

15 February 2016

Ms Sophie Dunstone  
Committee Secretary  
Senate Legal and Constitutional Affairs Legislation Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Ms Dunstone,

**Inquiry into the Migration Amendment (Complementary Protection and Other Measures) Bill 2015**

Thank you for the opportunity to provide a written submission to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) inquiry into the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the Bill). The Law Council also welcomed the invitation to speak to its submission at the Committee's hearing on the Bill last Friday and welcomes the opportunity to provide further clarification in respect of its evidence and in response to Questions on Notice from the Chair, Senator Macdonald.

**Subsection 5LAA(1)**

The explanatory memorandum refers to decision makers still being required to consider whether a person can safely and legally access an area upon returning to a receiving country (see, for example, p. 11). At the public hearing on 5 February 2016, the Department of Immigration and

Border Protection stated that:

In considering whether a person can relocate to another area of a receiving country, such that it would mitigate a real risk of significant harm to the person, decision makers will continue to take into account avenues of safety and lawfulness of access from the point of return to the place of safety, in line with policy guidelines. This policy is consistent with the domestic legal interpretation.<sup>1</sup>

And:

Again, that is why our perspective is: if you felt that the bill would be strengthened by bringing some of those words around 'safe' and 'legal', which are the protections, out of the explanatory memorandum and into the bill, the department

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<sup>1</sup> Mr David Wilden, First Assistant Secretary, Immigration and Citizenship Policy, Department of Immigration and Border Protection, *Committee Hansard*, 5 February 2016, p. 28.

would not have any objections, because it is the same policy intent of government, just expressed at a different level.<sup>2</sup>

Various submitters and witnesses expressed concern that proposed subsection 5LAA(1) does not contain a 'reasonableness' test.

**a) In the LCA's view, what would be the implications of amending the Bill so that it explicitly required the decision maker to consider whether a person can 'safely and legally' access an area upon returning to a receiving country?**

The Law Council considers that the amended provision would remain inconsistent with Australia's domestic legal interpretation of international law, as well as its obligations under international law. As outlined in its submission and oral evidence, the Law Council notes that whether internal relocation is permissible requires a consideration of reasonableness.

Consistent with international law on the question of internal relocation, in considering internal relocation of a Ukrainian national who faced persecution in his home region on account of the expression of his political beliefs through journalism, Kirby J in *SZATV v Minister for Immigration and Citizenship* stated:

*...internal relocation will not be a reasonable option if there are logistical or safety impediments to gaining access to the separate part of national territory that is suggested as a safe haven. Nor if the evidence indicates that there are other and different risks in the propounded place of internal relocation; or where safety could only be procured by going underground or into hiding; or where the place would not be accessible on the basis of the applicant's travel documents or the requirements imposed for internal relocation.*

*An inability or unwillingness on the part of the national authorities to provide protection in one part of the country may make it difficult to demonstrate durable safety in another part of that country. In some circumstances, having regard to the age of the applicant, the absence of family networks or other local support, the hypothesis of internal relocation may prove unreasonable. In each case, the personal circumstances of the applicant; the viability of the propounded place of internal relocation; and the support mechanisms available if an applicant has already been traumatised by actual or feared persecution, will need to be weighed in judging the realism of the hypothesis of internal relocation.*<sup>3</sup>

Whether a factor is relevant to the question of the reasonableness of relocation will be largely determined by the applicant's case. As the United Nations High Commissioner for Refugees (**UNHCR**) has set out in its guidance, relied upon by the High Court in *SZATV*, relevant factors to the condition of a country may include living conditions in the area of proposed relocation, and whether this area is practically, safely and legally accessible.<sup>4</sup>

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<sup>2</sup> Mr Wilden, Department of Immigration and Border Protection, *Committee Hansard*, 5 February 2016, p. 34.

<sup>3</sup> *SZATV v Minister for Immigration and Citizenship*, [2007] HCA 40, [80]-[81] (citations omitted).

<sup>4</sup> United Nations High Commissioner for Refugees, *Guidelines on international protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04 23 July 2003, [7].

It is UNHCR's view that decision makers are required to assess whether the internal flight or relocation alternative is, firstly, a relevant consideration, and secondly, whether it is a reasonable consideration.<sup>5</sup> However, the UNHCR Guidelines consider that factors such as the safe and legal access go only to the question of relevance, not of reasonableness.<sup>6</sup> Furthermore, the Law Council notes that an assessment of reasonableness is not just about quality of life, but also basic human dignity and rights. The Law Council considers that the Explanatory Memorandum is misleading in this regard.

The Law Council welcomes the Government's intent that a decision maker consider whether a person can 'safely and legally' access an area upon returning to a receiving country. As the Law Council stated in its submission to the Committee, with reference to the consideration by the Parliamentary Joint Committee on Human Rights of the Bill, discretionary or administrative safeguards alone, such as the decision maker considering the legality and safety of an internal flight option, are likely to be insufficient for the purpose of permissible limitation under human rights law.<sup>7</sup>

However, while a statutory amendment that requires decision makers to consider the legality and safety of an internal flight option would be welcome, there nevertheless remains a risk of *refoulement* and inconsistency with domestic legal interpretation of international law, as well as international law, due to the removal of the consideration of 'reasonableness'.

