



# National Council of Churches in Australia

## Christian World Service

### ***Fact Sheet: Introducing the Complementary Protection Model***

#### **What processing changes would be required?**

- The model proposes transferring the Minister's discretionary powers to decide on cases engaging Australia's non-Refugee Convention protection obligations (known as complementary protection grounds - i.e. CAT, ICCPR etc) - to the Department of Immigration and Citizenship (DIAC).
- It does not propose removing the Minister's powers to intervene on national or public interest grounds or general humanitarian grounds such as health, medical or family reunion grounds. Only those that trigger Australia's international protection obligations beyond the Refugee Convention.
- The procedure and standards for applying for protection under complementary protection grounds would be the same as when applying for protection under the 1951 Refugee Convention as each relate to Australia's international protection obligations, albeit under different treaties.
- Under the proposed model, a protection visa application would first be lodged at the Department. Departmental refugee status determination staff would then assess the application to see whether the applicant has grounds for refugee status and then complementary protection.
- In the event of a negative decision, the applicant would have the same appeal rights as refugees (i.e. to the Refugee Review Tribunal or RRT and the Federal Court - on the basis of 'an error in law' as opposed to the merits of case).
- Successful applicants would be granted a permanent protection visa with the same rights and entitlements as given to Convention refugees.
- Currently, Ministerial requests are assessed by DIAC staff within the Ministerial Unit and then referred for decision to the Minister. In the transitional phase, these staff would continue to process applications. Instead of processing applications and making referrals, they would be deciding on applications.

#### **What are the advantages of the Model?**

1. Allows for expedited processing of complementary protection claimants.
2. Reduces the cost of:
  - detention,
  - DIAC refugee status determination,
  - RRT review costs,
  - government-funded and Red-Cross-administered Asylum Seeker Assistance Scheme income support, and
  - community or church-provided charity.
3. Reduces the length of detention and the consequent impact of long-term detention on applicants, their family members and the community.
4. Increased transparency would allow for greater accountability in decision-making (currently the Minister cannot be compelled to make a decision and a court cannot review any decision made. Nor is any reason given for the decision).

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5. Increased transparency and accountability would enable Australia to demonstrate that it is satisfying its international treaty obligations.
6. Allows for the review of first instance DIAC decisions by the Refugee Review Tribunal and the judiciary.
7. Allows for more consistency in decisions (Minister's have always used this power differently).
8. Faster status determination will further reduce any incentive to prolong stay in Australia by lodging non-genuine claims. It would also reduce incentives for Migration Agents to recommend this course of action to extend ones stay.
9. Given current concerns over the length of time taken to process applications, which the former Immigration Minister, Amanda Vanstone, believes leads to situations where compelling "public interest" cases develop through extended time spent in the community (i.e. through developing ties with Australia), the introduction of a first instance decision would reduce the number of public interest claims.
10. Reduce appeals to the Federal Court (after being refused by DIAC and RRT, many applicants appeal to the Federal Court before requesting Ministerial intervention) and increasing appeals to the UN Committee on Torture.
11. Reduce the burden on the Minister of the day to make decisions that should properly be done by the Department.
12. Reduce potential for damaging allegations of Ministerial abuse of powers, as raised during the Inquiry into Ministerial Discretion.

### **What impact would it have for the main groups of concern?**

#### **1. Asylum Seekers in the Community**

- Currently, those clearing immigration and then making an application for asylum must first apply as a refugee to DIAC and then appeal to the RRT and receive negative decisions from both before they can lodge a request to the Minister on complementary protection grounds. This means that they often have to wait for months, or even years, before their claims are considered against relevant criteria.
- Additionally, while their case is before the Minister, they are not necessarily eligible for the government-funded, Red Cross-administered Asylum Seeker Assistance Scheme (ASAS) and often have no work rights, and thus no Medicare coverage.
- Under the proposed model, asylum seekers making an application to DIAC for a protection visa would automatically be screened to see whether they have grounds for a complementary protection visa.
- This would save valuable DIAC and RRT status determination resources and save making ASAS payments to those with grounds for complementary protection obliged to apply for refugee status at DIAC and RRT for reasons outlined above.
- Faster status determination would further deter claims made by some applicants to prolong their stay in Australia.
- Income support is already available through ASAS during DIAC refugee status determination and appeals to the RRT.

## **2. Asylum Seekers in Detention**

- Currently, protection visa applicants in detention with grounds for complementary protection must apply as a refugee to the DIAC and appeal to the RRT and receive negative decisions from both before they can appeal to the Minister on complementary protection grounds. This process effectively prolongs the detention of protection visa applicants, as they must first be considered under irrelevant criteria by the DIAC and the RRT before being able to appeal under relevant criteria to the Minister.
- Being forced to first apply under such erroneous criteria significantly lengthens the period of detention and creates a significant incentive to voluntarily return home. Indeed, the lack of a 'first instance' decision on complementary protection grounds and the implication of prolonged detention could be considered to amount to duress in accepting voluntary return.
- Under the proposed model, asylum seekers making an application to DIAC for a protection visa would automatically be screened to see whether they have grounds for a complementary protection visa.
- This would save valuable DIAC and RRT refugee status determination resources, substantially reduce the cost of detention per protection visa applicant and significantly reduce the effects of long-term detention on each individual applicant and their family members.
- Faster status determination would further deter claims made by some applicants to prolong their stay in Australia.
- Those with grounds for applying for complementary protection would not be deterred from making an application, as they would have access to income support through ASAS during their primary application.

## **3. TPV Holders**

- Currently, there is no form of complementary protection available for TPV holding refugees whose further protection visa application is unsuccessful, but who still have a compelling humanitarian reason not to be returned (other than appealing to the Minister to exercise her non-compellable discretionary powers under section 417).
- Under the proposed model, TPV holders applying for further protection visas would be automatically assessed against refugee Convention and complementary protection criteria.

## **4. Nauru Detainees**

- Detainees on Nauru applying for protection visas would be automatically assessed for refugee and complementary protection grounds. During previous processing on Nauru, some groups were assessed against complementary protection criteria.

## **5. Requirements of the Model**

- Draft legislation to enact the changes required by the model with strict codification of complementary protection criteria.
- DIAC refugee status determination staff (with the exception of Ministerial Interventions Unit staff) and RRT staff would have to be trained to assess applications for a protection visa against the criteria for complementary protection.
- Education about the new system.

Further documents available:

- UNHCR Executive Committee Conclusion on Complementary Protection
- UNHCR, Australian government, NGO position papers
- Complementary Protection and Judicial Review
- Comparative International Practice regarding Complementary Protection

For more information, please contact:

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