



Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Senate Legal and Constitutional Affairs Legislation Committee

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Law Institute of Victoria

Migration Law Committee

National Human Rights Committee

Executive Summary

1. The Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (**the Bill**) aims to align the existing statutory framework for complementary protection in the *Migration Act 1958* (Cth) with changes made to the statutory refugee protection framework by Schedule 5 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (**Caseload Act**). The Law Council opposed these amendments.¹
2. As with the amendments made by the Caseload Act, the Law Council considers that the Bill's proposed amendments depart from Australia's voluntarily assumed international obligations, and accepted rule of law and procedural fairness standards. The passage of this Bill could therefore adversely affect protection claims made by asylum seekers, in some circumstances risking *refoulement*.
3. The Law Council therefore considers that the proposed amendments are not justified by the Bill's objective and opposes the passage of the Bill in its current form. Instead, the Law Council recommends:
 - (a) In respect of changes to the refugee protection framework:
 - (i) The parts of this Bill that do not accord with Australia's obligations under the *Convention relating to the Status of Refugees* (**Refugee Convention**) are not progressed; and
 - (ii) The provisions of the Migration Act amended by the Caseload Act, in particular as it relates to the statutory framework for refugee protection, are subject to an independent review to assess compatibility with Australia's obligations under the Refugee Convention;
 - (b) The existing exclusion clauses relating to complementary protection are removed;
 - (c) In relation to Item 24:
 - (i) The Privacy Commissioner consider the relevant provisions in the Bill, given that a broad range of personal identifiers will be able to be legally disclosed in respect of a wider range of non-citizens;
 - (ii) The Independent National Security Legislation Monitor (**INSLM**) consider subsections 336F(5) and 36(1C) in terms of effectiveness, necessity and proportionality insofar as it relates to Australia's counter-terrorism laws. This should also happen if the Bill is enacted; and
 - (iii) The Migration Act is amended to only permit disclosure to a foreign country or agency where it protects the information in a way that is consistent with the Australian Privacy Principles (**APPs**); and

¹ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), 5 November 2014 ('LCA Caseload Bill submission'), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2898_-_Migration_and_Maritime_Powers_Legislation_Amendment_Resolving_the_Asylum_Legacy_Caseload_Bill_2014.pdf.

- (d) Merits review is provided to all people who are refused a protection visa or whose visa has been cancelled.

Introduction

4. The Law Council welcomes the opportunity to provide the following comments to the Senate Committee as part of its inquiry into the Bill.
5. The Bill was introduced into the House of Representatives on 14 October 2015. It seeks to amend the existing complementary protection provisions in the Migration Act to align with changes made by the Caseload Act in December 2014 to the statutory refugee protection framework.
6. The Law Council expressed its concerns over the changes to the refugee protection framework to this Committee during its inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (**Caseload Bill**). The Law Council's concerns were realised with the passage of the Bill.
7. The Law Council welcomes the Government's decision to no longer proceed with the amendments in the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, which sought to repeal the complementary protection provisions from the Migration Act and replace this statutory framework with an administrative framework.²
8. However, the Law Council is concerned by the introduction of this Bill. The Law Council's key concerns relate to further changes to the statutory refugee framework; inconsistency with international obligations regarding complementary protection; disclosure of information to foreign countries potentially risking *refoulement*; and restricted access to merits review.
9. The Law Council therefore opposes the passage of this Bill. It recommends that the amendments to the Migration Act made by Schedule 5 of the Caseload Act be examined in respect of their adherence to international law, and rule of law and procedural fairness standards, and that the existing complementary protection framework is also amended to accord with these obligations and standards.

Background to the complementary protection framework

10. As noted above, this Bill has been introduced in order to align the existing complementary protection provisions in the Migration Act with changes made by the Caseload Act to the statutory refugee protection framework. In the Minister's Second Reading Speech on this Bill, the Hon Peter Dutton MP noted that by addressing this inconsistency, the Bill 'will restore Australia's intended interpretation of Australia's complementary protection obligations.'³

² Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 2015, 6 (Peter Dutton) ('Second Reading Speech'), available at:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F9719682d-09af-4772-a03a-a954ad5d7b6a%2F0011%22>.

