Refugee Legal:

Defending the rights of refugees

Submission to the Senate Legal and Constitutional Affairs Committee: *Migration Amendment (Complementary Protection and Other Measures) Bill 2015*

1 Introduction – Refugee Legal

1.1 Refugee Legal, formerly known as the Refugee and Immigration Legal Centre (RILC), is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia.[1] Since its inception over 27 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration and Border Protection's Immigration Advice and Application Assistance Scheme (IAAAS). Refugee Legal has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.

1.3 We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee (**the Committee**) inquiry into the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

2 Outline of submission

2.1 Refugee Legal has profound concerns about the amendments to the *Migration Act 1958* (**the Act**) proposed by the Bill and recommends that it not be passed. We submit that the proposed amendments would create a legal framework for processing protection claims that is inconsistent with international law as well as those tests applied by comparable developed countries. Most critically, the enactment of these amendments would heighten the risk of Australia wrongly returning vulnerable people to countries where they face a real risk of suffering serious human rights abuses, in breach of its fundamental legal and moral duties not to do so.

2.2 We have identified the following four specific areas of concern.

- **Policy rationale**. The policy rationale provided by the government for the proposed amendments regarding the professed inconsistency between the refugee and complementary protection legal frameworks is fundamentally flawed.
- **Internal relocation.** The amendments proposed would deny decision-makers the ability to consider fundamental practical realities faced by persons seeking protection,

[1] Refugee Legal, formerly known as the Refugee and Immigration Legal Centre (RILC), is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. Refugee Legal brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

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impose an impossible evidentiary burden on vulnerable people seeking protection, and depart from the internationally adopted legal test for internal relocation.

- **State protection.** The proposed amendments seek to deny vulnerable persons protection on the basis that they would be deemed to have protection from the harm they fear in his or her home country, rather than on the basis of whether they would in practice be provided the requisite level of protection by the government authorities. The amendments also inappropriately expand the concept of "effective protection" to include protection provided by non-government entities which may include terrorist and religious extremist groups that control large parts of a state's territory.
- **Particular risk.** The amendments proposed may operate discriminatorily in practice to impose a higher evidentiary standard and require vulnerable people to demonstrate they are at an otherwise higher risk of suffering risk serious human rights abuses (including torture and death) in cases where they are fleeing widespread systematic human rights abuses.

3 Background

3.1 In 2011, the Parliament passed the Migration Amendment (Complementary Protection) Bill 2011 introducing the complementary protection statutory framework.[2] The Explanatory Memorandum accompanying that Bill provided that the purpose of these amendments were to:

- introduce greater efficiency, transparency and accountability into Australia's arrangements for adhering to its *non-refoulement* obligations under international human rights instruments to which it is a signatory *other than* the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol (**the Refugee Convention**); and
- 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.

3.2 These other *non-refoulement* obligations derive from the following international instruments to which Australia is a signatory: the International Covenant on Civil and Political Rights (**ICCPR**); the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (**Second Optional Protocol**); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**). By enacting these other international *non-refoulement* obligations Australia joined 28 countries of the European Union, Canada, the United States, New Zealand, Hong Kong and Mexico, as well as the regional refugee systems of Latin America and Africa.

3.3 To date we have been unsuccessful in identifying publically available information published by the Department that would assist to demonstrate the kinds of protection visa applicants

[2] Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011, page 3, states that this Bill was in response to: the Senate Legal and Constitutional References Committee report *A Sanctuary under Review: An examination of Australia's Refugee and Humanitarian Determination Processes* (June 2000); the Senate Select Committee on Ministerial Discretion in Migration Matters (March 2004); the Legal and Constitutional References Committee report *Administration and Operation of the Migration Act 1958* (March 2006); and the Australian Human Rights Commission. Prior to this, the need for formal legal (statutory) processes for the assessment of persons against complementary protection criteria had also been identified and promoted in the international context by the United Nations Committee Against Torture, the United Nations Human Rights Committee, and the Executive Committee of the United Nations High Commissioner for Refugees.

