee Convention is obvious. Persecution will normally involve the violation of a person’s human rights and a finding that there is real risk of persecution would be likely to involve a finding that there is a real risk of a breach of the European Convention on Human Rights. It would therefore be strange if different standards of proof applied. ... Since the concern under each Convention 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.¹⁴⁵

¹⁴² A very recent and clear summary of the European Court of Human Rights’ approach to cases concerning article 3 of the ECHR can be found in *Abdolkhani v Turkey* (European Court of Human Rights, Application No 30471/08, 22 September 2009) [72]–[75].

¹⁴³ During the drafting of the *Qualification Directive*, Sweden sought to replace ‘substantial grounds’ with ‘well-founded fear’ (as per the original draft article 5(2) of the *Qualification Directive*) to ensure that the same proof entitlements were established for beneficiaries of subsidiary protection as for refugees.

¹⁴⁴ *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958, 994 (Lord Keith), 996 (Lord Bridge and Lord Templeman), 997 (Lord Griffiths), 1000 (Lord Goff).

¹⁴⁵ *Kacaj v Secretary of State for the Home Department* [2001] INLR 354, [10]. See also *Bagdanavicius v Secretary of State for the Home Department* [2005] 2 AC 668;

For these reasons, and bearing in mind the protection function of both s 36(2)(a) and s 36(2)(aa), Australian decision-makers should follow the UK approach. In particular, given that the Australian test for ‘well-founded fear of persecution’ is whether the applicant faces a ‘real chance’ of persecution,¹⁴⁶ it would be a logical and relatively easy step to equate the meaning of ‘real risk’ in s 36(2)(aa) with ‘real chance’.

C The Canadian Approach: ‘Substantial Grounds’ Test Higher than ‘Well-Founded Fear’

In Canada, the standard of proof for claims relating to torture is that the person would be subjected personally ‘to a danger, *believed on substantial grounds to exist*, of torture within the meaning of art 1 of the Convention Against Torture’.¹⁴⁷ This has been interpreted by the Federal Court of Appeal to mean ‘more likely than not’ or on the ‘balance of probabilities’, which imposes a higher test for beneficiaries of complementary protection than the ‘well-founded fear’ of persecution test for Convention refugee claims (which in Canada means a ‘reasonable chance or serious possibility’ of persecution¹⁴⁸). It is the same in US law, where the standard of proof for torture-based claims is ‘more likely than not’, a higher standard than the ‘reasonable possibility’ test in asylum claims.¹⁴⁹

When the Canadian Act came into force, the Immigration and Refugee Board’s Legal Services division explained that ‘all three grounds for protection should be decided using the same standard of proof, namely the *Adjei* test, “reasonable chance or serious possibility”. The test is premised on the prospective nature of the risk and that same prospective element is present in all three protection grounds.’¹⁵⁰ This approach was adopted initially by decision-makers, until the Federal

[2005] UKHL 38, [30]. This threshold has also been used in Canada with respect to ‘well-founded fear’ in Convention refugee claims: *Ponniah v Canada (Minister of Employment and Immigration)* (1991) 13 Imm LR (2d) 241(FCA) 245.

¹⁴⁶ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (‘*Chan*’). There it was held that real, that is, substantial, chance includes less than a 50 per cent likelihood.

¹⁴⁷ Immigration and Refugee Protection Act SC 2001, c 27, s 97(1)(a) (emphasis added).

¹⁴⁸ This test derives from *Adjei v Canada (Minister of Employment and Immigration)* [1989] 2 FC 680, (1989) 57 DLR (4th) 153 (CA).

¹⁴⁹ Joan Fitzpatrick, ‘Harmonized Subsidiary Protection in the European Union — A View from the United States’ in Daphne Bouteillet-Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant, 2002) 130; *Immigration and Nationality Act*, 8 CFR §§208.16(c)(2), 208.13(b)(2).

¹⁵⁰ Immigration and Refugee Board of Canada, *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (15 May 2002) 39, <<http://www.unhcr.org/refworld/docid/3d3bd1984.html>>.

Court of Appeal ruled conclusively in *Li v Canada (Minister of Citizenship and Immigration)* that a higher standard of proof was to be applied for s 97(1)(b) claims.¹⁵¹ First, the court observed that art 97(1)(a) uses almost identical language to art 3 CAT, which means that the Committee against Torture's interpretation of art 3 is highly relevant. Accordingly, the court concluded that the relevant standard was 'on the balance of probabilities' or 'more likely than not'.¹⁵² Secondly, the court said that the different nature of claims under s 96 (Convention refugees) compared to s 97(1)(a) (torture cases), such as the issue of nexus, meant that an identical standard of proof was not necessary, even though it recognised that there was 'no rational sense' in adopting a higher standard for the latter. Significantly, the court extended this higher threshold to art 97(1)(b) claims (risk to life or to a risk of cruel and unusual treatment or punishment) in the 'absence of some compelling reason' to the contrary.¹⁵³

It has been suggested that an advantage of this dual threshold approach is that it 'should encourage independent and separate analyses of the three different types of claims contained in the consolidated grounds of protection.'¹⁵⁴ While that is important, there is no compelling reason why rigorous interpretation cannot occur even if the same standard of proof is applied. However, it has also been noted that in practice, the higher standard applied to s 97 can work to the advantage of applicants who are found not to be credible, since objective factors, such as country of origin conditions, may trump credibility issues and require that protection be granted.¹⁵⁵

D Australian Extradition Law

In Australia, 'substantial grounds for believing' is the standard of proof in s 19(2)(d) of the *Extradition Act 1988* (Cth).¹⁵⁶ It provides

¹⁵¹ *Li v Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1; 2005 FCA 1 (a challenge to the Supreme Court of Canada was ruled out) ('*Li v Canada*').