³ *Ibid* 4.

11. Complementary protection claims arise in respect of Australia's *non-refoulement* obligations under the *International Covenant on Civil and Political Rights (ICCPR)*,⁴ the Second Optional Protocol to the ICCPR, the *Convention on the Rights of the Child (CROC)* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*.⁵
12. The existing statutory complementary protection framework was introduced by the *Migration Amendment (Complementary Protection) Act 2011 (Cth) (Complementary Protection Act)*. Prior to the introduction of the statutory framework, there was no mechanism within the Migration Act enabling the (then) 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.
15. The existing statutory 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.⁶ Under these provisions, a protection claim must first be assessed against the Refugee Convention.⁷ The complementary protection criteria will only be considered if the person is found not to be a refugee.
13. The (then) Minister's Second Reading Speech on the Migration Amendment (Complementary Protection) Bill 2011 (**2011 Complementary Protection Bill**), set out the intent behind the introduction of the statutory complementary protection framework. The Hon Chris Bowen MP noted that the Bill aligned Australia's protection visa process with its existing international obligations and practices.⁸ The Minister also noted that the construction of the framework 'received positive feedback from external stakeholders including United Nations High Commissioner for Refugees (**UNHCR**), the Refugee Council of Australia and leading academics.'⁹
14. The Explanatory Memorandum to the 2011 Complementary Protection Bill also noted that the new statutory test for complementary protection¹⁰ reflected the views of the United Nations Human Rights Committee on when *non-refoulement* obligations would arise, as articulated in its General Comment 31. That General Comment also notes

⁴ Specifically at arts 6 and 7.

⁵ Specifically at art 3.

⁶ Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2009, ('EM 2009 CP Bill') available at:

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld:%22legislation/ems/r4522_ems_03449275-3365-4a8f-b450-70dfc891c105%22;rec=0.

⁷ At para 36(2)(aa).

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1356 (Chris Bowen), available at: http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2011-02-24/0009/hansard_frag.pdf;fileType=application%2Fpdf.

⁹ *Ibid* 1357. This was in reference to the 2009 Bill, upon which the 2011 bill was based. Stakeholders, including the Law Council, provided comments to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Complementary Protection) Bill 2009.

¹⁰ EM 2009 CP Bill: 'In order for a non-citizen to 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'.

that Article 2, paragraph 2, of the ICCPR 'requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order'.¹¹

15. Contrary to Minister Dutton's assertion that the current Bill reflects the intended interpretation of Australia's complementary protection obligations, the Law Council therefore considers that this Bill resiles from the stated objective of the introduction of the statutory complementary protection framework. The Law Council's key concerns with this Bill are addressed below.

Further changes to the statutory refugee protection framework

Concerns with amendments made by the Caseload Act

16. Prior to the introduction of the Caseload Act, a refugee was defined at paragraph 36(2)(a) as 'a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.
17. The amendments to the Migration Act by Schedule 5 of the Caseload Act clarified the Government's intention over when Australia's *non-refoulement* obligations should arise and the meaning of certain words and terms including 'refugee' and 'well-founded fear of persecution'. The Explanatory Memorandum to the first reading of the Caseload Bill set out that that these changes were made in response to a series of High Court and Federal Court decisions.¹²
18. The Law Council's Supplementary Submission to this Committee on the Caseload Bill¹³ highlighted concerns with the Bill expressed by UNHCR over inconsistencies between the Bill and the Refugee Convention. The Law Council considers that UNHCR is an authoritative source of legal interpretation of the Refugee Convention, owing to its mandate,¹⁴ and supports domestic legislation that accords with UNHCR's interpretation of the Convention.
19. UNHCR submitted that the proposed amendments to the (then existing) statutory refugee protection framework in the Caseload Bill narrowed the personal scope of the refugee definition at Article 1A(2) of the Refugee Convention, by, for example:

¹¹ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 18th sess, UN Doc CCPR/C/21/Rev.1/Add. (26 May 2004), [13].