that have been found to be owed protection on complementary protection grounds. However, the Administrative Appeals Tribunal (Migration and Refugee Division) (**AAT**) does, and previously the former Refugee Review Tribunal (**RRT**) did, publish a selection of its decisions on the Australasian Legal Information Institute website (AustLII)[3] deemed to be of particular interest.[4] This resource, together with other research[5], confirms our longstanding experience that the most common categories of persons found to meet the complementary protection criteria include as follows:

- women at risk of honour killings;
- victims of domestic violence;
- people at risk of being targeted by extremist and paramilitary groups (but not for Refugee Convention reasons, that is not due to their race, religion, political opinion etc);
- people at risk of torture and other significant harm from government authorities such as police or security officers;
- people at risk of extortion, kidnapping and death from criminal and extremist groups; and
- people at risk of being targeted in blood feuds or for other revenge-related reasons.

3.4 This data provides helpful background as to the kinds of highly vulnerable people who may be placed at increased risk of being returned to face serious human rights abuses if the amendments proposed by the Bill were enacted.

4 Policy rationale

4.1 We note that the policy rationale for the amendments indicated by the government includes the need to resolve an inconsistency between the legal frameworks governing refugee claims and that complementary protection claims. [6] The Explanatory Memorandum states:

> *Under the current process, a person may not meet one of the elements of the refugee test relating to internal relocation, effective protection and behaviour modification under the current refugee framework. However, they may then be found to satisfy the complementary protection test because those same elements are currently not aligned. This Bill addresses this inconsistency.* [7]

4.2 Refugee Legal respectfully submits that this policy rationale is fundamentally flawed. The legal tests governing whether a person is owed protection on refugee grounds are, and must be, different from those for complementary protection grounds. If the two tests were not different in scope then complementary protection would naturally be obsolete.

4.3 Refugee Legal further submits that the policy motives expressed by the government for the individual proposed amendments are, in many respects, inconsistent with how these

[3] AAT (Migration and Refugee Division) published decisions can be found at: http://www.austlii.edu.au/au/cases/cth/AATA/2015/ (for protection merits review decisions from 01/07/2015) and Refugee Review Tribunal published decisions at http://www.austlii.edu.au/au/cases/cth/RRTA/ (for protection merits review decisions prior to 01/07/2015).
[4] Under s.431 the AAT (Migration and Refugee Division) is, and prior to 01/07/2015 the former RRT was, obligated to publish decisions that are of "particular interest".
[5] Andrew & Renata Kaldor Centre for International Refugee Law, *Summary of decisions by the Refugee Review Tribunal involving analysis of complementary protection* (Last updated 15 October 2015) – available at: http://www.kaldorcentre.unsw.edu.au/sites/default/files/Relevant_RRT_cases_151015.pdf [accessed 18/11/2015]
[6] House of Representatives, Bills, Migration Amendment (Complementary Protection and Other Measures) Bill 2015, Second Reading Speech, Wednesday, 14 October 2015, at page 2
[7] Page 31, Statement of Compatibility with Human Rights at [16]

amendments would apply in practice. These further flaws in the policy rationale are discussed further below.

5 Internal relocation

5.1 The purpose of complementary protection and those international human rights instruments from which it is derived is directed at protecting vulnerable people who in their ordinary lives are at risk of serious human rights abuses. The proposition that these people must be expected to radically alter how they live their lives in ways that are fundamentally impracticable and unreasonable is entirely at odds with this core purpose.

5.2 Currently, under Australian and international law, a person is not eligible for complementary protection if he or she can access another location within his or her home country where there is not a real risk of significant harm, and it is reasonable for him or her to settle there. This principle is commonly referred to as the 'relocation' or 'internal flight' principle.

5.3 The Bill purports to provide for Australian law to depart from this internationally adopted and recognised test. It seeks to do so in two respects. Firstly, the amendments seek to remove the reasonableness safeguard from the internal relocation test, denying decision-makers the ability to consider the practical realities faced by the person seeking protection.[8] Secondly, the amendments seek to place an impossibly onerous and impractical legal onus on the person applying for protection to prove that they would face such significant harm in every area within the receiving country.

