

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

Senate Legal and Constitutional Affairs Committee

23 January 2014

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Acknowledgement

The Law Council wishes to acknowledge the assistance of its National Human Rights Committee and the Human Rights Committee of the Law Society of South Australia in the preparation of this submission.

Executive Summary

The Law Council of Australia is concerned by the introduction of the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* (Cth) into Parliament on 4 December 2013. If enacted, this Bill would remove provisions in the *Migration Act 1958* (Cth) that enable those at real risk of execution, torture and other significant harm to apply for a protection visa under the "complementary protection" regime.

The complementary protection regime was introduced in 2012 to ensure that persons who do not meet the definition of "refugee" in *The Convention relating to the Status of Refugees* as amended by the 1967 Protocol ("the Refugee Convention") but who face a real risk of significant harm such as death, torture or cruel, inhuman or degrading treatment on return to another country, can apply for a protection visa and then be assessed against the other requirements of the Migration Act.

Removing these provisions would mean that even if a person can show that they face a real risk of significant harm if returned home they will not be eligible to apply for a protection visa, unless they meet the Refugee Convention criteria. Rather they will be left reliant upon the exercise of non-compellable, non-reviewable Ministerial discretion as to what visa - if any - they might be granted.

The Law Council is of the view that the exercise of Ministerial discretion does not provide appropriate or adequate protection against the risk of return to a place of significant harm and therefore does not adequately acquit Australia's international protection obligations under the *International Covenant on Civil and Political Rights* ("the ICCPR"), the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, the *Convention on the Rights of the Child* ("the CROC") and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("the CAT") from which Australia's complementary protection obligations flow.

Past experience suggests that reliance on the exercise of Ministerial discretion can also be an inefficient, inconsistent and costly approach to determining a person's protection status. This experience is likely to be heightened should the Bill be passed, given the lack of access to legal advice for asylum seekers following the withdrawal of funding for the Immigration Advice and Application Assistance Scheme and the absence of a clear protection status determination process in place for asylum seekers arriving by boat.

In this submission the Law Council outlines the reasons for its view that a statutory system of complementary protection is a necessary guard against the risk of exposing people to serious harm and more effective and efficient than a system reliant on the exercise of ministerial discretion. The submission also includes some comments on the threshold for assessing risk under the existing provisions and outlines some features of the Bill that it considers are contrary to rule of law principles.

In light of these concerns, the Law Council recommends that the Bill not be passed.

Introduction

1. The Law Council of Australia is grateful for the opportunity to provide the following submission to the Senate Legal and Constitutional Affairs Committee (“the Committee”) in response to its inquiry into the *Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013* (“the Bill”).
2. This Bill, introduced on 4 December 2013 by the Hon. Scott Morrison MP, Minister for Immigration and Border Security (“the Minister”), seeks to amend the *Migration Act 1958* (Cth) (“the Migration Act”) to remove the criterion for the grant of a protection visa on the basis of complementary protection grounds and to make consequential amendments.
3. The Law Council opposes the passage of the Bill, and encourages the Committee to recommend that it not be passed.¹
4. The Law Council has previously supported the complementary protection provisions. These protections enable people who face harm or persecution on grounds outside of those covered by the *Convention relating to the Status of Refugees* (“the Refugee Convention”) to apply for protection under the Migration Act.
5. If complementary protection provisions are removed from the Migration Act, those fearing torture and other significant harm will be dependent upon the exercise of non-compellable, non-reviewable Ministerial discretion to grant a visa, which prior to the introduction of the complementary protection visas, was only exercisable after the rejection of a protection visa claim by the Refugee Review Tribunal (“the RRT”).
6. The Law Council notes that this Committee has previously considered the merits of the complementary protection regime in detail when it enquired into a 2009 Bill which sought to introduce protections very similar to those ultimately enacted in March 2012.²
7. The majority of the Committee recommended that the Bill be passed with some amendments relating to the type of harm that would be required to be established under the new provisions, and that certain exemption provisions be reviewed. In making these recommendations it noted that the Senate References Committee had on several previous occasions recommended the introduction of complementary protection legislation, as had the Senate Select Committee on Ministerial Discretion in Migration Matters in 2004.
8. The Law Council remains of the view that the complementary protection provisions, which have now been in operation for just under two years, can be shown to be necessary to address genuine protection needs and preferable to a non-statutory approach.

¹ The Law Council issued a Media Statement to this effect on 6 December 2013, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediastatements/1307%20--%20Proposed%20Reforms%20-%20Complementary%20Protection%20Provisions.pdf>.

² Senate Legal and Constitutional Affairs Legislation Committee, *Report on Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009, available at: http://www.aph.gov.au/binaries/senate/committee/legcon_ctte/migration_complementary/report/report.pdf (“Senate Committee Inquiry into 2009 Bill”).

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9. This submission outlines the Law Council's reasons for this view, as well as providing a summary of the current provisions and the proposed amendments. The Law Council also draws the Committee's attention to its long standing concerns relating to the lack of a clear protection status determination process for asylum seekers who have arrived in Australia by boat, and the lack of access to legal advice for people in immigration detention in Australia or those released into the community on restrictive bridging visas. Since the election of the current Commonwealth Government in September 2013, no protection claims made by asylum seekers arriving by boat have been assessed. No process for assessing such claims has been announced.
 10. The Government has also withdrawn funding for the Immigration Advice and Application Assistance Scheme ("the IAAAS"), leaving many thousands of asylum seekers³ reliant on pro bono legal advice to understand and exercise their legal rights and with little assistance to outline their claim in an appropriate written form. Even where assistance is gained, the legal process for determining protection claims remains unclear. This creates an environment of uncertainty, prolonged detention or restrictions on liberty and a general deterioration of the rights and wellbeing of those seeking asylum in Australia. It also creates a growing administrative and financial burden for the Department of Immigration and Border Security.
 11. This state of legal uncertainty underscores the need to retain the complementary protection regime currently contained in the Migration Act. The Law Council considers that this regime, particularly when accompanied by access to legal advice, forms part of a fair and transparent statutory protection process that should be available to all persons fleeing persecution and other human rights violations regardless of their mode of arrival.

³ The Department of Immigration and Border Security provided the following information about the number of asylum seekers in Australia in its opening statement to the November 2013 Senate Estimate Hearings before the Senate Committee on Legal and Constitutional Affairs "From September 2008 to 15 November 2013, we have seen some 51 399 people arrive illegally excluding crew. Of this number around 5800 are in held detention, around 3300 are in community detention, around 22 900 in the community on a bridging visa and around 1800 in offshore processing centres. The remainder have either been voluntarily or involuntarily removed or been granted a permanent visa. "Supplementary Budget Estimates hearing, Parliament House, Canberra – 19 November 2013, Martin Bowles PSM Secretary, Department of Immigration and Border Protection, available at: <https://www.immi.gov.au/about/speeches-pres/transcript-opening-statement-2013-11-19.htm>. Since the election of the Coalition Government and the withdrawal of funding for the IAAAS in September 2013, none of those asylum seekers who have arrived by boat and remain in Australia have access to assistance under the IAAAS. Those previously entitled to assistance under the IAAAS have also been unable to access such assistance.

Current Complementary Protection Provisions

Introduction of the Complementary Protection Regime

12. “Complementary protection claims” are claims raising Australia’s non-refoulement obligations under the ICCPR, the Second Optional Protocol to the ICCPR, the CROC and the CAT.
13. Prior to 2012, there was no mechanism within the Migration Act enabling the Department of Immigration and Citizenship (“DIAC”) to assess, at first instance, claims that might engage Australia’s non-refoulement obligations under treaties other than the Refugee Convention. Claims for complementary protection could only be decided by the Minister personally following rejection of applications for protection visas based on the criteria relating to the Refugee Convention by DIAC and a tribunal.
14. The complementary protection framework was introduced into the Migration Act by the *Migration Amendment (Complementary Protection) Act 2011 (Cth)* to

*... establish an efficient, transparent and accountable system for considering complementary protection claims, which will both enhance the integrity of Australia’s arrangements for meeting its non-refoulement obligations and better reflect Australia’s longstanding commitment to protecting those at risk of the most serious forms of human rights abuses.*⁴
15. The complementary protection provisions allow claims made by visa applicants that may engage Australia’s non-refoulement obligations (as per the above mentioned human rights instruments) to be considered under a single protection visa application process, with access to the same decision-making framework that applies to applicants who make claims that may engage Australia’s obligations under the Refugee Convention.⁵ Under these provisions, a protection claim must first be assessed against the Refugees Convention.⁶ The complementary protection criteria only require consideration if the person is found not to be a refugee.
16. Decisions to refuse to grant a protection visa on complementary protection grounds may be reviewed in the same way as decisions to refuse to grant a protection visa on the Refugee Convention grounds. However, the RRT does not have jurisdiction to review a decision under section 36(2C)(a) or (b) of the Migration Act, which are the complementary protection ‘exclusion clauses’ (described below). Decisions made pursuant to these provisions are reviewable by the Administrative Appeals Tribunal (“the AAT”).
17. It is also noted that those applicants who fall within the definition of “unauthorised maritime arrivals”⁷ (such as those arriving in Australia by boat without a visa), are

⁴ Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2011*, available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/r4522_ems_03449275-3365-4a8f-b450-70dfc891c105%22;rec=0.