¹² Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, ('Caseload Bill EM') available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5346ems_a065619e-f31e-4284-a33e-382152222022%22. In respect of Australia's *non-refoulement* obligations, see 165-6 at [1134]-[1136]. In respect of the 'internal relocation' principle, see 171-2 at [1182]-[1188]. In respect of the meaning of 'well-founded fear of persecution' see 174 at [1194]. In respect of the meaning of 'membership of a particular social group' see 177-9 at [1216]-[1217] and [1223].

¹³ Law Council of Australia, Supplementary Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), 18 November 2014, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2900-2999/2906_-_Inquiry_into_the_Migration_and_Maritime_Powers_Legislation_Amendment_Resolving_the_Asylum_Legacy_Caseload_Bill_2014.pdf.

¹⁴ UNHCR fulfils its international protection mandate by '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto': *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, [8(a)].

- disregarding consideration of the ‘reasonableness’ of the proposed area of internal flight or relocation;
- concluding that a person does not have a well-founded fear of persecution if the receiving country has an appropriate criminal law system, a reasonably effective police force and an impartial judicial system provided by the relevant State, without an assessment of the effectiveness, accessibility and adequacy of State protection in the individual case;
- concluding that a person does not have a well-founded fear of persecution if ‘adequate and effective protection measures’ are provided by a source other than the relevant State; and
- concluding that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour relating to certain characteristics.¹⁵

20. As the Law Council noted in its Supplementary Submission, domestic statutory interpretation of a State’s responsibilities under international law does not change the nature of these responsibilities because:

- the *Vienna Convention on the Law of Treaties* requires States to implement their obligations in good faith and stipulates that a State may not invoke the provisions of internal law as a justification of its failure to perform its obligations under a treaty; and
- Article 42 of the Refugee Convention stipulates that States *cannot* make reservations to certain articles, including Article 1 (which includes the definition of a refugee).¹⁶

21. As the Law Council noted in its primary submission on the Caseload Bill,¹⁷ by seeking to define the constituent elements of refugee status at proposed sections 5H, 5J, 5L, 5K and 5M and paragraph 36(1C), it is possible that applicants who may have a protection claim under the Refugee Convention will be prevented from seeking protection from Australia.

22. The Bill was enacted with very few amendments made to Schedule 5.¹⁸

Proposed amendments

23. As a result of the changes to the statutory refugee framework in the Migration Act made by the Caseload Act, it is possible that Australia is failing to meet its obligations under the Refugee Convention and in so doing, may return people to harm despite

¹⁵ United Nations High Commissioner for Refugees, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), 31 October 2014, 2 (‘UNHCR Caseload Bill submission’).

¹⁶ Article 1A(2) of the Refugee Convention provides that a ‘refugee’ is a person who: ... *owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.* The Refugee Convention does not further define the term ‘refugee’.

¹⁷ LCA Caseload Bill submission, [133].

¹⁸ The amendments related to the meaning of ‘effective protection measures’ at sub-s 5J(2) and s 5LA; limits on the modification of behaviour at s 5J(3)(c); and the meaning of membership of a particular social group other than family at s 5L.

their eligibility for protection under the Convention if it was fully implemented in Australia.

24. This Bill makes further amendments to the meaning of 'refugee' and 'well-founded fear' at sections 5H,¹⁹ 5J,²⁰ paragraph 36(4)(a)²¹ and subsection 36(5).²²
25. Although described as technical amendments, for the reasons listed above, the Law Council continues to oppose the current and proposed statutory characterisation of the meaning of 'refugee', instead recommending that the definition reflect that at Article 1A(2) of the Refugee Convention.