5.4 *Reasonableness of relocation*

5.4.1 Currently, where a person applies for protection and there is another area within the relevant country where the person would not face a real risk of significant harm, that person is not eligible for a protection visa if it would be reasonable in all of the person's circumstances to move to that other area and settle there.[9] Under the current law, when decision-makers are deciding whether it would be reasonable for the person to relocate they are obligated to consider such matters as:

- If that person could safely access that other area by travelling from their point of entry in the country or home area to that other location without facing harm while doing so. **For example**, if there were roads where extremist groups regularly set up road blocks to target travelers along this route;
- If there would be any legal obstacles to the person relocating to that other area. **For example**, in many countries people are not able to choose where they live due to restrictions imposed by the government;
- If there would be any serious physical obstacles to that relocation. **For example**, that area may be inhabitable by humans due to extreme weather or due to it being a remote location where there is no access to government services, food, shelter or clean water;
- If the person would face serious risks to their personal safety that cannot otherwise be considered for refugee and complementary protection claims. **For example**, if they would face high levels of generalised violence and civil unrest, such as bombings of public places or civil war, or extremely high levels of violent crime; and

[8] Item 11, Part 1, Schedule 1 to the Bill.
[9] See: section 36(2B)(c) of the Act; and *MZYXS v Minister for Immigration and Citizenship* [2013] FCA 614 (Marshall J, 21 June 2013) at [37].

- If the personal circumstances of the person concerned would mean that they would not be able to subsist in that other area. **For example**, physical disabilities or medical conditions that may prevent them from working, systemic discrimination, language difficulties, access to basic government services such as health care and education for children.

5.4.2 The current relocation test as it applies under the Act is consistent with that adopted by those comparable countries referred to above, including the United States[10], United Kingdom, Republic of Ireland and other European Union Member States[11], Canada[12] and New Zealand[13]. Removing the requirement that any internal relocation be reasonable in the person's circumstances from Australian law would put the Australian system at odds with the test applied by developed world.

5.4.3 The proposed amendments would lead to absurd and extremely harsh results by precluding decision-makers from being able to consider the practical realities faced by people seeking protection in Australia.

5.4.4 **For example**, a widowed woman with five children from Quetta, Pakistan, seeks protection in Australia. She is an ethnic Hazara of Shia Muslim religion and some years ago she lost both her legs when the Pakistan Taliban detonated a bomb in a public market targeting persons of Hazara ethnicity and Shia religion. Her husband was killed in the same explosion.

5.4.5 Under the current law in Australia, if she and her children were found to be at a real risk of further significant harm in Quetta the decision-maker would then have to consider two things.[14] Firstly, is there another area within Pakistan where there would not be a real risk she would be personally targeted if she returned to Pakistan? If there is not, she would generally be eligible for protection in Australia.[15] Secondly, if the decision-maker identifies an area or areas in Pakistan where there would *not* be a real risk that she would be targeted again by the Taliban or other extremist groups, before refusing protection that decision-maker must consider the woman and her children's personal circumstances and whether she could safely and legally access that relocation area. This would include, among other things, consideration of whether she and her children would actually be capable of subsisting in that other area (that is, access food, shelter, clean water etc) and whether the children would be able to go to school in that location, and access basic medical care. If the decision-maker found that in her and her children's particular circumstances it would not be reasonable in the sense or practicable for them to relocate to that other area(s) they may

[10] See: *Immigration and Nationality Act* 8 C.F.R. § 208.16(c)(3)(ii) (1952)
[11] Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, arts 2(e), 15; Council Directive 2011/95/EU of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L337/9, arts 2(f), 15. See also: *Sufi and Elmi v United Kingdom*, European Court of Human Rights, Application Nos 8319/07 and 11449/07 (28 June 2011), [36] and [266].
[12] *Immigration and Refugee Protection Act*, SC 2001, s.97. See also *Re RCC* [2002] RPDD No 462
[13] *Immigration Act 2009*, s.131
[14] In the event they were not able to meet the refugee criteria, noting that the much narrower definition established by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, which among other things, contains a similar requirement that they have a well-founded fear of persecution in all parts of the country and precludes the consideration of whether it would be possible for someone to live in another area of the country.
[15] Provided she could meet the remaining criteria for a protection visa, including that related to health, character and security.