¹⁵² *Ibid* [18]–[28]. Since this was the interpretation which had been given in *Suresh v Canada (Minister of Citizenship and Immigration)* [2000] FCJ No 5 (FCA), Justice Rothstein said that Parliament could have enacted a lower test had it desired to depart from that interpretation.

¹⁵³ *Li v Canada*, [2005] FCJ No 1; 2005 FCA 1, [38].

¹⁵⁴ Jessica Reekie and Carolyn Layden-Stevenson, 'Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)' in International Association of Refugee Law Judges, *Forced Migration and the Advancement of International Protection* (MultiCopy Haarlem, 2008) 282.

¹⁵⁵ Observations of Justice Carolyn Layden-Stevenson, Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, 1–2 May 2008.

¹⁵⁶ A 'person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if ... the person does not satisfy the magistrate that there are *substantial grounds for believing* that there is an extradition objection in relation to the offence' (emphasis added).

that a person may be extradited provided that he or she ‘does not satisfy the magistrate that there are substantial grounds for believing’ that his or her extradition is sought for the purposes of prosecution or punishment on the grounds of race, religion, nationality or political opinions, or if those grounds may result in prejudice at his or her trial or curtailment of liberty, or if extradition is sought for a political offence.¹⁵⁷

Justice French considered the meaning of ‘substantial grounds for believing’ in extradition law in *Cabal (No 2)*:

In relation to the political objections in s 7(b) and (c) material which demonstrates a *real or substantial risk* that the circumstances described in those paragraphs exist or will exist may be sufficient to satisfy the condition in s 19(2)(d). The very nature of those objections is such that *the evidence* relied upon to make them out or to show substantial grounds for believing that they exist *may be indirect or circumstantial in character*.¹⁵⁸

In *Cabal (No 3)*, he held that:

The onus is upon the applicants and while it does not require that the extradition objection is proven on the balance of probabilities — *Cabal (No 2)* at 748-749, that onus is not easily discharged. It is no light matter for the magistrate or this Court to conclude that there are substantial grounds for believing that the requesting country is acting in bad faith, especially given the necessary assumption that the offences have been committed.¹⁵⁹

Subsequently, in *Rahardja v Republic of Indonesia*, the Federal Court held that an inquiry into ‘substantial grounds for believing’ was necessarily ‘speculative, because it is concerned with future and hypothetical events’. Accordingly, “it is inappropriate to apply an inflexible standard, such as the balance of probabilities, and a lesser degree of likelihood is sufficient to establish substantial grounds for the extradition objection” ... the minimum requirement is that the substantial ground of belief be “not trivial” or merely theoretical ... *it is sufficient there be a real chance of prejudice; it does not matter that the chance may be far less than a fifty percent chance*.¹⁶⁰

It went on to say:

it is sufficient if the person raising the objection establishes a substantial or real chance of prejudice; it is

¹⁵⁷ See *Extradition Act 1988* (Cth) ss 19(2)(d), 7.

¹⁵⁸ *Cabal v United Mexican States (No 2)* [2000] FCA 445, [15] (emphasis added).

¹⁵⁹ *Cabal v United Mexican States (No 3)* [2000] FCA 1204, [220] (emphasis added).

¹⁶⁰ *Rahardja v Republic of Indonesia* [2000] FCA 1297, [37] (emphasis added).

not necessary to show a probability of prejudice or any particular degree of risk of prejudice.¹⁶¹

In this context, it is useful to recall that the Australian test for ‘well-founded fear of persecution’ requires the decision-maker to consider whether the applicant faces a ‘real chance’ of persecution. In *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*, the High Court of Australia held that ‘real’ means a substantial and not a remote chance. It includes a less than 50 per cent chance.¹⁶² Given that the Federal Court has already favoured this standard in extradition law — ‘it does not matter that the chance may be far less than a fifty percent chance’ — and noting the approach of the UK Asylum and Immigration Tribunal (‘AIT’) in harmonising the standard of proof in refugee and complementary protection cases, there is a strong rationale to apply this threshold in the Australian complementary protection context as well.

E ‘Necessary and Foreseeable Consequence’

There is a clear overlap in international jurisprudence between this term and ‘real risk’. Indeed, the UN Human Rights Committee has never used this phrase to impose an independent test for non-removal; rather, it has only used it to explain the meaning of ‘real risk’.¹⁶³ In other words, ‘necessary and foreseeable consequence’ does not form an additional element of the ‘real risk’ test — rather, it is a way to understand that test by asking whether the alleged harm is a necessary and foreseeable consequence of removal. As UNHCR explained in its submission to the Senate Committee, ‘the requirement that the risk of ill-treatment is a necessary and foreseeable consequence of removal is surplusage beyond the relevant test of “real risk”’.¹⁶⁴

This seems to have been recognised when the complementary regime was first introduced to Parliament. In his second reading speech, the Parliamentary Secretary stated:

A risk of harm must go beyond mere theory or suspicion to give rise to a non-refoulement obligation. According to the commentary of the United Nations Human Rights

¹⁶¹ Ibid [47].