⁵ Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2011*, available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/r4522_ems_03449275-3365-4a8f-b450-70dfc891c105%22;rec=0.

⁶ Section 36(2)(aa)

⁷ This term is defined in the Migration Act s5AA.

precluded from making a valid application for a protection visa under any of the grounds contained in section 36 of the Migration Act, unless the Minister exercises his or her discretion under subsection 46A(2) to 'lift the statutory bar' and allow an unauthorised maritime arrival to make an application for a visa, if the Minister thinks that it is in the public interest to do so.⁸

18. Since the election of the Government in September 2013, it appears that the Minister has not exercised his discretion under section 46A(2) to allow illegal unauthorised maritime arrivals to apply for a protection visa in Australia. The Government is also continuing to pursue a policy introduced by the former Labor Government, which provides that all unauthorised maritime arrivals will be liable to be transferred to a regional processing country for the determination of their protection claims, and for settlement if they are found to be owed protection. The processes which will apply to the assessment of protection claims made by asylum seekers who have arrived by boat and remain in Australia remain uncertain.
19. The combination of these policies severely limits access by asylum seekers who arrive by boat to the current complementary protection provisions in subsection 36(2) of the Migration Act. However, it is also noted that the amendments proposed in the Bill would also apply to people seeking protection who have entered Australia with a valid visa, such as a student or tourist visa.

Content of the Current Provisions

20. Subparagraph 36(2)(aa) of the Migration Act provides for the grant of a protection visa in circumstances where a non-citizen has been found not to be owed protection obligations under the Refugee Convention, but 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. Subparagraph 36(2)(c) also provides that a non-citizen in Australia who is a member of the same family unit as a non-citizen who meets the criteria in subparagraph 36(2)(aa) and holds a protection visa can also apply for a protection visa under these provisions.
21. Pursuant to subsection 36(2A), a non-citizen will suffer significant harm if he or she:
- will be arbitrarily deprived of his or her life; or

⁸ For a period during 2009 to 2011, if the Minister exercised this discretion, asylum seekers arriving by boat (known as 'offshore entry persons') were processed according to a process that mirrored the statutory process in providing for an initial assessment of their protection claims by an officer of DIAC followed by an independent review by an external reviewer. However this process did not allow access to merits review in the RRT. Following a number of policy changes made as a result of the M70 decision in August 2011, the Government announced that from 24 March 2012, it would allow access to the statutory process for asylum seekers arriving by boat. This access has since been affected by the provisions of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* ('the Regional Processing Act'), which subjects asylum seekers arriving by boat since 13 August 2012 to the possibility of transfer to a regional processing country. Under the Regional Processing Act, 'offshore entry persons' were subject to regional processing arrangements and are liable to be transferred to Nauru or PNG. In May 2013, the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* expanded the scope of this regime by providing that all non-citizens that arrive in Australia by boat will be known as 'unauthorised maritime arrivals' and be subject to the regional processing framework provided under the Regional Processing Act unless they are excluded.

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- will have the death penalty carried out on him or her; or
 - will be subjected to torture; or
 - will be subjected to cruel or inhuman treatment or punishment; or
 - will be subjected to degrading treatment or punishment.⁹

22. Section 36(2B) contains exceptions to the protection criteria in sections 36(2)(a) and (aa), stating that there is no 'real risk' of significant harm:

- if the applicant can safely relocate to another part of the country;
- if an authority within the country can provide protection; or
- if the risk is faced by the population generally and not by the non-citizen personally.

23. Section 36(2C) sets out exclusion clauses to the protection criteria in sections 36(2) (aa). These render an applicant ineligible for complementary protection if there are serious reasons for considering that he or she has:

- committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
- committed a serious non-political crime before entering Australia; or
- been guilty of acts contrary to the purposes and principles of the UN.

24. Complementary protection will also be denied if the Minister is satisfied that the applicant is:

- a danger to Australia's security; or
- having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence) is a danger to the Australian community.¹⁰

25. Subsection 36(3) also provides that Australia is taken not to have protection obligations in respect of an applicant who has not taken all possible steps to seek protection in a country apart from Australia, including countries of which the non-citizen is a national. However, this limitation does not apply in certain circumstances, such as in relation to a country in respect of which the applicant has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.¹¹

26. The Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 introducing the complementary protection provisions explained that this criteria:

reflects that a high threshold is required to engage Australia's non-refoulement obligations under the Covenant and the CAT. In order for a non-citizen to

⁹ Migration Act s36(2C)(a).

¹⁰ Migration Act s36(2C)(b) .

¹¹ Migration Act ss36 (4)(5) and (5A).

receive complementary protection, the Minister must have 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 test is reflected in the views of the United Nations Human Rights Committee in its General Comment 31 as to when a non-refoulement obligation will arise under the Covenant.

Australia's non-refoulement obligations under the Covenant and the CAT are absolute and cannot be derogated from. Therefore, even if a non-citizen is considered ineligible to be granted a protection visa, Australia would be bound by its non-refoulement obligations not to remove the non-citizen to a country in respect of which there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen's removal to that country, there would be a real risk that the non-citizen will suffer significant harm.¹²

27. The Explanatory Memorandum to the 2011 Bill also explained that the amendments would:

maintain strong arrangements for protecting the Australian community, by providing that non-citizens who would currently be ineligible for the grant of a protection visa because of exclusion provisions in Article 1F and Article 33(2) of the Refugees Convention, will also be ineligible for the grant of a protection visa when applying on the basis of their complementary protection claims because of similar exclusion provisions. Non-citizens who are ineligible for a protection visa on complementary protection grounds because of the exclusion provisions will not be removed from Australia but will be managed towards case resolution, taking into account key considerations including protection of the Australian community and the individual circumstances of their case.¹³

28. As noted above, the complementary protection provisions only apply to non-citizens who can make a valid application for a protection visa under the Migration Act, meaning that those persons who are prevented from making a valid application for a visa under section 46A of the Migration Act, cannot make a valid application for a protection visa on complementary protection grounds (unless the Minister determines it is in the public interest to do so).
29. Complementary protection visa applicants also remain subject to other provisions of the Migration Act, including section 501(6)(c)(i), where the Minister can refuse or cancel a visa on character grounds such as a person's present or past criminal conduct (paragraph 501(6)(c)(i)) or where there is a significant risk the person represents a danger to the Australian community.

Judicial consideration of the complementary protection provisions

30. The Law Council notes that the complementary protection provisions have been considered in numerous applications to the RRT, the Federal Circuit Court and the Federal Court.

¹² Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2011*, available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/r4522_ems_03449275-3365-4a8f-b450-70dfc891c105%22;rec=0.

¹³ Ibid.

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31. A comprehensive table outlining the nature of these applications and the relevant findings of the court or tribunal has been prepared by the Andrew & Renata Kaldor Centre for International Refugee Law (“the Kaldor Centre”).¹⁴ The trends apparent from these decisions have also been summarised in other publications by the Kaldor Centre, such as its submission to the Parliamentary Joint Committee on Human Rights.¹⁵
 32. The Law Council recommends that this Committee carefully consider this material as part of its inquiry and has highlighted particular areas of relevance later in this submission.
 33. The Law Council draws particular attention to the following unanimous Full Court of the Federal Court decision in *Minister for Immigration and Citizenship v SZQRB*¹⁶ – noting that special leave to appeal to the High Court was refused on 13 December 2013 - which is summarised below.