be eligible for protection.[16]

5.4.6 However, if the proposed amendments were enacted the decision-maker deciding this case would be legally prohibited from considering these critical real life matters. That is, even if the decision-maker were confident that the woman and her children might be at risk of significant non-targeted harm (**for example**, such as starvation, disease or no access to an education for the children) in that other area, if they were not at a real risk of being targeted by the Taliban or other intentional and selective significant harm in that location, their protection applications would have to be refused. The decision-maker would be legally prohibited from considering these real life serious issues. In practice it might even be that the woman and her children could not as a matter of practical reality be capable of accessing that relocation area. **For example**, there might be snow falls blocking the roads at certain times of the year making access to the location impossible. Again, the decision-maker is precluded from being able to consider these practical realities of what would actually occur if the person was returned to their country of origin.

5.4.7 The Explanatory Memorandum states "[i]n considering whether a person can relocate to another area, a decision maker is required to take into account whether the person can *safely and legally access* the area upon returning to the receiving country", and similarly "ascertain if a *safe and legally accessible alternative flight option*" [emphasis added].[17] Refugee Legal submits that this policy statement is fundamentally at odds with how the drafted provision would be legally construed by a court, meaning that decision-makers would be making decisions contrary to law. Further, in the event that this is the policy intent it is unclear why this critical safeguard is not made explicit in provision itself.

5.4.8 Removing the ability for decision-makers to consider the practical realities of internal relocation also risks another kind of indirect *refoulement*, where circumstances in the relocation site are so poor as to drive the person back to his or her home area where they are at risk of serious human rights abuses. If the person cannot in fact travel to the proposed relocation area of the country, gain admittance and settle there, without being free from the risk of violations or ending up in a part of the country where he or she could be subject to them, the *non-refoulement* concern will persist.[18] Returning vulnerable people in these circumstances to their country of origin where they would feel they have no other practical option but to return to their home area where they are at risk of serious human rights abuses would amount to a serious breach of international law, and ultimately put highly vulnerable people at risk of significant harm such as torture and death.

5.4.9 The proposed amendment would also prohibit decision-makers from having regard to the best interests of children affected. As detailed above, even if a child affected would not be able to access basic health care or an education due to an absence of government services in the relocation area concerned, the decision-maker would be prohibited from considering these issues. We further note that in this regard the proposed amendments are inconsistent with Australia's international obligation on a separate basis under CROC to ensure that legislation is drafted with the best interests of children as a primary consideration.[19]

5.4.10 Some commentators have sought to emphasise that internal relocation may also require more rigorous consideration in the complementary protection context compared with that for refugee claims, given the absolute prohibition on return to treatment proscribed by the

[16] Provided she could meet the remaining criteria for a protection visa, including that related to health, character and security.
[17] At [55] and [59], p11
[18] *Salah Sheekh v. the Netherlands*, ECtHR, op. cit., fn. 317, para. 141.
[19] Article 3. See also Articles 6.

ICCPR and CAT.[20] This follows that such cases being not about the reasonableness of the "response to fear of persecution", but rather the reasonableness of a response to a "real risk" of "significant harm", including death.[21]

5.5 *New legal onus – an impossible burden*

5.5.1 In addition to excluding consideration of the practical realities of internal relocation, the test proposed by the Bill would also impose a new legal onus on the person seeking protection to prove that they face significant harm in *every* area within their country of origin.[22] This additional requirement is inconsistent with the legal test imposed both under international law and also by other countries. In the context of refugee claims, the United Nations High Commissioner for Refugees (**UNHCR**) has described this legal onus as an "impossible burden".[23]

5.5.2 Currently, the legal test in Australia and elsewhere, including under international law, requires the decision-maker when considering whether a person could relocate internally in their country of origin to avoid suffering serious human rights abuses, to identify a location where they believe the person could, in their particular circumstances, reasonably relocate to and settle in. The person affected would generally then have an opportunity to provide information and evidence why it would not be safe or otherwise reasonable for them to live in that nominated area. However, the proposed amendments seek to repeal this internationally adopted formula[24] and replace it with an obligation on the person to satisfy the decision-maker that they would be at risk in *every* area within their home country. If the person seeking protection could not prove a real risk of significant harm in every single geographical location within the country their application would have to be refused.