¹⁶² *Chan* (1989) 169 CLR 379.

¹⁶³ In *Mutombo v Switzerland* (1994) 15 Hum Rts LJ 164, [9.4], although the Committee against Torture did use both terms to find that the return of an applicant would ‘have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured’, it did not explain the distinction, if any, between the two terms.

¹⁶⁴ UNHCR, Submission No 20 to Senate Committee, above n 10, [37].

Committee, a real risk of harm is one where the harm is a necessary and foreseeable consequence of removal.¹⁶⁵

Similarly, the Explanatory Memorandum states: ‘A real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal.’¹⁶⁶

This is illustrated by the Human Rights Committee’s views in *ARJ v Australia*. There, it said that state parties to the ICCPR are prevented from exposing a person to ‘a real risk (*that is*, a necessary and foreseeable consequence) of a violation of his rights under the Covenant.’¹⁶⁷ The risk of such ill-treatment ‘must be real, *i.e.* be the necessary and foreseeable consequence of deportation’.¹⁶⁸

F ‘Real Risk’

In the European Court of Human Rights, claims brought under article 3 ECHR (‘inhuman or degrading treatment or punishment’) require an applicant to show that there are substantial grounds for believing that he or she would face a real (‘foreseeable’¹⁶⁹) risk of being subjected to torture or inhuman or degrading treatment or punishment if removed.¹⁷⁰ The risk is to be considered as at the date of the decision-maker’s consideration of the case.¹⁷¹ A mere possibility of harm is insufficient, but it is not necessary to show definitively, or even probably, that ill-treatment will occur.¹⁷² The ill-treatment must qualitatively attain a ‘minimum level of severity’,¹⁷³ the assessment

¹⁶⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8990 (Laurie Ferguson).

¹⁶⁶ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), [67], noting that this is reflected in Human Rights Committee ‘General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ CCPR/C/74/CRP.4/Rev.6 (21 April 2004) (‘*UN Human Rights Committee General Comment No 31*’).

¹⁶⁷ Human Rights Committee, *ARJ v Australia*, Comm No 692/1996, UN Doc CCPR/C/60/D/692/1996 (11 August 1997) [6.8] (emphasis added).

¹⁶⁸ *Ibid* [6.14] (emphasis added). See also [6.10].

¹⁶⁹ *Soering v United Kingdom* (1989) 11 EHRR 439, [100].

¹⁷⁰ See Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) [246], [249], [252]. However, it should be recalled that article 3 ECHR also applies to the manner in which an expulsion is carried out: see Nuala Mole, ‘Asylum and the European Convention on Human Rights’, Council of Europe H/Inf (2002) 9, 40–1.

¹⁷¹ *Salah Sheekh* (European Court of Human Rights, Application No 1948/04, 11 January 2007), [136].

¹⁷² See also *Kacaj v Secretary of State for the Home Department* [2001] INLR 354, [12].

¹⁷³ *Greek case*, European Commission, Application Nos 3321/67, 3322/67, 3323/67, 3344/67 (18 November 1969), 12 *Yearbook of the European Convention on Human Rights* 170, para 11; *Ireland v United Kingdom* (1979–80) 2 EHRR 25, [162]; *Tyrer*

of which is relative and ‘depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim’.¹⁷⁴ Thus, even a small risk can be significant and ‘real’ where the foreseeable consequences are very serious.¹⁷⁵ One commentator has argued that the more the ill-treatment is caused by underlying social and political disorder, such as civil war or terrorism, the higher the minimum level of severity will be assessed.¹⁷⁶

There are no exceptions to art 3 ECHR, which means that there is no scope for balancing a person’s conduct (however abhorrent) against the risk of harm if he or she is returned. This has been affirmed consistently by the European Court of Human Rights.¹⁷⁷

It is not necessary for an applicant to show special distinguishing features if it is accepted that, on the basis of the applicant’s ethnic group or similar status, he or she faces a real risk of torture or inhuman or degrading treatment or punishment if removed. In 2007 in *Salah Sheekh v The Netherlands*, the European Court of Human Rights reconsidered its previous interpretation of ‘real risk’ from *Vilvarajah v United Kingdom*, holding that:

[i]t might render the protection offered by [art 3 ECHR] illusory if, in addition to the fact that he belongs to the Ashraf — which the Government have not disputed — the applicant be required to show the existence of further special distinguishing features.¹⁷⁸

(1979–80) 2 EHRR 1, [29]–[30]; *Soering v United Kingdom* (1989) 11 EHRR 439, [10].

¹⁷⁴ *Soering v United Kingdom*, (1989) 11 EHRR 439, [100], [104]. See also *Ireland v United Kingdom* (1979–80) 2 EHRR 25, [162], [167], [174]; *Tyrer* (1979–80) 2 EHRR 1, [29], [80].