Proposed Reforms

Content of the proposed reforms

34. The effect of the Bill introduced on 4 December 2013 is to amend the Migration Act and remove the complementary protection provision grounds as criteria for the grant of a protection visa under section 36.
35. The purpose of the Bill is to give effect to the Government’s position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that non-refoulement obligations under the CAT, CROC and the ICCPR are a matter for the Government to attend to in other ways.¹⁷
36. The Bill does this by:
 - removing paragraph 36(2)(aa) from the Migration Act, and limiting the criteria for grant of a protection visa to:

¹⁴ The Andrew & Renata Kaldor Centre for International Refugee Law, based in the University of New South Wales Law School, was established in 2013 by Andrew Kaldor AM and Renata Kaldor AO. Founding Director, Professor Jane McAdam states that the Centre aims to bring a principled, human rights-based approach to the issue of refugee law and policy in Australia by feeding high-quality research into public policy debates and legislative reform. For further information see <http://www.law.unsw.edu.au/news/2013/10/andrew-renata-kaldor-centre-international-refugee-law-launched#sthash.paS2KaAD.dpuf>. See more at: <http://www.law.unsw.edu.au/news/2013/10/andrew-renata-kaldor-centre-international-refugee-law-launched#sthash.paS2KaAD.dpuf>.

¹⁵ See for example, Jane McAdam and Fiona Chong, *Complementary Protection In Australia: A Review of the Jurisprudence*, University of NSW, Kaldor Centre, 2013, available at: http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cp_rrt_uploaded_5.12.13.pdf; see also the Kaldor Centre’s *Submission to the Parliamentary Joint Committee on Human Rights Complementary Protection*, 6 December 2013, available at: http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cp_submission_to_jt_cttee_hr_6.12.13.pdf.

¹⁶ [2013] FCAFC 33 (20 March 2013).

¹⁷ The Hon. Scott Morrison MP, Minister Immigration and Border Security, *Second Reading Speech to the Migration Amendment (Regaining Control over Australia’s Protection Obligations) Bill 2013*, House of Representatives, 5 December 2013, available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22r5155%22%20DataSet%3Ahansardr,hansards%20Title%3A%22second%20reading%22;rec=1.

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- non-citizens in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugee Convention as amended by the Refugee Protocol; or
 - non-citizens in Australia who are a member of the same family unit as these non-citizens mentioned above and that non-citizen holds a protection visa.
- removing those features of section 36 that contain exceptions and exemptions from the complementary protection grounds, such as subsections 36(2A), 36(2B) and 36(2C) of the Migration Act;
 - making changes to subsection 36(4) which currently provides guidance as the scope of Australia's protection obligations;
 - making changes to the existing provisions in section 411 of the Migration Act that outline what decisions relating to protection visas are reviewable by the RRT and which decisions are reviewable by the AAT. The effect of these changes is to clarify that a RRT-reviewable decision is:
 - a decision to refuse to grant a protection visa (other than a decision that was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugee Convention);
 - a decision to cancel a protection visa (other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugee Convention).
 - applying the changes to current and future applications for protection visas:
 - the Bill provides that the changes apply in relation to each application for a protection visa made on or after the day the amendments commence; or made prior to the commencement of the amendments, where there has been no primary decision made on that application. The Bill also provides that where there has been a primary decision and the matter is under review or has been the subject of review or judicial review (and has been remitted), the application will not be reviewed against the complementary protection criteria in paragraphs 36(2)(aa) or 36(2)(c).
 - the changes also mean that if an applicant had a primary decision made prior to the commencement of this Bill to refuse to grant a protection visa, and the decision was made relying on the complementary protection criteria in paragraphs 36(2)(aa) and 36(2)(c), the RRT will be required to apply the amendments, and not the law that applied at the time of the primary decision. The RRT will only be able to commence or continue a review on the basis of a refusal to grant a protection visa, relying on the applicant not meeting the Refugee Convention protection grounds in paragraphs 36(2)(a) or 36(2)(b).
 - the changes also make it clear that any person who had a protection visa application refused on the basis of the complementary protection grounds would not be able to make a further application for a protection visa, unless the Minister exercises the non-compellable power under section 48B to enable the person to make a valid application for a protection visa.

Rationale for the proposed reforms

37. In his Second Reading Speech introducing the Bill, the Minister stated that:

[i]t is the government's position that it is not appropriate for Australia's non-refoulement obligations under the CAT and the ICCPR to be considered as part of a protection visa application under the Migration Act. Such a measure creates another statutory product for people smugglers to sell.¹⁸

38. When introducing the Bill, the Government stated that although it is removing the complementary protection regime, Australia's non-refoulement obligations will be considered through an administrative process, as was the case prior to March 2012.¹⁹ Under this process, the Minister may exercise his or her personal and non-compellable intervention powers in the Migration Act to grant that person a visa, for example, if the Minister is satisfied that the person engages Australia's non-refoulement obligations under the CAT and the ICCPR. Considerations of this nature could also occur as part of pre-removal procedures, which are undertaken by departmental officials to assess whether the removal of an asylum seeker could engage Australia's non-refoulement obligations.²⁰ The Explanatory Memorandum to the Bill states that:

The Minister for Immigration and Border Protection's personal powers have the advantage of being able to deal flexibly and constructively with genuine cases of individuals and families whose circumstances are invariably unique and complex, and who may be disadvantaged by a rigidly codified criterion.

It will allow the Minister for Immigration and Border Protection to exercise his or her intervention powers to grant the most appropriate visa dependent upon the individual circumstances of the case by taking into consideration not only Australia's non-refoulement obligations, but also Australia's broader humanitarian considerations, in an administrative process. This is particularly relevant where people may be caught up in situations of civil strife and unable to return home in the short term.²¹

39. During the second reading speech introducing the Bill, the Minister also commented on the relatively small number of protection visas granted on complementary protection grounds, noting that only 57 applications have satisfied the requirements for the grant of a protection visa on complementary protection grounds. The Minister queried the necessity to introduce complementary protection provisions, which he described as "a costly and inefficient way to approach the issue given the small number of people who meet the complementary protection criterion."²² The Minister also stated that the visas were

¹⁸ Ibid.

¹⁹ Explanatory Memorandum to the Bill, available at:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr5155%22>.

²⁰ Ibid.

²¹ Ibid.

²² The Hon. Scott Morrison MP, Minister Immigration and Border Security, *Second Reading Speech to the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013*, House of Representatives, 5 December 2013, available at:

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22r5155%22%20DataSet%3Ahansardr_hansards%20Title%3A%22second%20reading%22;rec=1.

being granted to people who had committed serious crimes in their homelands and others fleeing because of their links to criminal gangs.²³

40. Further, the Minister also claimed that the complementary protection provisions are unnecessary for Australia to meet its obligations under international law, noting that:

*Australia accepts that the position under international law is that Australia's non-refoulement obligations under the CAT and the ICCPR are absolute and cannot be derogated from. However, there is no obligation imposed upon Australia to follow a particular process or to grant a particular type of visa to those people for whom non-refoulement obligations are engaged. This is particularly the case where people are of security or serious character concern and they do not meet the criteria for grant of a protection visa.*²⁴

41. The Minister expressed the view that since the introduction of the complementary protection obligations, courts have broadened the scope of the interpretation of Australia's obligations under the CAT, CROC and the ICCPR beyond that which is required under international law. Of particular concern to the Minister is how courts approach the test for assessing whether a person engages Australia's complementary protection obligations, which the Minister describes as being "lowered to the same 'real chance' threshold as under the Refugees Convention".²⁵
42. The next section of this submission seeks to address a number of the points raised by the Minister in support of the rationale for the amendments proposed in the Bill.

Law Council's Concerns

43. The Law Council has a history of advocating for greater implementation of Australia's international human rights obligations, including those obligations in relation to non-refoulement (or non-return) of persons in certain circumstances under instruments such as the Refugee Convention, the ICCPR, CROC and the CAT.
44. Since 1999, the Law Council has advocated for a legislative scheme for granting protection visas for asylum seekers which complements how Australia's obligations under the Refugee Convention is implemented.
45. The Law Council has previously made submissions about the inadequacy of a scheme reliant on Ministerial discretion in relation to complementary protection and has called for legislative incorporation of other non-refoulement obligations through a complementary protection scheme.²⁶ The Law Council supported the

²³ Ibid. See also <http://www.news.com.au/national/breaking-news/govt-to-remove-special-protection-visa/story-e6frku9-1226775007083>.