5.5.3 In practice, for a large number of people this legal burden would not be capable of being satisfied. Even for those protection visa applicants fortunate enough to have legal assistance this requirement would likely still be unattainable. This would lead to a large number of highly vulnerable persons, many of who may be victims of serious torture and trauma, being wrongly denied protection in Australia due to the legal requirements being impossible to meet. **For example**, a young male of Russian nationality seeks protection in Australia following him being a key witness in the prosecution of a high level member of an organised crime syndicate. He previously changed his name and moved to a number of different cities in Russia, but each time members of the criminal gang had obtained his mobile number and sent text messages saying they would soon take revenge. Under the proposed changes, if he sought protection in Australia he would have to submit detailed evidence demonstrating that there is a real risk that the gang would find and seek to kill him in respect of every local area within the entire Russian Federation.

5.5.4 Coupled with the removal of the reasonableness of relocation requirement, it is likely that internal relocation will become a regular basis to wrongly and unfairly deny protection to vulnerable people who do not have the capacity or means to meet this exceptionally

[20] See: articles 6 and 7 of the ICCPR; article 3 of CAT; and *Migration Review Tribunal – Refugee Review Tribunal Complementary Protection Training Manual*, Prof. Jane McAdam and Matthew Albert, January 2012, at page 28.
[21] Ibid
[22] Item 11, Part 1, Schedule 1 to the Bill
[23] UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) at [1], cited in Hathaway and Foster, *The Law of Refugee Status*, 2nd ed, (Cambridge, CUP, 2014) at 338.
[24] See: UNHCR Position Paper, *Relocating Internally as a Reasonable Alternative to Seeking Asylum - (The So-Called "Internal Flight Alternative" or "Relocation Principle")*, February 1999, at p6 'Relocation and the Burden of Proof'.

onerous legal burden.

6 State protection

6.1 *Deemed protection*

6.1.1 Currently, the law in Australia provides that a person will not be owed complementary protection if he or she could obtain a sufficient level of protection from government authorities in their home country such that the risk of them suffering significant harm would be reduced to one that is fanciful or farfetched.[25] This test reflects the realities faced by persons at risk of human rights abuses as it requires decision-makers to consider the circumstances of each case and consider whether the level of protection the person would be able to obtain in their particular circumstances, would actually have the necessary effect of reducing the risk of harm to the person to one that is remote.

6.1.2 The Bill proposes to amend the state protection test to provide that a person will be *deemed* under law not eligible for complementary protection if "effective protection measures against significant harm are available to the person in the country".[26] Rather than providing for decision-makers to determine whether sufficient state protection could be accessed by the person in practice such that they would not be at a real risk of significant harm, the proposed new test seeks to deem people to have adequate access to sufficient state protection in specified circumstances.

6.1.3 Under the proposed amendments a person would be *deemed* to be able to access effective protection in specified circumstances, including: where protection against the harm *could*[27] be provided by the government, or non-government entities in his or her home country that controls the country or a substantial part of the territory of the relevant country, and among other things, in the case of protection provided by the relevant State the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.[28]

6.1.4 Critically, the proposed effective protection test limits its focus to what protection *could* theoretically be provided to the person seeking protection, rather than: (1) what level protection *would* in fact be provided to them in the circumstances; and (2) whether that level of protection provided in practice would be sufficient to reduce the risk down to an acceptable level (a risk that is remote). The deeming operation of the proposed effective protection test may have the absurd effect that, in some cases, a person seeking protection may be taken not to meet the complementary protection criteria despite there being a real risk that he or she will, in fact, be subject to significant harm.[29] This risks unacceptably harsh and unjust consequences for vulnerable people in need of protection.