Recommendations:

In respect of changes to the refugee protection framework:

- **The parts of this Bill that do not accord with Australia's obligations under the Refugee Convention are not progressed; and**
- **The provisions of the Migration Act amended by the Caseload Act, in particular as it relates to the statutory framework for refugee protection, are subject to an independent review to assess compatibility with Australia's obligations under the Refugee Convention.**

Inconsistency with international obligations regarding complementary protection

Internal relocation

26. As with the amendment to the refugee protection framework under the Caseload Act, this Bill will exclude any consideration of 'reasonableness' from an assessment of complementary protection.
27. Prior to the introduction of the Caseload Act, the idea of internal relocation was well established in Australian law. As noted by Kirby J in *SZATV v Minister for Immigration and Citizenship*, invocation of the internal protection alternative was 'extremely common' in any case where a refugee applicant leaves a country which is 'large or even middling in size'.²³ Australian decision makers and courts would routinely consider:²⁴
- whether the fear of harm is isolated to the applicant's home area;
 - whether internal relocation was safely and legally accessible;
 - whether the original risk of harm or another new risk of harm would be present in another proposed area; and

¹⁹ At Items 3-4.

²⁰ At Items 5-10.

²¹ At Item 19.

²² At Item 21.

²³ *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 31 [40].

²⁴ *Ibid* at [24].

- (d) whether the internal relocation is reasonable, in terms of practicability.
28. The insertion of paragraph 5(J)(1)(c) by the Caseload Act intentionally removed the High Court’s test for ‘reasonableness’ in circumstances of internal relocation,²⁵ such that the principle no longer encompasses consideration of whether the relocation is ‘reasonable’ in light of an applicant’s individual circumstances.²⁶
29. The existing internal relocation principle for complementary protection currently appears at paragraph 36(2B)(a) with the condition that relocation is ‘reasonable’. The Federal Court had previously confirmed, in *MZYXS v Minister for Immigration and Citizenship*,²⁷ that the issues which arise when considering the reasonableness of relocation in the refugee context are the same which arise in the complementary protection context.
30. New Items 11 and 16 of the Bill together replace this provision with proposed new paragraph 5LAA (1)(a). The key change is that the persecution must now relate to ‘all areas of the receiving country’, which is broader than existing law.²⁸
31. The Explanatory Memorandum to this Bill provides that proposed new paragraph 5LAA (1)(a) ‘is consistent with Australia’s *non-refoulement* obligations’ under the ICCPR and CAT.²⁹ It states that ‘[i]nternational jurisprudence on Australia’s *non-refoulement* obligations confirms that consideration should be given to whether the person will face a real risk of significant harm in the whole of a country....’³⁰
32. Although this latter statement is correct, contrary to the Government’s other assertion in the Explanatory Memorandum, international jurisprudence also requires an assessment of reasonableness in circumstances of possible internal relocation. This was identified by UNHCR in its submission on the Caseload Bill.³¹ That submission referred to UNHCR’s *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* as the authoritative guidance on this issue.
33. The Human Rights Committee discussed internal relocation in *B.L. v Australia* (2053/2011) in respect of a complaint brought in relation to Articles 6, 7 and 18 of the ICCPR. The Committee noted that, consistent with international refugee law, international human rights law requires that where ‘resettlement would not be unreasonable under the circumstances, returning a person to a place where they can live in safety does not violate the principle of *non-refoulement*.’³²
34. Despite this clear intention under international law that reasonableness is a consideration, ‘[t]he Government considers that, in interpreting the “reasonableness”

²⁵ As set out in *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40. While the Court considered that this ‘internal relocation’ principle was within the scope of the Refugee Convention, it placed emphasis on the reasonableness test.

²⁶ Caseload Bill EM [1183].

²⁷ *MZYXS v Minister for Immigration and Citizenship* [2013] FCA 614, per Marshall J.

²⁸ Caseload Bill EM [1181]-[1183]: this codifies the existing internal relocation principle, but unlike the existing principle, makes no reference to reasonableness.

²⁹ Explanatory Memorandum, Migration Amendment (Complementary Protection and Other Measures) Bill 2015, [58] (‘CP Bill EM’), available at:

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F5556ems_afbc5f56-9361-4e98-9e8d-376a8f7a2e81%22.

³⁰ *Ibid* [59].

³¹ UNHCR Caseload Bill submission, [20]-[21].