¹⁷⁵ Terje Einarsen, ‘The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum’ (1990) 2 *International Journal of Refugee Law* 361, 372.

¹⁷⁶ Alberta Fabbriotti, ‘The Concept of Inhuman or Degrading Treatment in International Law and Its Application in Asylum Cases’ (1998) 10 *International Journal of Refugee Law* 637, 646. See also Jaime Oraá, *Human Rights in States of Emergency in International Law* (Oxford University Press, 1992) 96.

¹⁷⁷ This was established in *Chahal v United Kingdom* (1996) 23 EHRR 413, [79]–[80] and has been affirmed in a long line of cases, most recently in *Saadi v Italy* (2008) 24 BHRC 123, [127], [139].

¹⁷⁸ *Salah Sheekh* (European Court of Human Rights, Application No 1948/04, 11 January 2007), [148]. The court tried to disguise that it was reconsidering *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, but mainly in an attempt to appease the Dutch judiciary: see Jean-François Durieux, ‘Salah Sheekh is a Refugee: New Insights into Primary and Subsidiary Forms of Protection’, (Refugee Studies Centre Working Paper Series No 49 October 2008) 12.

G '*Significant Harm*'

The 2009 version of the Bill referred to 'irreparable harm'. Numerous submissions to the Senate Committee cautioned against the use of this term¹⁷⁹ since it is, by its very nature, already encompassed by the forms of harm proscribed by the Bill (return to arbitrary deprivation of life, the death penalty, torture, and cruel, inhuman or degrading treatment or punishment). As the UN Human Rights Committee has made clear, if individuals are at risk of a violation of arts 6 or 7 of the ICCPR if removed, they do not have to prove additionally that they risk irreparable harm; irreparable harm is synonymous with, or inherent in, the very nature of harm prohibited by those provisions.¹⁸⁰

The Committee, 'persuaded that the current wording of the bill [wa]s too restrictive',¹⁸¹ recommended that it be replaced by the term 'serious harm' (which reflects the language of the EU *Qualification Directive*).¹⁸² The amending legislation instead uses the language of 'significant harm', since 'serious harm' already appears in s 91R(2) of the Act.¹⁸³

H Summary

Drawing on the views of the UN Committee against Torture, the UN Human Rights Committee, the European Court of Human Rights, and the EU *Qualification Directive* (EU law on complementary protection), the common elements of the standard of proof in complementary protection cases are the existence of 'substantial grounds for believing' that a person would face a 'real risk' or 'danger' of harm.

The problem with the very convoluted test currently set out in s 36(2)(aa) of the legislation is that it combines all of the international and regional tests discussed above, *plus* additional ones drawn from

¹⁷⁹ See Senate Committee Report, above n 14, [3.9].

¹⁸⁰ *UN Human Rights Committee General Comment No 31* (21 April 2004), [12]: 'Moreover, the art 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, *such as that contemplated by articles 6 and 7* of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.' (emphasis added)

¹⁸¹ Senate Committee Report, above n 14, [3.18].

¹⁸² *Ibid* Recommendation 1.

¹⁸³ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), [64].

various other human rights documents (such as ‘necessary and foreseeable consequence’) to require that there are:

- a) substantial grounds for believing that,
- b) as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country,
- c) there is a real risk that the non-citizen
- d) will suffer significant harm.

As an amalgam of thresholds that were meant to explain each other, *not* to be used as cumulative tests, it is confusing, unworkable and inconsistent with comparable standards in other jurisdictions. Accordingly, the standard of proof needs to be made much simpler, otherwise it is likely to:

- a) cause substantial confusion for decision-makers;
- b) lead to inconsistency in decision-making;
- c) impose a much higher test than is required in any other jurisdiction or under international human rights law;
- d) risk exposing people to *refoulement*, contrary to Australia’s international obligations; and
- e) lead to more complaints to the international treaty monitoring bodies.¹⁸⁴

In light of the analysis above, and the acknowledgement in the Explanatory Memorandum that ‘[a] real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal’,¹⁸⁵ the standard of proof should be understood as follows: there are ‘substantial grounds for believing’ that ‘there is a real risk that the non-citizen will suffer significant harm’ (which means that the harm is ‘a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country’).

Finally, for the reasons outlined in Section V.B above, when it comes to interpreting s 36(2)(aa) in practice, a unified approach based on the ‘well-founded fear’ standard is appropriate, especially in a determination system that considers refugee and complementary protection claims as part of a single procedure.

¹⁸⁴ Thank you to Matthew Zagor for this last point.

¹⁸⁵ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), [67], noting that this is reflected in the *UN Human Rights Committee General Comment No 31* (21 April 2004).

VI Exclusion from Complementary Protection: s 36(2C)

In refugee law, people may be excluded from refugee status if they are suspected of having committed certain types of serious crimes.¹⁸⁶ While similar exclusion clauses are replicated in the amending legislation with respect to complementary protection, they go beyond art 1F of the Refugee Convention. Indeed, the new s 36(2C) conflates the exclusion clauses in art 1F (s 36(2C)(a)) with the exception to the principle of *non-refoulement* in art 33(2) of the Refugee Convention (s 36(2C)(b)). Article 33(2) is intended to apply to conduct occurring *after* a person has been accepted as a refugee, whereas art 1F operates at the point of determining whether a person meets the refugee definition at all.