²⁴ The Hon. Scott Morrison MP, Minister Immigration and Border Security, *Second Reading Speech to the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013*, House of Representatives, 5 December 2013, available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22r5155%22%20DataSet%3Ahansardr,hansards%20Title%3A%22second%20reading%22;rec=1.

²⁵ Ibid.

²⁶ See *Submission to the Inquiry into the Operation of Australia's Refugee and Humanitarian Program*, June 1999; *Submission to the Inquiry into the Migration Amendment (Judicial Review) Bill 2004*, May 2004;

Migration Amendment (Complementary Protection) Bill 2009 upon which the 2011 Bill was based, and which ultimately resulted in the introduction of the complementary protection provisions in March 2012.²⁷

46. A number of the Law Council's Constituent Bodies have also made submissions and public statements in strong support of the complementary protection regime. For instance, the Law Society of New South Wales stated that an administrative process for dealing with complementary protection provides "insufficient legislative protection" for Australia's international non-refoulement obligations.²⁸ The Law Institute of Victoria (the LIV) also made a submission in respect to the 2009 Bill, welcoming the complementary protection provisions and noting the shortcomings of ministerial intervention as a means of giving effect to Australia's non-refoulement obligations.²⁹ The LIV noted that ministerial discretion is non-compellable, non-reviewable and non-delegable and can be exercised only after a person has been refused a visa by DIAC and on review by a tribunal. It submitted that the previous administrative process was inefficient and does not provide for a sufficient guarantee of fairness and integrity.
47. The Law Council also has a policy of absolute opposition to the death penalty.³⁰ The Law Council supported the legislative implementation of the non-refoulement obligations under the ICCPR as a means of reinforcing the Australian Government's opposition to the death penalty. These obligations include the obligation to consider the risk that a person's rights under Article 6 of the ICCPR in relation to the right to life might be violated if they are returned to another country.
48. In line with this policy, the Law Council holds concerns that the removal of the complimentary protection legislative regime from the Migration Act would detract from the Australian Government's opposition to the death penalty, by removing the statutory obligation to consider the risk that a person's right to life might be violated if they are returned to another country.
49. In addition, the Law Council opposes the Bill on the following grounds:
- complementary protection provisions are more efficient and effective than the exercise of Ministerial discretion;
 - complementary protections are necessary to guard against the risk of exposing people to serious harm; and

Submission to the Inquiry into the Administration and Operation of the Migration Act 1958, Sep 2005 available at www.lawcouncil.asn.au.

²⁷ The Migration Amendment (Complementary Protection) Bill 2009 (2009 Bill) was introduced in the House of Representatives on 9 September 2009 by the Hon. Laurie Ferguson M.P., Parliamentary Secretary for Multicultural Affairs and Settlement Services. On 9 September 2009, the Senate referred the 2009 Bill to the Senate Legislation Committee on Legal and Constitutional Affairs, for inquiry and report by 16 October 2009. The Bill lapsed at the prorogation of the Parliament. The Law Council made a submission to this inquiry, available at www.lawcouncil.asn.au. On 24 February 2011, the *Migration Amendment (Complementary Protection) Bill 2011* (2011 Bill) was introduced into Parliament. It has been altered to reflect some of the changes that were recommended by the Senate Committee and in other submissions made to the Minister for Immigration. The 2011 Bill was passed and the amendments came into effect in March 2012.

²⁸ See the Australian International Lawyer 2009 No. 12 p 2, available at:

<http://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/063678.pdf>.

²⁹ Law Institute of Victoria, Submission to the Senate Legal and Constitutional Affairs Inquiry into the *Migration Amendment (Complementary Protection) Bill 2009* (September 2009).

³⁰ The Law Council's Death Penalty Policy was approved by Directors in 2008. A copy is available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LCA_death_penalty.pdf.

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- complementary protection has been used sparingly and for genuine protection reasons.

50. The following section of the submission provides further detail in relation to each of these issues.

51. The Law Council also provides some comments in relation to the threshold for assessing risk under the complementary protection provisions, and outlines a number of general concerns that features of the Bill are contrary to rule of law principles.

Complementary protection provisions preferable to reliance on exercise of Ministerial discretion

52. If the complementary protection provisions are removed from the Migration Act by this Bill, there will be no statutory mechanism for individuals seeking asylum in Australia to have 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. Such applicants will be reliant upon the exercise of the Minister's personal discretionary "public interest" powers, such as those contained in section 417 of the Migration Act.

53. Section 417 relevantly provides that:

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

(2) In exercising the power under subsection (1) on or after 1 September 1994, the Minister is not bound by Subdivision AA or AC of Division 3 of Part 2 or by the regulations, but is bound by all other provisions of this Act.

(3) The power under subsection (1) may only be exercised by the Minister personally.

...

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

54. The Explanatory Memorandum to the Bill states that personal powers such as that contained in section 417 " have the advantage of being able to deal flexibly and constructively with genuine cases of individuals and families whose circumstances are invariably unique and complex, and who may be disadvantaged by a rigidly codified criterion".³¹ However the Law Council submits that the experience prior to the introduction of the complementary protection provisions suggests a different outcome.

³¹ The other personal, non-compellable intervention powers identified in the Explanatory Memorandum to the Bill include sections 195A, 351, 391, 454 and 501J of the Migration Act.

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55. Prior to 2012, those seeking protection in Australia on grounds outside of the Refugee Convention would be subject to lengthy delays and uncertainty in terms of both the assessment process and outcome of their claim. In many cases they would face an ongoing risk that they would be returned to a place of harm.
56. For example, prior to the introduction of the complementary protection provisions, a person in genuine fear of torture or other forms of serious harm who did not also meet the Refugee Convention definition would first have to apply for a protection visa under section 36 although it was known that such application was bound to fail. This application would then have to be considered and rejected at the departmental level, and then the person would have to seek review of this decision in a tribunal. Only once the tribunal had also rejected the claim could the person seek the Minister's intervention under section 417. However, even then, the Minister would be under no obligation to consider the person's claim for protection, or to apply principles of natural justice to the consideration of the claim. A negative decision by the Minister would also not be subject to merits review.
57. The Law Council notes that the inadequacies of an approach reliant on the exercise of executive discretion were also mentioned by this Committee in its inquiry into the 2009 Bill, where the majority of the Committee observed that the reliance on Ministerial discretion "is widely considered to be inefficient and unnecessarily burdensome on all parties".³² The reasons for this conclusion were clearly set out in the Department of Immigration's evidence at the 2009 inquiry, which set out the unnecessary requirements and delays involved, and was quoted by the Committee in making the conclusion³³:
58. The inadequacies of an approach reliant on Ministerial discretion have also been summarised by Professor McAdam as follows:
- Former Immigration Minister Chris Evans, who originally sought to introduce complementary protection, regarded the section 417 process as an incredible waste of ministerial time, with over 2,000 requests received each year. He also lamented that he was single-handedly 'playing God' with asylum seekers' futures. The system was described in Parliament as 'inefficient and time-consuming', adding 'stress to the applicants', and causing 'excessive uncertainty and delays'. The process also suffered from allegations of political interference, favouritism and arbitrariness, inconsistent with basic principles of the rule of law.*³⁴
59. The vast majority of other sections identified in the Explanatory Memorandum as containing personal powers for the Minister to intervene to grant a protection visa on complementary protection grounds, such as sections 351, 391, 454 and 501J of

³² Senate Legal and Constitutional Affairs Legislation Committee, *Report on Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009, available at:

http://www.aph.gov.au/binaries/senate/committee/legcon_ctte/migration_complementary/report/report.pdf.

³³ Senate Legal and Constitutional Affairs Legislation Committee, *Report on Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009, p 3, citing the Department of Immigration and Citizenship Submission, p 2, available at:

http://www.aph.gov.au/binaries/senate/committee/legcon_ctte/migration_complementary/report/report.pdf

³⁴ See Kaldor Centre, Submission to the Parliamentary Joint Committee on Human Rights Complementary Protection, 6 December 2013, available at:

http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cp_submission_to_jt_cttee_hr_6.12.13.pdf.

the Migration Act, also require a decision to be made by a tribunal prior to the Minister's power being exercised.