6.1.5 **For example**, a young man from Turkey fled to Australia after he was discovered having a romantic relationship with the daughter of a government official with powerful political connections and links to organised crime. He fled for Australia after he received a letter informing him that he would be killed unless he handed himself to the public official. Under the current law, the decision-maker tasked with assessing his complementary protection claims would have to consider, among other things, whether he could in his particular

[25] See: s.36(2B)(b) and *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147 at [40].
[26] Item 11, Part 1, Schedule 1 to the Bill
[27] As opposed to 'would'
[28] See: s.5LA; and Items 12, 13 and 14, Part 1, Schedule 1 to the Bill
[29] For a discussion of this issue in the context of effective protection under the new definition of refugee (as inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*) which is identical to the proposed that test proposed by the Bill in this instance, refer to the Administrative Appeals Tribunal's *Guide to Refugee Law in Australia*, Chapter 8, page 21 – available at: http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=5a449cc6-395e-4727-892a-a233afb72969 [accessed

circumstances obtain the requisite level of protection from the Turkish government authorities such that the risk of him being killed or tortured by the father would be remote or less. However, under the proposed amendments, in some circumstances, even if the decision-maker was satisfied on the evidence that in the man's circumstances there was a real risk that he would be killed if he returned to Turkey that decision-maker would be nonetheless compelled to refuse protection if satisfied that the man was deemed to have effective protection in Turkey (including, among other things, generally speaking the state has "an appropriate criminal law, a reasonably effective police force and an impartial judicial system").

6.2 *Non-state entities*

6.2.1 Under the current law it is only protection from an authority of the country that generally can be considered when determining whether the person can access protection from the harm feared. However, the proposed amendments seek to require consideration of protection from non-state entities, including (but not limited to) an international organisation that controls the relevant State or a substantial part of the territory of the relevant State. In practice, the following non-state entities may meet this criteria, subject to the facts of a particular case:

- United Nations Peace Keepers;
- allied forces invited to assist government forces;
- terrorist organisations such as Islamic State (IS)[30], Al-Qaeda and the Afghan and Pakistan Talibans;
- military or rebel forces not under the State's control (and who may have invaded the country); and
- tribal warlords and mercenary groups.

6.2.2 The Bill contains no restriction on what type of non-state entity is capable of providing protection. This could lead to disastrous results. **For example**, a young Iraqi male of Sunni Muslim religion from southern Iraq sought protection in Australia after members of local Shia Muslim militia groups in his home area targeted him personally by shooting at the car he was travelling in and sending threatening letters to his business. Under the current law, when considering the protection he could receive from the harm he fears the decision-maker assessing his complementary protection claims could only consider protection offered by the Iraqi government authorities. However, if the proposed amendments were enacted the decision-maker would also have to consider whether this man could obtain protection from Sunni militia and extremist groups (including IS) and other non-government entities that might have effective control of parts of the country.

6.2.3 Of additional concern is the potentially lower standard of protection needed to be available from such non-state entities relative to that from state entities in order for a person to be deemed to have access to effective protection. Under the proposed laws, in considering whether effective protection was available from non-state entities there is no requirement that it consist of "an appropriate criminal law, a reasonably effective police force and an impartial judicial system" (unlike for protection from government authorities).

6.2.4 Refugee Legal also has very serious concerns that, unlike States which are accountable under international law, non-state entities are under no ongoing duty to protect persons under its de facto control. National protection by authorities of the State can be the only

[30] previously and alternatively referred to as the Islamic State of Iraq and Syria (ISIS) and the Islamic State of Iraq and the Levant (ISIL)

meaningful alternative. Australia will fail to fulfill its obligations if it were to return persons to the dubious protection of non-state entities.

7 Personal risk

7.1 Currently, the law provides that a person is not eligible for complementary protection if the risk of significant harm they face in his or her home country is one faced by the population generally and is not faced by them personally.[31] Case law states that the "faced personally" element of this qualification requires the person to face a risk of differential treatment, or because of characteristics that distinguish them from the general population.[32] Following this, under the current law a person is not eligible to meet the complementary protection criteria if he or she faces a real risk of significant harm in his or her home country, but the nature of that risk is exactly the same as the risk faced by the general population.