³² Communication No. 2053/2011. See: Appendix 1. See also [7.4].

element into the internal relocation principle in the refugee context, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation.³³

35. The Law Council also notes that UNHCR has previously observed that the requirement of proving 'country-wide persecution,'³⁴ imposes an 'impossible burden and one which is patently at odds with the refugee definition.'³⁵ The Law Council is concerned that the passage of this Bill will shift the onus onto the applicant to disprove why they cannot relocate to one or more particular areas, and that decision makers will present applicants with lengthy lists of 'available areas for relocation,' placing a high evidentiary burden on the applicant.
36. Further, the Law Council considers that there are potential issues with the proposed characterisation of the relocation test, both in respect of the complementary protection framework, and the existing refugee protection framework as amended by the Caseload Act:
- (a) the concept of an 'area' remains undefined and it may be open to decision makers to elect any area where applicants could potentially relocate, including uninhabitable areas of a country;
 - (b) Departmental guidelines that address the relocation test in the refugee context provide that relocation options should provide 'safe and legal access.'³⁶ Although this is a sensible limitation to the relocation test, the fact that this limitation is guidance only, and not prescribed in legislation, may lead to inconsistent applications of this test by decision makers; and
 - (c) generally, the absence of statutory definition of key terms may lead to large numbers of judicial review matters.
37. As summarised in the case of *Harjit Singh Randhawa v the Minister of Immigration, Local Government and Ethnic Affairs*, the internal relocation principle has been applied internationally in England, New Zealand and Canada.³⁷ The England and Wales Court of Appeal has stated that:

*Relocation in a safe haven will not provide an alternative to seeking refuge outside the country of nationality if, albeit that there is no risk of persecution in the safe haven, **other factors exist which make it unreasonable to expect the person fearing persecution to take refuge there.** Living conditions in the safe haven may be attendant with dangers or vicissitudes which pose a threat which is as great, or greater than the risk of persecution in the place of habitual residence. **One cannot reasonably expect a city dweller to go to live in a desert in order to escape the risk of persecution.** Where the safe haven is not a viable or realistic alternative to the place where persecution is feared, one can properly say that a refugee who has fled to another country is „outside the country of his nationality by reason of a well-founded fear of*

³³ CP Bill EM [60].

³⁴ See for example reasoning in USA Board of Immigration Appeals decisions.

³⁵ United Nations High Commissioner for Refugees, *The Internal Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (Apr 2001), n 28.

³⁶ Department of Immigration and Border Protection, *PAM3 Refugee and Humanitarian – Refugee Law Guidelines*, Ch 8 – Real chance in all areas of the receiving country - s5J(1)(c) at [8.3], accessed at 17 November 2015.

³⁷ *Harjit Singh Randhawa v the Minister of Immigration, Local Government and Ethnic Affairs*; (1994) 124 ALR 265, at [11] per Black CJ.

persecution". ... [T]he test of whether an asylum seeker could reasonably have been expected to have moved to a safe haven ... involves a comparison between the conditions prevailing in the place of habitual residence and those which prevail in the safe haven, having regard to the impact that they will have on a person with the characteristics of the asylum seeker [emphasis added].³⁸

38. Relocation principles have also been recognised implicitly in successive versions of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*. The Handbook provides:

The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.³⁹

39. For example, the case of *SZAIX v Minister for Immigration and Multicultural and Indigenous Affairs & Anor*,⁴⁰ concerned an Indonesian ethnic Chinese Christian woman who had been raped twice by Muslim men. The applicant had lived in Jakarta her whole life and claimed persecution as a member of a particular social group: ethnic Chinese women. The Tribunal found she could relocate in Indonesia. On appeal, the appellant argued that as a single mother with no family, facing discrimination, never having lived outside her suburb in Jakarta and likely to experience psychological problems of returning to the country where she had been assaulted, it was not reasonable to relocate within Indonesia. The Court found the Tribunal had not considered 'the major difficulty in the practical realities, both psychological and physical that now would confront her if returned to Indonesia'. Under the proposed amendments, it is likely that this applicant would be required to relocate.

40. The Law Council therefore considers that the premise on which this amendment, and existing paragraph 5(J)(1)(c), is based, is inaccurate and that these provisions should be amended to accord with international law.