60. By contrast, the Law Council is of the view that the complementary protection grounds in section 36(2) of the Migration Act enable decision makers to assess from the outset whether a person was at risk of one of the specified human rights violations. This upfront process avoids the financial expense, time and human suffering associated with long periods of uncertainty experienced by applicants who would otherwise be required to wait until their protection visa claims have been rejected at both the departmental and tribunal level before requesting that the Minister exercise his or her personal discretion. Under the statutory approach, the evidence relevant to the application is tested in a consistent and lawful manner while it remains relatively fresh, rather than being ventilated over years due to significant administrative delays.
61. The Law Council notes that section 195A of the Migration Act also provides the Minister with a non-compellable, non-reviewable power to intervene and grant a person who is in immigration detention with a visa. This power can be exercised without requiring an applicant to first exhaust a tribunal process. However, for the reasons described above, this process suffers from a lack of transparency and consistency if it is relied upon as an alternative to a statutory system of complementary protection. Past experience suggests that significant backlogs of applications for consideration by the Minister under these powers can develop, leaving applicants at risk of prolonged immigration detention or return to places where they are at real risk of serious harm, including torture or death. There are also concerns that applicants are at risk of being denied procedural fairness as a result of the powers being exercised personally by the Minister, given the less transparent process involved.
62. The Law Council further notes that the existence of a statutory scheme of complementary protection does not remove the discretionary power of the Minister to grant a visa for compassionate or humanitarian reasons, for example pursuant to sections 195A or 417 of the Migration Act, if the Minister considers it is in the public interest to do so, meaning that the flexibility to consider the circumstances of a particular individual (as described in the second reading speech to this Bill) remains open to the Minister under the existing regime.
63. The Human Rights Committee of the Law Society of South Australia (LSSA), one of the Law Council's constituent bodies, has also raised the concern that removing the existing provisions could be costly. Although the Explanatory Memorandum to the Bill suggests that the cost of removing the existing complementary protection provisions would be low, the LSSA Committee questions how this is calculated given that it will necessarily require more people to access the RRT on their way to accessing Ministerial intervention. Applicants may "hold out" longer in the process in the hope that the Minister will intervene if they are advised that there are certain decisions that only the Minister can make. By contrast, under a statutory approach, applicants can be better advised about the prospects of success from the beginning of their application. If assessed at the departmental level against both criteria, an unsuccessful applicant may be less inclined to "hold out" for Ministerial intervention.

SZQRB v Minister for Immigration and Citizenship

64. The case of *SZQRB v Minister for Immigration and Citizenship*³⁵ provides a contemporary example of the complexities associated with reliance on a non-statutory scheme of protection and also contains important judicial consideration of the complementary protection provisions in the Migration Act. It is also an example of a case where the then Minister for Immigration made a decision not to use his personal powers under the Migration Act to grant a protection visa irrespective of the merits the particular case and irrespective of Australia's international obligations.
65. In May 2010, a 34 year old Hazara man (known as SZQRB) sought asylum in Australia by boat and was detained on Christmas Island. As SZQRB arrived by boat and without a valid visa, he was ineligible to apply for a protection visa under section 36 of the Migration Act, unless the Minister lifted the statutory bar under section 46A to allow a claim for protection to be made.
66. In SZQRB's case, the Minister did not lift the statutory bar, meaning that SZQRB could not make a valid application for a protection visa, even though his application for a protection visa would have relied upon Australia's international obligations under the Refugee Convention as contained in section 36(2)(a).
67. In accordance with a protection determination process established by the former Rudd Government and applied to unauthorised maritime arrivals at that time, SZQRB applied for a Refugee Status Assessment and was found not be a refugee by a delegate of the Minister and an Independent Merits Reviewer. He was subsequently granted a temporary safe haven (subclass 449) visa and a bridging visa allowing his release from detention.
68. Pursuant to section 91K of the Migration Act, even though SZQRB now held a valid visa, he was still precluded from making a valid application for another visa, including a protection visa. However, the Minister is given a non-compellable power in s 91L to determine that section 91K should not apply to an application by a non-citizen.
69. In March 2012, as part of the non-statutory protection determination process outlined in Guidelines issued by the Minister, DIAC completed an International Treaties Obligations Assessment (ITOA) of SZQRB's claim.
70. The purpose of the ITOA process was to determine whether SZQRB was a person to whom Australia had protection obligations by reason of being party to the CAT and ICCPR. The ITOA specifically noted that article 3 of CAT required Australia not to "expel, return 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".³⁶ The ITOA also noted article 6 ("no-one shall be arbitrarily deprived of his life") and article 7 of the ICCPR ("no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

³⁵ [2013] FCAFC 33.

³⁶ [2013] FCAFC 33 at [238].

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71. Following this process, the Department found that if SZQRB were removed to Afghanistan, Australia would not be in breach of its non-refoulement obligations under the CAT and the ICCPR.
72. In August 2012, SZQRB's temporary visa expired and he was detained in immigration detention. He received a notice from the Department that he would be removed from Australia on 23 September 2012.
73. On 21 September 2012, the Minister made a decision that the return of SZQRB to Afghanistan was consistent with Australia's international obligations (including, but not limited to, Australia's obligations under the Refugee Convention, the ICCPR, and the CAT). The Minister stated that he made this decision on the basis of the recommendation of the Independent Merits Reviewer, the ITOA and the pre-removal clearance process. The Minister also stated that he would not consider, or further consider, the exercise of any of his personal non-compellable public interest powers under the Migration Act, irrespective of whether there was factual or legal error in the decisions of the Independent Merits Reviewer or the Department.
74. SZQRB filed an application in the Federal Court seeking judicial review of the Minister's decision not to exercise his non-compellable public interest powers under the Migration Act. SZQRB claimed that if removed from Australia he was at real risk of being arbitrarily deprived of his life. SZQRB also claimed that the Minister had erred in making a decision not to consider, or not to further consider, the exercise of any of his personal non-compellable public interest powers under the Migration Act with respect to SZQRB.
75. SZQRB contended that the Minister was wrong to rely upon the ITOA for the decision that SZQRB was not a person to whom Australia owed protection obligations under the CAT or the ICCPR.³⁷ SZQRB contended that:
- the ITOA was arrived at in circumstances of jurisdictional error;
 - SZQRB was not accorded procedural fairness; and
 - the assessment was not made according to law because the wrong standard of satisfaction was applied.³⁸
76. In a unanimous decision, the Full Court of the Federal Court held that the ITOA conducted by the Department was not carried out according to law because the wrong test was applied in considering whether SZQRB was entitled to protection under the CAT or ICCPR.
77. The Court found that the ITOA assessed whether it "*was more likely than not*" that SZQRB would be arbitrarily deprived of his life if returned to Afghanistan, noting that this is a higher threshold than the "*real chance*" test used in the Refugee Convention under Australian law.³⁹

³⁷ [2013] FCAFC 33 at [43].

³⁸ [2013] FCAFC 33 at [43].

³⁹ [2013] FCAFC 33 at [240]-[246] per Lander and Gordon J; with whom Besanko, Jagot and Flick JJ agreed on this issue.

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78. The Court held that the correct test to be applied when considering whether SZQRB would suffer significant harm is the “real chance” test and accordingly found that the ITOA did not apply the appropriate standard.⁴⁰
79. The Court also held that the ITOA process was flawed in that SZQRB was not accorded procedural fairness. The Department failed to alert SZQRB of information that was relevant to the decision that Australia’s non-refoulement obligations would not be breached if he were returned.⁴¹
80. The Court made an order for a declaration that the ITOA was not made according to law and issued an injunction restraining the Minister from removing SZQRB from Australia until his claims for protection had been assessed according to law.⁴²
81. In considering the relief to be granted, the Court observed that the Migration Act assumes that the Minister will comply with Australia’s international obligations under the Refugee Convention, the CAT, and the ICCPR before the Minister allows a non-citizen to be returned to the country of his nationality.⁴³ It also observed that once the Minister has detained an unlawful non-citizen for the purpose of assessing that unlawful non-citizen’s claims for protection, the Minister must complete that assessment before the Minister removes that non-citizen from Australia.⁴⁴
82. In a separate judgment, Flick J held that a further order should be made declaring invalid the Minister’s decision not to exercise his non-compellable public interest powers as it was arbitrary or not made in accordance with the objects and purposes of the Migration Act. Flick J observed that it was not possible to discern a legislative intent within the relevant provisions of the Migration Act to confer upon the Minister a power that can be exercised “*irrespective*’ of – the merits of a particular case and “*irrespective of*’ Australia’s international obligations or the “*public interest*” (original emphasis).⁴⁵ Flick J further observed that:

Having been informed of the circumstances peculiar to SZQRB and to an assessment of Australia’s international obligations, the Minister in the present proceedings could not simply put them to one side. In so concluding, it is not necessary to link that decision-making process with whatever objectives the Minister may have had in mind in proceeding to decide “not to consider, or not to further consider, the exercise of any of my personal non-compellable public interest powers”. It is, in particular, not necessary to link that decision-making process necessarily to a desire on the part of the Minister to insulate his decision from judicial scrutiny. It is sufficient to conclude that the Minister’s decision may properly be regarded either as “arbitrary” or as a decision which is not made in accordance with a proper consideration of the objects and purposes of the Migration Act. On either approach, the Minister’s decision is affected by jurisdictional error.⁴⁶

⁴⁰ [2013] FCAFC 33 at [246] –[247].