7.2 The Bill proposes to amend the complementary protection test to provide that "if the real risk is faced by the population of the country generally, the person must be at a *particular risk* for the risk to be faced by the person personally" [emphasis added].[33] That is, it seeks to impose an additional requirement to that which currently applies, providing that the person must also establish on evidence that they are not only at a real risk of significant harm but that they are also at a 'particular risk' (if the risk they face is faced by the population of the home country generally).

7.3 It is clear from the Explanatory Memorandum that this proposed amendment is intended to operate discriminatorily to impose a different and more onerous test for persons fleeing countries where there are widespread human rights abuses occurring. This would include, but not be limited to, persons from countries such as Syria, or failed states where there is widespread civil unrest. It might also include persons from countries affected by widespread genocide or those under the effective control of terrorist and other extremist groups.

7.4 It is our submission that the proposed provision, as it is currently drafted, may be interpreted by courts to require people in these circumstances to essentially meet a *higher risk* threshold than other people seeking to meet the complementary protection criteria.

7.5 The Explanatory Memorandum states that this amendment is necessary "to put beyond doubt that complementary protection is only available where the real risk of significant harm is faced by the non-citizen personally rather than being an indiscriminate risk faced by the population generally". In this regard, the Minister advised in the Second Reading Speech: "[t]here may be occasions, however, where levels of generalised violence in a country can become so dangerous, consistent or targeted towards groups as to pose significant harm to individuals. It may be possible in such circumstances that the level of risk faced by a person in an area of generalised violence may crystallise into a *personal, direct and real risk* of harm in their case. This amendment ensures that such issues are taken into consideration in the analysis of a person's complementary protection claims" [emphasis added].[34] Refugee Legal respectfully submits that the legal consequences of the proposed amendment go further than, and are inconsistent with, the government's stated policy purpose. The proposed amendment in practice would not merely exclude persons who are at the same level of risk as the population generally, but may further exclude persons at a higher risk of such harm than the rest of the population in their home country but are unable to establish that the level of risk is high enough as to amount to a "particular risk"'. Further a person who may face a "personal, direct and real risk" of suffering human rights abuses may not in all

[31] s.36(2B)(c)
[32] *SZSPT v MIBP* [2014] FCA 1245 (Rares J, 3 November 2014) at [11]-[15].
[33] Item 11, Part 1, Schedule 1 to the Bill
[34] House of Representatives, Proof of Bills, Migration Amendment (Complementary Protection and Other Measures) Bill 2015, Second Reading Speech, Wednesday, 14 October 2015, at page 3

instances face a "particular risk" of that harm as the scope of these risk thresholds differ on a plain reading of the legislation.

7.6 Refugee Legal submits that this additional threshold is illogical and inconsistent with Australia's fundamental moral and legal duty to protect vulnerable people at risk of significant harm in other countries. The purported test that seeks to impose a higher risk and evidentiary threshold depending on the extent of the level of human rights violations in the relevant country also creates the foreseeable risk of Australia returning highly vulnerable individuals to countries where there is a real risk they may be tortured or killed. At its most extreme, it could be argued that in practice this amendment may permit the involuntary return of persons to countries were they are at a high risk of genocide and indiscriminate violence which be in direct contravention to the fundamental aims and principles of human rights law, and morality.

7.7 **For example**, a husband, wife and two infant children from Syria enter Australia on tourist visas and seek protection in Australia on the basis of their fear of harm from both rebel and government forces in their country. Under the current law, in order to meet the complementary protection criteria they would, among other things, need to show that they face a real risk of suffering significant harm if they returned to Syria and that the type(s) of risk(s) they face differ in some degree from those faced by the entire Syrian population faces (which might be satisfied by them living in a particular area if the risks in that area are not identical as those for members of the population living in all parts of the country[35]). However, if the proposed amendments were enacted the family would not only have to prove that in addition to them being at a real risk of suffering significant harm in Syria, and that the risk(s) they face differ in some way to that faced by everyone in Syria, they would also need to satisfy the decision-maker that they would be at a particular risk of suffering that harm. In the event they cannot prove the risk they faced was not just a real one but also one that was a *particular risk*, which is arguably a higher threshold, they would not be eligible to meet the complementary protection criteria. Given the complementary protection criteria can only be considered after they have been found not to meet the refugee criteria, failing to meet this criterion would then mean the family would have to be removed from Australia to Syria as soon as reasonably practicable if they had no other visa permitting them to stay in Australia.[36]