Lack of protection for people facing a generalised risk of significant harm

41. New paragraph 5LAA(1)(b) sets out that there is a real risk that a person will suffer significant harm only if the real risk is faced by the person personally. It is to be read in conjunction with new paragraph 5LAA(1)(a), that removes the standard of 'reasonableness' developed in refugee law (including by the High Court) in respect of internal relocation. New subsection 5LAA(2) provides clarification to the application of paragraph 5LAA(1)(b).

³⁸ *E v SSHD* [2003] EWCA Civ 1032, [2004] QB 531, cited in *Januzi v SSHD* [2006] 2 AC 426 at [13].

³⁹ United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. [91], available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁴⁰ *SZAIX v. Minister for Immigration and Multicultural and Indigenous Affairs & Anor.* (2006) 150 FCR 448.

42. The requirement for a personal, rather than a mere general, risk is currently found at paragraph 36(2B)(c), which provides that there is *not* a real risk that a non-citizen will suffer significant harm if ‘the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally’. Item 16 repeals this provision.
43. The Explanatory Memorandum correctly notes that international jurisprudence sets out that real risk of significant harm must be personal. For example, in *Dewage v Australia*,⁴¹ the Committee Against Torture stated that:

[10.3]...In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights...the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would return.

[10.4]The Committee recalls its general comment No. 1 in which it states that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion, but the risk does not have to meet the test of being highly probable; it is enough that the danger is personal and present (paras. 6 and 7). In its jurisprudence, the Committee has determined that the risk of torture must be foreseeable, real and personal....

44. European jurisprudence is also instructive on the issue of personal risk of harm. In assessing ‘serious harm’ as a qualification for subsidiary protection (akin to complementary protection),⁴² the Grand Chamber of the European Court of Justice has found that ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection’.⁴³ The Court has found that a serious threat to an individual’s life will therefore be established where indiscriminate violence that amounts to armed conflict:

*...reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.*⁴⁴

45. The replacement of the existing wording at paragraph 36(2B)(c), and its replacement by paragraph 5LAA(1)(b) and subsection 5LAA(2) that require a person to be at ‘particular risk’ to face a personal risk, departs from the accepted standard of generalised risk in international jurisprudence. This is contrary to the Government’s statement in the Explanatory Memorandum that the provision is consistent with international jurisprudence of the ICCPR and CAT.⁴⁵ As noted above, the Committee

⁴¹ Communication No. 387/2009.

⁴² Under art 15(c) of the Council Directive 2004/83/EC. Article 2(e) defines a person eligible for subsidiary protection as: ‘a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.’

⁴³ *Elgafaji and Elgafaji v Staatssecretaris van Justitie*, Judgment, C-465/07, [2009] ECR I-921, [39].

⁴⁴ *Ibid* [43].

⁴⁵ CP Bill EM, [63].

Against Torture has stated that personal risk may include circumstances of 'gross, flagrant or mass violations of human rights'.

46. As with proposed paragraph 5LAA(1)(a), the Law Council is concerned that the proposed amendments to paragraph 5LAA(1)(b) will lead to the onus being placed on the applicants – in this context, to provide particular evidence that their protection claims are stronger than those of others from their country. This may significantly alter the threshold for finding 'real risk' particularly in countries where there is a higher risk of generalised harm, as decision makers may assess applicants against others from their country.
47. The Law Council is therefore concerned that the combination of paragraphs 5LAA(1)(a) and 5LAA (1)(b), which is inconsistent with international standards of protection, may risk *refoulement*.

Modification of behaviour

48. New subsection 5LAA(5) introduces a requirement, subject to certain limits, that a person who would otherwise be eligible for complementary protection pursuant to the standards at international human rights law, modify their behaviour in order to avoid risk of significant harm.
49. This proposed amendment is consistent with the requirement for people who would otherwise be eligible for refugee status under the Refugee Convention to modify their behaviour, pursuant to subsection 5J(3). The Senate approved this requirement with the passage of the Caseload Act, subject to further amendments which restricted the application of the provision in certain circumstances, such as altering of religious belief, concealing a physical, psychological or internal disability, or altering or concealing sexual orientation, identify or intersex status.⁴⁶
50. In the Law Council's submission on the Caseload Bill, it discussed the case of *Appellant S395/2002 v MIMA*.⁴⁷ The High Court in that case found that a Tribunal will err if it assesses a claim on the basis that an applicant is expected to take reasonable steps to avoid persecution if returned to his or her country of origin.⁴⁸ The High Court found that the Tribunal's task was to assess what the applicant will do, not what he or she could or should do.
51. In UNHCR's submission to the Caseload Bill, it stated:⁴⁹