⁴¹ [2013] FCAFC 33 at [262] per Lander and Gordon J with whom Besanko, Jagot and Flick JJ agreed; note Flick J also made further comments on the denial of procedural fairness in His Honour’s separate judgment.

⁴² [2013] FCAFC 33 [264] and [274].

⁴³ [2013] FCAFC 33 at [270].

⁴⁴ [2013] FCAFC 33 at [270].

⁴⁵ [2013] FCAFC 33 at [386].

⁴⁶ [2013] FCAFC 33 at [387].

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83. When making these findings the Court noted that in March 2012 the complementary protection grounds were introduced in paragraph 36(2)(aa) of the Migration Act. The Court observed that the existence of these provisions was further evidence of Australia's recognition of its international obligations under the CAT and the ICCPR to provide protection to those non-citizens who enter Australia and are entitled to protection.⁴⁷ It found that the introduction of complementary protection grounds were consistent with the scheme of the Migration Act generally, which is to recognise Australia's international obligations and to afford protection to those entitled to protection under the Refugee Convention, the CAT or the ICCPR.⁴⁸
84. In May 2013, the Minister applied to the High Court for special leave to appeal the matter. On 13 December 2013, the full bench of the High Court refused to grant the Minister application for special leave.⁴⁹
85. The decision means that the Minister was restrained from removing the applicant from Australia until his application for protection has been determined according to law.
86. It also has a significant impact on the position of hundreds of other asylum seekers who arrived by boat and had their claims for protection assessed and rejected by the same non-statutory process that may have suffered similar legal flaws as that exposed by the decision in SZQRB. Some of these applicants have remained in immigration detention or on restricted bridging visas for up to four years, without having their claims for protection assessed by a fair legal process. Many also struggle to access legal advice or representation, particularly in light of the withdrawal of funding for the Immigration Advice and Application Assistance Scheme.
87. The Law Council notes that it is not yet clear what administrative processes would be put in place by the current Government to give effect to a non-statutory system of complementary protection should the current Bill be passed. It also notes that under the existing provisions of the Migration Act, as SZQRB arrived by boat without a valid visa, he would be unable to access the complementary protection regime under section 36(2)(aa) unless the Minister exercised his personal powers to allow him to make such an application.
88. However, this case demonstrates that reliance on the exercise of the Minister's personal powers under the Migration Act can fail to ensure that complementary protection claims are assessed according to a fair, lawful process that aligns with Australia's obligations under the CAT and the ICCPR. It also demonstrates that reliance on such powers can lead to an inefficient, time consuming and costly process, particularly where procedural fairness is not guaranteed.
89. *SZQRB v Minister for Immigration and Citizenship* further highlights the need to ensure that a clear and fair process for determining the protection claims of asylum seekers who arrive by boat is put in place by the current Government to determine the claims of many thousands of asylum seekers in Australia in immigration

⁴⁷ [2013] FCAFC 33 at [100].

⁴⁸ [2013] FCAFC 33 at [98]-[99].

⁴⁹ *Minister for Immigration and Citizenship v SZQRB* [2013] HCATrans 323 (13 December 2013). A copy of the transcript of the Special Leave Application is available at: <http://www.austlii.edu.au/au/other/HCATrans/2013/323.html>.

detention or in the community on restrictive bridging visas, including those directly affected by the decision in *SZQRB v Minister for Immigration and Citizenship*. As the Law Council has advocated elsewhere, such a process should be conducted in accordance with procedural fairness, and include review rights and access to legal representation. The failure to put in place such a process leaves vulnerable men, women and children who may have genuine protection claims to face legal uncertainty and prolonged restrictions on their liberty, which can often lead to distress and mental illness.

90. This case is discussed further below in relation to the standard of proof to be applied to the determination of complementary protection claims.
91. The Law Council notes that there are many other case study examples of the risks associated with reliance upon the exercise of Ministerial discretion under the Migration Act, including the case of Dr Mohammed Haneef, which has been well documented through the Clarke Inquiry into that case, and in which the Law Council actively participated.⁵⁰ The use of ministerial discretion under the Migration Act has also been considered by parliamentary committees and other independent inquiries including the Senate Select Committee on Ministerial Discretion in Migration Matters in March 2004.⁵¹

Complementary protections guard against the risk of exposing people to serious harm

92. One of the consequences of relying on ministerial discretion as opposed to a statutory complementary protection regime is the risk that Australia will return people in genuine need of protection to places where they face a real risk of serious harm.
93. As the Minister noted in his second reading speech, Australia accepts it has non-refoulement obligations arising from the ICCPR, the CAT and the CROC that oblige Australia not to return persons to a country where they face a real risk of persecution, arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment. Australia also acknowledges that the non-refoulement obligations under the CAT and the ICCPR are absolute and cannot be derogated from.
94. Despite acknowledging these obligations, the Minister also stated that there is no obligation imposed upon Australia to follow a particular process or to grant a particular type of visa to those people for whom non-refoulement obligations are engaged.
95. While the Law Council accepts that detailed processes for determining a person's protection status have not been prescribed under these Conventions, experience from comparable jurisdictions,⁵² as well as commentary at the international level,

⁵⁰ For details relating to this case and the Clarke Inquiry, including the Law Council's submissions, see <http://www.lawcouncil.asn.au/lawcouncil/index.php/10-divisions/145-mohamed-haneef-case>.

⁵¹ Senate Select Committee on Ministerial Discretion in Migration Matters Report, March 2004, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/minmig/index.

⁵² The Law Council notes that Australia's existing complementary protection provisions align with comparable provisions in the European Union (EU), Canada, the United States (US), and New Zealand. 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

suggests that an approach dependent on the exercise of Ministerial discretion cannot guarantee protection for people for whom Australia's non-refoulement obligations are engaged.

96. As Professor McAdam explains:

The obligations to which complementary protection gives effect are absolute and cannot be derogated from under international law. The Ministerial intervention process is non-compellable, non-delegable and non-reviewable. This means that the Minister has no obligation to consider whether or not to exercise the discretionary power under section 417, and if he does choose to do so, then neither the decision relating to the exercise of the power, nor the ultimate decision, can be reviewed. It is not transparent or subject to procedural fairness considerations.

By its very nature, a discretionary power like this cannot fully comply with Australia's protection obligations under international law. Although international treaties do not prescribe the form in which States are to give effect to their obligations, it is apparent that any provision that contains a non-compellable and non-reviewable discretion is at odds with Australia's duty to respect the principle of non-refoulement under international human rights law.⁵³

97. The Law Council respectfully agrees with this view, which it has expressed in past submissions supporting the introduction of complementary protection provisions.⁵⁴

98. Similar views have been expressed by relevant UN bodies. For example:

- in 2008, the United Nations Committee against Torture recommended, that Australia adopt a system of complementary protection, ensuring that the minister's discretionary powers are no longer solely relied on to meet Australia's non-refoulement obligations under human rights treaties.
- in 2009, the United Nations Human Rights Committee recommended that Australia should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.

Protection and the Content of the Protection Granted [2004] OJ L304/12, arts 2(e), 15 ('EU Qualification Directive'); *Immigration and Refugee Protection Act*, SC 2001, c 27, s 97 (Canada); *Immigration and Nationality Act*, 8 CFR §§208.16, 208.17 (1952) (US); *Immigration Act 2009* (NZ) codifying in part New Zealand's international law obligations conceded by the government in *Attorney-General v Zaoui* [2006] 1 NZLR 289. See also:

http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/images/rrt_manual_jm_6.1.12_final_sent_0.pdf.

⁵³ See Submission to the Parliamentary Joint Committee on Human Rights Complementary Protection, 6 December 2013, available at:

http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cp_submission_to_jt_cttee_hr_6.12.13.pdf.