7.8 The existing complementary protection statutory framework was enacted to further facilitate and safeguard Australia's *non-refoulement* obligations.[37] Protection of vulnerable persons under these international instruments is premised on exceptionality of treatment. For example, in assessing whether a practice amounts to "torture", CAT requires decision-makers to "take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."[38] In this regard, the existence of widespread violations of human rights may in fact substantiate the existence of a real risk of torture, and a need for protection. The UK Asylum and Immigration Tribunal previously held in the complementary protection

[35] The Administrative Appeals Tribunal (formerly the Refugee Review Tribunal) has consistently found that persons fleeing targeted harm in Syria can meet this requirement, subject to their personal circumstances, including for reason that persons from different geographical regions in Syria face different levels of risk and different kinds of harm, and in this regard the level if risk for some people could not be said to be the same as for the Syrian population as a whole: see Andrew & Renata Kaldor Centre for International Refugee Law, *Summary of decisions by the Refugee Review Tribunal involving analysis of complementary protection* (Last updated 15 October 2015) – available at: http://www.kaldorcentre.unsw.edu.au/sites/default/files/Relevant_RRT_cases_151015.pdf [accessed 18/11/2015]
[36] s.198 of the Act
[37] Under those human rights instruments other than the Refugee Convention
[38] Article 3(2)

context that "it would be ridiculous to suggest that if there were a real risk of serious harm to members of the civilian population in general by reason of indiscriminate violence that an individual Appellant would have to show a risk to himself over and above that general risk".[39]

7.9 We also refer to the concerns previously expressed by the Committee in relation to the current legal test,[40] which is less onerous than the one proposed. It should be noted that a similar provision appeared in the initial draft of New Zealand's Immigration Bill, however the provision was the subject of strong criticism[41] and subsequently omitted from the amending legislation due to it being inconsistent with international protection obligations.

8 Recommendation

8.1 For the above reasons we submit that the proposed amendments would create a legal framework for processing protection claims that is largely inconsistent with international law as well as those tests applied by comparable developed countries. It is further submitted that these amendments would in practice increase the risk of Australia being responsible for wrongly returning vulnerable people to countries where they face a real risk of suffering serious human rights abuses in breach its fundamental legal and moral duties not to do so.

8.2 For these reasons, Refugee Legal strongly recommends that the Bill not be passed by Parliament.

[39] *Lukman Hameed Mohamed v Secretary of State for the Home Department* AA/14710/2006 (unreported, 16 August 2007). See also James C Hathaway and Michelle Foster, *The Law of Refugee Status*, Second Edition 2014, at 2.9, p174 for relevant discussion on this issue in the refugee context.[40] Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Complementary Protection) Bill 2009, 19 October 2009, p. 18 – available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/migration_complementary/report/index [accessed 20/11/2015]

[40] Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Complementary Protection) Bill 2009, 19 October 2009, p. 18 – available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/migration_complementary/report/index [accessed 20/11/2015]

[41] See, for example, Human Rights Commission, Submission on the Immigration Bill (2007). That submission acknowledges the difficulty in devising criteria, given the 'absence of consistent international direction'. Notwithstanding that, the Commission unequivocally states that the Immigration Bill as initially drafted was 'arguably inconsistent with the standards and procedures adopted by some other likeminded countries'. The Commission recommended that 'the meaning of protected person [be] redrafted to ensure that it cover[ed] indiscriminate or generalized risk of violence in a person's country of origin'. In the commentary accompanying the current draft Immigration Bill the Transport and Industrial Relations Committee stated: 'Many submitters argued that clause 122 is inherently undesirable and fails to meet New Zealand's international obligations. Of particular concern was subclause (b) which requires that, in order for a person to gain protection status, the torture, arbitrary deprivation of life, or cruel treatment in question would "not be faced generally by other persons or from that country". In the opinion of the Refugee Status Appeals Authority, this provision is unprincipled, unnecessary and fails to meet New Zealand's international obligations...We therefore recommend that clause 122 be removed.'