While using art 33(2) as an additional exclusion clause is unlawful with respect to refugees,¹⁸⁷ the absence of an overarching international instrument on complementary protection means that this is not technically prohibited for people who would fall within s 36(2A). Mandal notes the inconsistency of this approach, given that the Convention exclusion clauses represent ‘a considered balance between the humanitarian imperative of international protection and the need to maintain the integrity of the institution of asylum’,¹⁸⁸ and have been transplanted without elaboration into regional instruments such as the OAU Convention (in Africa) and the Cartagena Declaration (in Latin America).¹⁸⁹

However, while Australia may decide not to grant a protection visa to a person for character and conduct grounds such as those set out in s 36(2C), it cannot avoid its absolute *non-refoulement* obligations under international human rights law. In other words, even though people who meet the criteria in s 36(2C) may be denied a protection

¹⁸⁶ *Refugee Convention*, art 1F.

¹⁸⁷ *Refugee Convention*, art 42. See also the view of the UK government in House of Commons Select Committee on European Scrutiny, *Fourth Report of Session 2002–03* (2003) [6.22]; Erika Feller, ‘Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR’ (6 November 2002) 5; Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 5–6 November 2002 13623/02 ASILE 59 (30 October 2002) 3.

¹⁸⁸ Ruma Mandal, ‘Protection Mechanisms outside of the 1951 Convention (“Complementary Protection”)', (UNHCR Legal and Protection Policy Research Series, PPLA/2005/02, June 2005) [135].

¹⁸⁹ *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Organization of African Unity, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974); Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85).

visa, they cannot be removed from Australia.¹⁹⁰ The prohibition on return applies irrespective of how abhorrent the conduct of the individual concerned might be.¹⁹¹ The Committee against Torture has stated that the prohibition on *refoulement* under CAT cannot be diminished by the influence of matters of state security, international comity or domestic politics.¹⁹²

There is no consistent state practice as to how such 'undesirable', but non-removable, people should be treated.¹⁹³ At a bare minimum, however, states must ensure that they do not themselves treat them in a manner that is cruel, inhuman or degrading. The highest appellate courts of France, Germany, Belgium, the UK and South Africa have acknowledged that even people without any formal immigration status are entitled to minimum health and other social services, and that no individual can be denied minimum dignity whatever his or her immigration status.¹⁹⁴ States owe human rights obligations to all people within their territory or jurisdiction.¹⁹⁵

¹⁹⁰ See also *UN Human Rights Committee General Comment No 20* (10 March 1992), [3].

¹⁹¹ This was established in *Chahal v United Kingdom* (1996) 23 EHRR 413, [79]–[80] and has been affirmed consistently, most recently in *Saadi v Italy*, (2008) 24 BHRC 123, [127].

¹⁹² Peter Burns, 'The United Nations Committee against Torture and Its Role in Refugee Protection' (2000–2001) 15 *Georgetown Immigration Law Journal* 406. This view is reflected in the Ministerial Guideline (MSI 387) pursuant to which the Australian Immigration Minister presently exercises his discretion under s 417 of the *Migration Act* in relation to granting permission to remain on public policy grounds.

¹⁹³ For a detailed analysis of the status that should be accorded to people protected by the principle of *non-refoulement* but who are ineligible for a protection visa by virtue of section 36(2C), see McAdam, above n 9, ch 6.

¹⁹⁴ France: *Conseil constitutionnel* DC 93-325 (13 August 1993), DC 97-39 (22 April 1997), DC 79-109 (9 January 1980); Belgium: Judgment of the Court of Arbitration (22 April 1998), Judgment of the Labour Tribunal of Liège 2nd Chamber (24 October 1997) RG 24.764/96; Germany: Federal Constitutional Court Judgment (8 January 1959) BVerfGE 9, 89, Judgment (21 June 1987) BVerfGE 45, 187; Judgment (17 January 1979) BVerfGE 50; Judgment (24 April 1986) BVerfGE 172, cited in Daphné Bouteillet-Paquet, 'Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union' in Daphné Bouteillet-Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant, 2002) 240 fn 98. In South Africa, the Supreme Court of Appeal held that denying employment to asylum seekers, who had no entitlement to social security support, constituted a breach of their right to human dignity under the Bill of Rights (*Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2). It noted that although the State did not have a positive obligation to provide employment, deprivation of the opportunity to work attains a different dimension 'when it threatens positively to degrade rather than merely to inhibit the realization of the potential for self-fulfilment': *Minister of Home Affairs v Watchemuka* (2004) 4 SA 326, [32].

¹⁹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (*Advisory Opinion*), [2004] ICJ Rep 136, [111]–[112]; UN Human Rights Committee, Concluding Observations on the US, above n 67, [10].