⁵⁴ See Law Council of Australia and Law Institute of Victoria, *Submission to the Senate Legal and Constitutional Affairs' Inquiry into the Provisions of the Migration Amendment (Complementary Protection) Bill 2009 (Cth)*, 2008, available at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2008-10/migration_complementary/index.

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- the United Nations High Commissioner on Refugees (UNHCR) Executive Committee's Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection,⁵⁵ which urged State parties to the Refugee Convention to:
 - use complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the Refugee Convention;
 - ensure measures to provide complementary protection are implemented in a manner that strengthens, rather than undermines, the existing international refugee protection regime; and
 - provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedoms of those seeking protection on grounds outside of the Refugee Convention, taking into account the relevant international instruments and giving due regard to the best interest of the child and family unity principles.

99. The Law Council notes that numerous Australian inquiries have also recommended that Australia adopt a statutory system of complementary protection to ensure that Australia no longer relies solely on discretionary ministerial powers to meet its non-refoulement obligations under the ICCPR; the CAT and the CROC. For example the:

- Legal and Constitutional References Committee report "Administration and Operation of the Migration Act 1958" (March 2006);
- Senate Committee on Ministerial Discretion in Migration Matters (March 2004); and
- Senate Legal and Constitutional References Committee report "A Sanctuary under Review: An examination of Australia's Refugee and Humanitarian Determination Processes" (June 2000).

100. There is also a concern that inconsistent determination processes, such as processes reliant upon the exercise of personal powers by the Minister, arguably privileges certain protection obligations.⁵⁶

Complementary protection has been used sparingly and for genuine protection reasons

101. During the second reading speech introducing the Bill, the Minister commented on the relatively small number of protection visas granted on complementary protection grounds noting that only 57 applications have satisfied the requirements for the grant of a protection visa on complementary protection grounds. The Minister queried the necessity to introduce complementary protection provisions,

⁵⁵ UNHCR ExCom Conclusions, 7 October 2005, available at: <http://www.unhcr.org/excom/EXCOM/43576e292.html>.

⁵⁶ For further discussion of the exercise of Ministerial discretion and Australia's relevant human rights obligations see Senate Select Committee on Ministerial Discretion in Migration Matters Report, March 2004, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/minmig/report/~media/wopapub/senate/committee/minmig_ctte/report/report_pdf.ashx.

which he described as “a costly and inefficient way to approach the issue given the small number of people who meet the complementary protection criterion”.⁵⁷ The Minister also stated that the visas were being granted to people who had committed serious crimes in their homelands and others fleeing because of their links to criminal gangs.⁵⁸

102. The Law Council is of the view that these comments fail to provide a full picture of how the complementary protection regime has been applied since its introduction in March 2012.

103. The Law Council agrees that protection visas issued on these grounds have been used sparingly, but evidence collated by the Kaldor Centre suggests that each of the visas issued on complementary protection grounds has been for genuine protection need.⁵⁹ For example, the Kaldor Centre reports that complementary protection cases have involved risks of serious harm arising from inter-personal disputes, such as extortion attempts, blood feuds, honour killings, and/or domestic violence, as well as people at risk of harm arising from intractable and violent civil unrest, such as the conflict in Syria, or due to their unavoidable need to dangerous roads if returned to Afghanistan. It is reported that this kind of caseload is very similar to that of other jurisdictions around the world.⁶⁰ In any event it is not obvious why the number of cases is thought to be a relevant consideration. However many there are they should be dealt with in the best, fairest and most efficient manner.

104. While it appears that complementary protection visas have been granted to people fearing violence at the hands of criminal organisations, it does not follow that the provisions have been used to provide protection to people in “criminal gangs”, as suggested by the Minister in his second reading speech.

105. The Law Council notes that during his Second Reading Speech introducing the Bill, the Minister did not refer to the many other features of the Migration Act that guard against the grant of protection visas to persons deemed to be of poor character, such as the so-called “character test” in section 501 where the Minister can refuse or cancel a visa on character grounds such as a person’s present or past criminal conduct (501(6)(c)(i)) or where there is a significant risk that the person represents a danger to the Australian community. Nor did the Minister refer to subsection 36(2C) which provides that complementary protection will be denied if the Minister is satisfied that the applicant is a danger to Australia’s security; or having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.⁶¹

⁵⁷ The Hon. Scott Morrison MP, Minister Immigration and Border Security, *Second Reading Speech to the Migration Amendment (Regaining Control over Australia’s Protection Obligations) Bill 2013*, House of Representatives, 5 December 2013, available at:

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22r5155%22%20DataSet%3Ahansardr_hansards%20Title%3A%22second%20reading%22;rec=1.

⁵⁸ Ibid. See also <http://www.news.com.au/national/breaking-news/govt-to-remove-special-protection-visa/story-e6frku9-1226775007083>.

⁵⁹ Jane McAdam and Fiona Chong, *Complementary Protection In Australia: A Review of the Jurisprudence*, University of NSW, Kaldor Centre, 2013, available at:

http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/cp_rrt_uploaded_5.12.13.pdf.

⁶⁰ Ibid.

⁶¹ Migration Act s36(2C)(b) .

106. The Law Council further notes that the complementary protection provisions have been subject to careful consideration by DIAC officers and the RRT who have sought to develop and apply Guidelines⁶² and practice manuals⁶³ for applying the tests for complementary protection. In accordance with Ministerial Direction No.56⁶⁴, the RRT must take account of the Guidelines to the extent that they are relevant to the decision under consideration. These Guidelines outline relevant matters to be taken into account when decision makers are determining whether complementary protection grounds have been raised. They also assist in ensuring that the exclusions and exceptions to complementary protection outlined above are appropriately applied and inform decision makers as to any relevant jurisprudence in respect of the provisions.

107. These Guidelines and Manuals provide a level of transparency and accountability in decision making that would be absent if the complementary protection provisions were removed from the Migration Act, and replaced with a non-statutory approach to assessing non-Refugee Convention protection needs.

108. It remains unclear from the Explanatory Memorandum accompanying the Bill what procedures would be followed by the Minister and his Department to give effect to such a system, beyond the identification of a number of personal, non-compellable powers under the Migration Act that could be utilised for this purpose. This lack of clarity is exacerbated by the current uncertainty surrounding the refugee status determination process for many thousands of “unauthorised maritime arrivals” currently awaiting the assessment of their protection claims in Australia.

Threshold for assessing risk

109. In his second reading speech, the Minister also expressed the view that since the introduction of the complementary protection obligations, the courts have broadened the scope of the interpretation of Australia’s obligations under the CAT and the ICCPR beyond that which is required under international law. Of particular concern to the Minister is how the courts approach the test for assessing whether a person engages Australia’s complementary protection obligations, which the Minister describes as being “lowered to the same ‘real chance’ threshold as under the refugees convention”. The Minister also expressed concern that:

The ‘real chance’ test is a very low bar and lower than required under the CAT and the ICCPR. The court’s interpretation of who should be provided complementary protection has transformed provisions intended to be exceptional into ones that are routine and extend well beyond what was intended by the human rights treaties.

⁶² For example, Department of Immigration and Citizenship, Procedure Advice Manual 3 Refugee and Humanitarian Complementary Protection Guidelines.

⁶³ For example see Migration Review Tribunal and Refugee Review Tribunal, *Guide to Refugee Law in Australia*, Chapter 10: Complementary Protection, 2013, available at: <http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=d09e3964-a50c-44bc-936a-4369fa312f1f>; see also Migration Review Tribunal and Migration Review Tribunal and Refugee Review Tribunal, Complementary Protection Manual, available at: http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/images/rrt_manual_jm_6.1.12_final_sent_0.pdf.

⁶⁴ Ministerial Direction No.56 was made under s.499 of the Act on 21 June 2013 and has effect from 22 June 2013.