#### **b) Would the LCA support such an amendment?**

The Law Council does not support any amendments that put people at risk of *refoulement*, and are contrary to domestic legal interpretation of international law or Australia's obligations under international law.

However, if the Committee is minded to recommend the passage of the Bill, the Law Council suggests:

- the inclusion of 'reasonableness' in the text, with the addition of:
  - an explanatory note in the in the *Migration Act 1958* (Cth); or
  - a section 499 direction on 'reasonableness' factors; or
  - at a minimum, stronger policy guidance in this regard.

Such an amendment would ensure the Department's intention to remove 'quality of life' considerations; or

- the inclusion of the words 'safely, legally and practically' accessible in subsection 5LAA(1).

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<sup>5</sup> Ibid. The assessment of whether or not there is a relocation possibility requires two main sets of analyses, undertaken under the headings 'reasonableness' and 'relevance'. The question of reasonableness is: 'Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?'. Questions of relevance are: 'Is the area of relocation practically, safely, and legally accessible to the individual?'; 'Is the agent of persecution the State?'; 'Is the agent of persecution a non-State agent?' and 'Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?'.

<sup>6</sup> Ibid.

<sup>7</sup> Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament*, 10 November 2015, [1.102]-[1.104].

**c) If not, why not? Does the LCA propose any alternative(s)?**

The Law Council does not support the further departure of complementary protection framework from international law, as this would be contrary to Australia's international human rights obligations and therefore the rule of law.<sup>8</sup>

The Law Council proposes that the decision maker is required to consider reasonableness in considering internal relocation, in accordance with the current provisions.

**Subsection 5LAA(2)**

During the course of the inquiry, submitters and witnesses expressed concerns about the requirement for a person, in order to be considered at particular risk, to face that risk personally and what this might mean for asylum seekers fleeing places where there was widespread violence not necessarily directed at a particular individual (for example, Syria). At the public hearing, the department stated:

While the bill puts beyond doubt the current provision in paragraph 36(2B)(c) of the Migration Act that there has to be a personal element to be a real risk of 'significant harm' rather than being an 'indiscriminate risk of harm' faced by the population in a country generally, this does not mean that a person must be individually targeted. Contrary to claims that this amendment will lead to the return of asylum seekers to war zones, it is the government's policy intent that there may be instances where levels of generalised violence in a country can become so dangerous, consistent or targeted towards groups as to pose significant harm to individuals. This will require an assessment by decision makers of the actual level of risk specifically posed to a particular person. A relevant factor in this assessment will be the existence of serious and indiscriminate human rights violations in the receiving country.<sup>9</sup>

...

If a person is at personal risk because of that mass violence, then they would trigger complementary protection obligations.<sup>10</sup>

**a) Does the LCA believe that the Bill could be amended to reflect the evidence given by the department? If so, how?**

Although the Law Council considers that it is deleterious to further define the elements of the complementary protection framework, beyond that which exists under international law, the Law Council considers that the Department's policy intent, as expressed in its evidence and the Explanatory Memorandum, could be reflected in subsection 5LAA(2), either as an amendment to the subsection or as an explanatory note in the Migration Act.

As set out in the Law Council's submission, international jurisprudence recognises that the more an applicant is able to show that he or she is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for the applicant to be eligible for subsidiary (i.e. complementary)

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<sup>8</sup> Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), Principle 8: States must comply with their international legal obligations whether created by treaty or arising under customary international law.

<sup>9</sup> Mr Wilden, Department of Immigration and Border Protection, *Committee Hansard*, 5 February 2016, p. 29.

<sup>10</sup> Mr Wilden, Department of Immigration and Border Protection, *Committee Hansard*, 5 February 2016, p. 30.

protection. The Law Council notes that, at present, the real risk and necessary and foreseeable tests work well to eliminate remote or insubstantial risks. Decision makers frequently use the existing framework to deny applicants protection where the generalised violence is not considered sufficiently likely.

The Law Council would therefore suggest an amendment to subsection 5LAA(2) that acknowledges that serious and indiscriminate human rights violations would put an individual at personal real risk of significant harm. The Law Council refers the Committee to the submission of the Australian Human Rights Commission that set out the approach taken in the United States:

*In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:*

*(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and*

*(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable*

The Law Council would be supportive of a similar approach, insofar as the burden is not placed on the applicant to prove or establish this personal risk, but is placed on the decision maker. However, the Law Council recommends that the Department consult with stakeholders on such proposed amendments.

**b) If not, why not? Does the LCA propose any alternative(s)?**

Not applicable.

The Law Council would be pleased to provide any additional information that the Committee requires on these questions. It also recommends that the statutory refugee framework, as amended by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), is amended to comply with these amendments.

Yours sincerely,

Michael Brett Young  
**CHIEF EXECUTIVE OFFICER**