Leaving people to live in the community without work rights or access to social security may amount to cruel, inhuman or degrading treatment. In 2005, the House of Lords held that the state's failure to provide adequately for asylum seekers could amount to inhuman or degrading treatment if they were left 'with no means and no alternative sources of support', were 'unable to support' themselves, and were, 'by the deliberate action of the state, denied shelter, food or the most basic necessities of life.'¹⁹⁶ Similarly, while not ruling directly on the matter, the European Court of Human Rights has acknowledged that poor living conditions could raise an issue under art 3 ECHR if they reached a minimum level of severity,¹⁹⁷ which may include living without any social protection. Furthermore, the longer a person remains in a country, the greater his or her personal, social and economic ties, and the greater his or her claim on the state's resources.¹⁹⁸ Likewise, holding people in immigration detention without a lawful justification is impermissible as a matter of international human rights law,¹⁹⁹ and therefore would not be a lawful alternative.

The Explanatory Memorandum to the 2009 Bill stated that 'alternative case resolution solutions will be identified to ensure Australia meets its *non-refoulement* obligations and the Australian community is protected.'²⁰⁰ This issue needs to be resolved in a timely manner that is consistent with Australia's human rights obligations more broadly. Leaving people in legal limbo is inconsistent with international human rights law.²⁰¹ UNHCR, for instance, submitted to the Senate Committee that 'further consideration should be afforded to what kind of immigration status (including possible renaming of the class of visa) and associated rights, notably family reunification, such persons should possess until such time as they may apply for a more

¹⁹⁶ *R v Secretary of State for the Home Department, ex parte Adam* [2006] 1 AC 396 (HL), [7] (Lord Bingham).

¹⁹⁷ *Pancenko v Latvia* (European Court of Human Rights, Application No 40772/98, 28 October 1999); *BB v France* (European Court of Human Rights, Application No 30930/96, 9 March 1998) (Cabral Barreto).

¹⁹⁸ *Nasri v France* (1995) 21 EHRR 458, [3]–[4] (Judge Morenilla).

¹⁹⁹ ICCPR, art 9(1). See eg, Human Rights Committee, *D and E v Australia*, Comm No 1050/2002, UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006); Human Rights Committee, *Baban v Australia*, Comm No 1014/2002, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003); Human Rights Committee, *Bakhtiyari v Australia*, Comm No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003); *C v Australia*, Comm No 900/1999, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); Human Rights Committee, *A v Australia*, Comm No 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); Human Rights Committee, *Shams and others v Australia*, Comm No 1255/2004, UN Doc CCPR/C/90/D/1255 (11 September 2007); Human Rights Committee, *Shafiq v Australia*, Comm No 1324/2004, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006).

²⁰⁰ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2009 (Cth), [64].

²⁰¹ *Ahmed v Austria* (1996) 24 EHRR 278 highlights the social impacts of being in limbo, primarily on the individual but also on the broader social fabric.

permanent visa.²⁰² Saul argued that ‘if they cannot be returned, prosecuted or lawfully detained, they require permanent status.’²⁰³ Indeed, the Senate Committee stated that it ‘look[ed] forward to learning further details about what form “alternative case resolution solutions” would take’.²⁰⁴ This has not been elaborated on in the recently passed amending legislation. The Explanatory Memorandum to the 2011 Bill noted only that

In the event that a non-citizen is ineligible to be granted a protection visa, but is owed a *non-refoulement* obligation, such a person will not be removed from Australia while the real risk of suffering significant harm continues, but will be managed towards case resolution, taking into account key considerations including protection of the Australian community; Australia’s *non-refoulement* obligations; and the individual circumstances of their case.²⁰⁵

The broader exclusion clauses make it all the more important that decision-makers rigorously assess protection claims against the Refugee Convention criteria first, before considering the complementary protection grounds.

VII Conclusion

The introduction of complementary protection into Australian law is a long-awaited and positive development. It implements domestically most of Australia’s international legal obligations relating to *non-refoulement* under human rights law, and provides a concrete, upfront basis on which people can claim protection on these grounds in Australia. In this way, it provides greater transparency and consistency than the current discretionary system, and better aligns Australian law with comparative practices throughout the European Union, Canada, the US, New Zealand, Hong Kong and Mexico.

Nevertheless, it is important to recognise that the amending legislation represents the beginning, rather than the end, of a process of systematically considering human rights-based protection claims in Australian law. Just as the meaning of the ‘refugee’ definition in the Refugee Convention has evolved over time through the ‘living instrument’ approach, so, too, must the interpretation of the complementary protection remain alert to developments in international human rights law. In *Taunoa v Attorney-General*, the New Zealand

²⁰² UNHCR, Submission No 20 to Senate Committee, above n 10, [51].

²⁰³ Saul, above n 114.

²⁰⁴ Senate Committee Report, above n 14, [3.39].

²⁰⁵ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), [90].

Supreme Court drew on UK and US approaches to note that while earlier cases ‘may provide helpful comparisons’ to understand the meaning of cruel, inhuman or degrading treatment, they ‘cannot be treated as binding precedents’,²⁰⁶ since ‘[w]hat amounts to inhuman treatment evolves. It turns on “today’s ... concepts”.’²⁰⁷ This is why it is impossible to draw up a definitive list of types of ill-treatment.