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110. It would appear from these comments that the Minister may be referring to the Full Federal Court's decision in *Minister for Immigration and Citizenship v SZQRB*, where the Court observed that the correct standard of proof for assessing whether a non-citizen was entitled to complementary protection under section 36(2)(aa) was the same as that applicable to a refugee claim under section 36(2)(a), that is, whether there was a "real chance" that the applicant would suffer significant harm.⁶⁵
111. As noted above, in *SZQRB v Minister for Immigration and Citizenship*, the Full Court of the Federal Court considered the correct standard of proof for assessing whether a non-citizen was entitled to protection under the ITOA process, which was a non-statutory process designed to assess whether the person engages Australia's protection obligations under the CAT and/or the ICCPR. In so doing the Court referred to the complementary protection grounds contained in paragraph 36(2)(aa), which seek to implement these obligations in statutory form.
112. The Court found that the correct standard of proof for assessing whether a non-citizen was entitled to complementary protection under the ITOA process and section 36(2)(aa) was the same as that applicable to a refugee claim under section 36(2)(a) – namely, whether there was a 'real chance' that the applicant would suffer significant harm.⁶⁶
113. In reaching this conclusion, the Court also noted the Minister's acceptance that this was the relevant standard in *Minister for Immigration and Citizenship v MZYYL*⁶⁷ and a similar concession in *Santhirarajah v Attorney-General for the Commonwealth of Australia*.⁶⁸ Accordingly, the Court found that the ITOA applied the wrong test in considering SZQRB's entitlement for Australia's protection obligations under the CAT and ICCPR.⁶⁹
114. As noted above, the Minister sought special leave to appeal this decision in the High Court. On 13 December 2013 special leave was refused. One of the issues considered by the High Court when rejecting the special leave application was the Full Court's reasoning in relation to 'real chance' test. During the hearing of the special leave application, counsel for SZQRB made the following observations about the 'real chance' test for determining complementary protection:⁷⁰
- as is clear from the second reading speech, the complementary protection provisions were introduced to give effect to the CAT, as well as the ICCPR and the CROC. These Conventions are each set out in different terms and do not use any specific wording in respect of the issue the standard of proof and the legislature has given effect to those in section 36(2)(a) using the words "real risk";

⁶⁵ See [2013] FCAFC 33 (20 March 2013) per Lander and Gordon JJ, with whom Besanko and Jagot JJ (at [297]) and Flick J (at [342]) concur on the issue of standard of proof.

⁶⁶ [2013] FCAFC 33 at [246]; see also [242], citing *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 as the relevant authority for the 'real chance' test.

⁶⁷ 20120 FCAFC 147.

⁶⁸ [2013] FCAFC 33 at [243] - [244].

⁶⁹ [2013] FCAFC 33 at [247].

⁷⁰ A copy of the transcript of the Special Leave Application is available at: <http://www.austlii.edu.au/au/other/HCATrans/2013/323.html>.

- in *Chan's Case*⁷¹ it was made clear by the High Court by reference to the House of Lords and the American Supreme Court application of the Refugee Convention that “real chance” and “real risk” were interchangeable terms. There is nothing in the text of a real risk test that even raises a more probable than not mathematical standard;
- the second reading speech to the Bill that introduced the complementary protection provisions shows how the protection offered by paragraph 36(2)(aa) is *supplementary* to the same kind of protection of the Refugee Convention. In other words, paragraph 36(2)(aa) offers the same protection against persecution as the Refugee Convention, but extends this protection beyond the limited grounds of political opinion, race, etc, to provide protection against harm as identified in the relevant articles of the CAT, ICCPR and CROC; and
- as a result, there is no contextual or purposive reason why the complementary protection provision should demand a higher standard of proof than that provided under the Refugee Convention. There is no reason why a different substantive test should be imposed. For these reasons, the “real chance” formulation of the standard of proof for complementary protection should not be open to appeal in this case.

115. Many commentators and experts have suggested that contrary to the views of the Minister, the Australian complementary protection criterion establishes much higher threshold than that required in international human rights law and complementary protection regimes elsewhere.⁷² This is because paragraph 36(2)(aa) of the Migration Act sets out a three-pronged threshold which applicants for complementary protection must meet. The Minister must be satisfied that: 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.

116. The Migration Review Tribunal's 2012 Complementary Protection Training Manual⁷³ explains that, as a result, the section combines a number of independent threshold tests—intended to explain each other, not be read together—into a single, cumulative test.

*The reason why this is problematic is 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 Australia's international obligations. This would undermine the very protection that the legislation is intended to ensure.*⁷⁴

⁷¹ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

⁷² See for example Elibritt Karlsen, *Complementary protection for asylum seekers—overview of the international and Australian legal frameworks*, Research Paper, Parliament of Australia, 2009; see also the Refugee Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Migration Amendment (Complementary Protection) Bill 2009*, 2009, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2008-10/migration_complementary/index.

⁷³ Migration Review Tribunal's 2012 Complementary Protection Training Manual, available at:

http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/images/rrt_manual_jm_6.1.12_final_sent_0.pdf.

⁷⁴ *Ibid* p. 14.

117. This has given rise to calls for this aspect of the complementary protection regime to be reformed.⁷⁵

118. For these reasons, the Law Council encourages the Committee to explore in greater detail any concerns raised by the Minister that the “real chance” test accepted by the Federal Court imposes a lower bar than that required under Australia’s international obligations under CAT and the ICCPR.

Features of the Bill are contrary to Rule of Law principles

119. In addition to the above concerns, the Law Council is of the view that a number of features of the Bill detract from or conflict with established rule of law principles.

120. In 2011, the Law Council developed a Policy Statement on Rule of Law Principles intended to act as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice.⁷⁶

121. Among the principles outlined in this statement is the requirement that the law must be both readily known and available, and certain and clear. In particular, people must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty. For that reason legislative provisions which create criminal or civil penalties should not be retrospective in their operation.

122. While the Law Council notes that the Bill does not seek to introduce or change criminal sanctions or civil penalties, its provisions have a profound effect on the lives and liberty of protection visa applicants. For this reason, the Law Council is concerned by Items 20-22 of the Bill which outline how the proposed changes will impact upon current applications for protection visas. For example, the Explanatory Memorandum to the Bill makes it clear that if an applicant had a primary decision made prior *to the commencement of this Bill* to refuse to grant a protection visa, and the decision was made relying on the complementary protection criteria in paragraphs 36(2)(aa) and 36(2)(c), the RRT will be required to apply the amendments, and not the law that applied at the time of the primary decision. The RRT will only be able to commence or continue a review on the basis of a refusal to grant a protection visa, relying on the applicant not meeting the Refugee Convention protection grounds in paragraphs 36(2)(a) or 36(2)(b).

123. This suggests that the Bill seeks to have retrospective effect on protection visa applications already in existence prior to the enactment of the proposed amendments.

124. Another rule of law principle relevant to this Bill provides that the Executive should be subject to the law and any action undertaken by the Executive should be authorised by law. This principle requires that executive powers should be carefully defined by law, such that it is not left to the Executive to determine for

⁷⁵ See for example, Law Institute of Victoria, Submission to the Senate Legal and Constitutional Affairs Inquiry into the *Migration Amendment (Complementary Protection) Bill 2009* (September 2009); Refugee Council of Australia Submission to the Senate Legal and Constitutional Affairs Inquiry into the *Migration Amendment (Complementary Protection) Bill 2009*.

⁷⁶ A copy of this statement is available at <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>

itself what powers it has and when and how they may be used. In particular, executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review. The Law Council is concerned that the Bill seeks to repeal the current statutory process that outlines clear criteria for determining whether protection should be granted, in favour of reverting to a system of complementary protection that is dependent upon the exercise of Executive discretion. It is further concerned that the Bill removes requirements to observe natural justice and excludes meaningful judicial review.

125. A third rule of law principle relevant to the current Bill provides that states must comply with their international legal obligations whether created by treaty or arising under customary international law. As outlined above, the Law Council is concerned that an approach based entirely on the exercise of ministerial discretion cannot guarantee protection against refoulement and therefore puts Australia at risk of abrogating or detracting from its non-derogable obligations under the CAT, ICCPR and the CROC.

Conclusion

126. The current Bill seeks to remove statutory protections designed to ensure that Australia fulfils its international obligations to provide protection to those fearing persecution or other forms of serious harm on grounds outside of those outlined in the Refugee Convention.
127. In addition to providing important protection against harm for individuals whose lives and liberty are at risk, the complementary protection provisions also provide a clear, transparent and consistent legal framework for determining whether a person should be granted a protection visa.
128. Removing these provisions could lead Australia back to a costly, time-consuming and potentially inconsistent process whereby those seeking protection on complementary grounds are forced to rely upon the exercise of the Minister's personal powers under the Migration Act. Under such an approach, procedural fairness may not be guaranteed and an applicant's claim can be ignored regardless of his or her particular protection need. It would be a return to a system for dealing with these troubling cases that was shown to have limitations and deficiencies.
129. The Law Council opposes the Bill on the grounds outlined above.

Recommendation

130. The Law Council recommends that the Bill not be passed.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.