This also means that rights presently not reflected in the legislation as giving rise to a *non-refoulement* obligation may need to be included as international and comparative practice develops. Indeed, the UN Human Rights Committee,²⁰⁸ the UN Committee on the Rights of the Child,²⁰⁹ the European Court of Human Rights,²¹⁰ the UN Committee on the Elimination of Racial Discrimination²¹¹ and the

²⁰⁶ [2008] 1 NZLR 429, [93], referring to *Higgs v Minister of National Security* [2000] 2 AC 228, 260.

²⁰⁷ *Taunoa* [2008] 1 NZLR 429, [93] (Elias CJ), citing *Hutto v Finney* 437 US 678 (1978) 685. Similarly, the US Supreme Court has held that the Eighth Amendment must draw its meaning from ‘the evolving standards of decency that mark the progress of a maturing society’: *Estelle v Gamble* 429 US 97 (1976) 102 (Marshall J), in whose judgment Burger CJ and Brennan, Stewart, White, Powell and Rehnquist JJ joined.

²⁰⁸ The Human Rights Committee recognises, at least in principle, that States’ *non-refoulement* obligations may be triggered ‘when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise’: Human Rights Committee, ‘General Comment 15: The Position of Aliens under the Covenant’ (11 April 1986) [5]. See also Human Rights Committee, ‘General Comment No 18: Non-Discrimination’ (10 November 1989); *UN Human Rights Committee General Comment No 31* (21 April 2004), [12].

²⁰⁹ The Committee on the Rights of the Child has made clear that the obligation is ‘by no means limited to’ those provisions (and CRC art 37): Committee on the Rights of the Child, ‘General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin’ (2005) [27]. The language of ‘irreparable harm’ has been used by the Human Rights Committee to describe harm that is comparable to that contemplated by *ICCPR* arts 6 and 7.

²¹⁰ *N v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 26565, 27 May 2008). See eg, art 9 cases: *Razaghi v Sweden* (European Court of Human Rights, Application No 64599/01, 11 March 2003); *Gomes v Sweden* (European Court of Human Rights, Application No 34566/04, 7 February 2006); *Z and T v United Kingdom* (European Court of Human Rights, Application No 27034/05, 28 February 2006); art 6 cases: *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745; *Einhorn v France* (European Court of Human Rights, Application No 71555/01, 16 October 2001); *Mamatkulov and Abdurasulovic v Turkey* (European Court of Human Rights, Grand Chamber, Application Nos 46827/99 and 46951/99, 4 February 2005); *Tomic v United Kingdom* (European Court of Human Rights, Application No 17837/03, 14 October 2003); *F v United Kingdom* (European Court of Human Rights, Application No 17341/03, 22 June 2004); art 4 cases: *Ould Barar v Sweden* (1999) 28 EHRR CD 213.

²¹¹ The Committee on the Elimination of Racial Discrimination has several times stated that: ‘The Committee also urges the State party to ensure, in accordance with article 5 (b), that no person will be forcibly returned to a country where there are substantial grounds for believing that his/her life or health may be put at risk. The Committee recommends that the State party seek cooperation with UNHCR in this regard’: for example, Committee on the Elimination of Racial Discrimination, ‘Consideration of

House of Lords²¹² have all recognised that the principle of *non-refoulement* may extend beyond protection of the right to life and the right to be free from torture or cruel, inhuman or degrading treatment or punishment. The Committee on the Rights of the Child has made clear that the *non-refoulement* obligation applies in *any* case where there are substantial grounds for believing that there is a real risk of ‘irreparable harm’ if the person is removed.²¹³ The House of Lords has stated that, as a matter of principle, any provision of the ECHR could give rise to a *non-refoulement* obligation,²¹⁴ but that the threshold in such cases would be very high.²¹⁵

In his submission to the Senate Committee, Saul helpfully identified three additional bases on which complementary protection could be ‘naturally extended’: first, on the basis of arbitrary deprivation of liberty, ‘which is recognised by international law and the common law as one of the most fundamental of rights violations, particularly in cases of protracted or incommunicado detention, or enforced disappearances’; second, for persecution on any ground (rather than linked to one of the five reasons set out in the Refugee Convention); and third, to prevent return to an unfair or discriminatory criminal trial, amounting to a denial of justice.²¹⁶ In their joint submission, the Refugee Advice and Casework Service (RACS) and the Immigration Advice and Rights Centre (IARC) also suggested the recognition of ‘persons who face a real risk that their rights to protection of their privacy, family and home (under Article 17 of the ICCPR) may be violated if they are returned to their country of origin or former country

Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan’ UN Doc CERD/C/JPN/CO/3-6 (16 March 2010) [23]. This seems an anomalous approach, given it is an unusually low threshold, but given its relevance it is noted here. See also Special Rapporteur on the Right to Food, ‘Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”’, UN Doc A/HRC/4/30 (19 January 2007) [64]: ‘Governments have a legal obligation to help the refugees from hunger’. See also Human Rights Council Advisory Committee, ‘Report to the Human Rights Council on the First Session of the Advisory Committee’, UN Doc A/HRC/AC/2008/1/L.11 (15 August 2008) part 1/6.

²¹² *R v Special Adjudicator, ex parte Ullah* [2004] 2 AC 323 (‘Ullah’); *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 (‘Razgar’).

²¹³ Committee on the Rights of the Child, ‘General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin’ (2005) [27].

²¹⁴ *Ullah* [2004] 2 AC 323, [21], [35], [39]–[49], [52], [53], [62], [67].

²¹⁵ *Ibid* [24]. See also *Razgar* [2004] 2 AC 368, [10]: ECHR art 8 could ‘be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3... an applicant could never hope to resist an expulsion decision without showing *something very much more extreme than relative disadvantage* as compared with the expelling state.’ (emphasis added.) The applicant would need ‘to establish at least a real risk of a flagrant violation of the very essence of the right’: *Ullah* [2004] 2 AC 323, [50] (Lord Steyn).

²¹⁶ Saul, above n 114.

of residence'.²¹⁷ In the UK, such people may be granted Discretionary Leave pursuant to parallel obligations under art 8 ECHR.

Additionally, there are at least three other protection gaps which ought to be addressed in Australian law. First, the complementary protection grounds should be extended (or clarified)²¹⁸ expressly to cover people fleeing situations of conflict or generalised violence, which is already a codified ground for protection in the regional regimes of the EU, Africa and Latin America.²¹⁹ At a minimum, section 36(2B)(c) — which provides an exception to complementary protection in situations of general risk unless an individual is personally at risk — should be deleted or clarified to ensure that people in situations of generalised violence are not denied protection. The Department of Immigration and Citizenship's argument that people fleeing from situations of generalised violence can be responded to by alternative responses in 'specific humanitarian crises'²²⁰ is an unreliable and ad hoc approach, which may only be triggered where large numbers of people have fled a particular situation. It would be preferable to have a specific legislative ground to enable individuals to claim protection on this basis.

Second, Australian legislation needs to respond to the protection needs of stateless persons, who often have substantially similar protection needs to refugees and beneficiaries of complementary protection and who are owed protection under the two statelessness treaties.²²¹ In the Second Reading Speech for the 2009 Bill, the Parliamentary Secretary for Multicultural Affairs and Settlement Services stated that the government

is committed to ensuring that other stateless cases are not left in the too-hard basket. The government is acutely aware of past failures to resolve the status of stateless people in a timely manner. The Minister for Immigration

²¹⁷ RACS and IARC, above n 11.

²¹⁸ Such people may fall within the protection of the provisions on torture or cruel, inhuman or degrading treatment, however the risk is that s 36(2B)(c) might be used to negate this. See discussion at Section IV.K above.

²¹⁹ *Qualification Directive* [2004] OJ L304/12, art 15(c); see also *Council Directive 2001/55/EC of 20 July 2001 on 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* [2001] OJ L212/12. This is in line with customary international law, on which see Goodwin-Gill and McAdam, above n 52, 286ff.

²²⁰ Department of Immigration and Citizenship, Submission No 16 to Senate Committee, above n 10, 6.

²²¹ *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

and Citizenship is committed to exploring policy options that will ensure that those past failures are not repeated.²²²

Neither the Explanatory Memorandum nor the Second Reading Speech for the 2011 Bill make any reference to statelessness. While the complementary protection regime is not necessarily the most appropriate forum for determining statelessness,²²³ it is important that the needs of stateless persons are addressed not merely through ‘policy options’, but rather through the creation of a new visa category in Australian law. The need for a ‘separate and distinct statelessness determination mechanism’ was endorsed by UNHCR in its submissions to the Senate Committee, noting also that it would ‘welcome future discussions with the Government of Australia to ensure these residual cases have access to international protection.’²²⁴ This issue is currently being explored by the government.

Finally, a provision incorporating the safeguard in article 3 of the Convention on the Rights of the Child that the ‘best interests of the child shall be a primary consideration’²²⁵ in all protection claims would help to ensure that the Explanatory Memorandum’s assertion that ‘[c]laims by children will be assessed in an age-sensitive way, in view of the specific needs of children’ is fulfilled.²²⁶ As the legislation presently stands, there is no specific guidance on assessing the claims of (or involving) children.

²²² Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8992 (Laurie Ferguson).

²²³ Although statelessness might be considered within the same single determination procedure: see the Summary Conclusions of the UNHCR-convened Expert Meeting on Stateless Determination Procedures and the Status of Stateless Persons (6–7 December 2010).

²²⁴ UNHCR, Submission No 20 to Senate Committee, above n 10, [55]. See also Refugee Council of Australia, Submission No 10 to Senate Committee, above n 10, 5.

²²⁵ See generally McAdam, above n 9, ch 5; Anna Lundberg, ‘The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children’s Rights’ (2011) 3 *Journal of Human Rights Practice* 49. This is already contained in the EU *Qualification Directive*, recital 17, however a more detailed recital has been proposed which would set out the particular factors to be taken into account: Committee on Civil Liberties, Justice and Home Affairs, *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted* (recast) (COM(2009)0551 – C7-0250/2009 – 2009/0164(COD)) (28 September 2010).

²²⁶ Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), [83]. This approach is also supported by Foster and Pobjoy, above n 10, 17–18; Human Rights Law Resource Centre, Submission No 5 to Senate Committee, above n 10, [20]–[22]. For recent cases that have considered child claimants in the international protection context, see *HS v Secretary of State for the Home Department* [2010] CSIH 97 (Scottish Extra Division, Inner House, Court of Session); *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.