*While there is a distinction between innate and therefore unchangeable characteristics, such as race, and voluntarily assumed characteristics such as religion and political opinion, it is noted that the 1951 Convention extends protection to both sets of characteristics because the first cannot be changed and the second, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights.*⁵⁰ To require individuals to

⁴⁶ At para 5J(3)(c).

⁴⁷ [2003] HCA 71.

⁴⁸ *Ibid*, at [40] and [50] per McHugh and Kirby JJ and at [80] and [82] per Gummow and Hayne JJ.

⁴⁹ UNHCR Caseload Bill submission, [37]-[38].

⁵⁰ United Nations High Commissioner for Refugees, *UNHCR intervention before the Supreme Court of the United Kingdom in the case of HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, 19 April 2010, [17]. See, also, UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, [12].

*hide, conceal, be discreet or alter their character or behaviour in order to avoid persecution is fundamentally at odds with the protection the 1951 Convention seeks to provide; this principle being widely accepted in international jurisprudence.*⁵¹

*...Persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.*⁵²

52. In *SZATV v Minister for Immigration and Citizenship*, the Tribunal had found that, although the applicant may not be able to work as a journalist (which had been the source of the feared persecution in his home region), internal relocation was a realistic option. However, on appeal, the High Court unanimously held that the Tribunal had, in effect, impermissibly expected the appellant to move elsewhere, not work as a journalist, and live discreetly so as not to attract the adverse attention of the authorities in his new location, lest he be further persecuted by reason of his political opinions.⁵³
53. The Law Council is concerned that the proposed provisions do not expressly identify employment⁵⁴ as ‘a characteristic fundamental to the person’s identity or conscience’, or ‘innate and immutable’, and there is no provision that an applicant should not be expected to change their occupation to avoid harm. The Law Council notes that in many cases, a refugee applicant’s occupation may have developed over their lifetime and may be their only skill. It considers that, in many asylum-producing countries and for many applicants, there is little or no opportunity to gain other skills or seek education or training in order to change occupation. The Law Council considers that in this sense, employment may be as immutable as other characteristics that are identified in the proposed amendment.
54. Furthermore, it should be noted that in respect of the Refugee Convention, a person’s occupation may make them part of a particular social group. In *SZATV*, Kirby J stated that in the context of relocation, it cannot be a reasonable adjustment contemplated by the Refugee Convention that a person should have to relocate internally by sacrificing one of the fundamental attributes of human existence which the specified grounds in the Convention are intended to protect and uphold.⁵⁵ For example, under the proposed amendments, an applicant who worked as a truck driver in Afghanistan could be required to change his profession despite not having other skills or opportunity to retrain, or not being able to make an adequate living to be able to sustain himself and his family by working in another occupation. The Law Council considers this may lead an applicant to have to choose between carrying on in an occupation that puts them at a real chance of serious harm; or ceasing that work and facing unemployment as a result.
55. The Law Council considers that these objections to the statutory requirement to modify behaviour in respect of the refugee protection framework apply equally to the

⁵¹ See *HJ(Iran) v Secretary of State for the Home Department* [2010] UKSC 31; *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2012] UKSC 38; CJEU judgment in *C-199/12, C200/12 and C201/12, X, Y and Z*, 7 November 2013; CJEU – *C-71/11 and C-99/11 Germany v Y and Z*, 5 September 2012.

⁵² R, *UNHCR intervention before the Court of Justice of the European Union in the cases of Minister voor Immigratie en Asiel v. X, Y and Z*, 28 September 2012, C-199/12, C-200/12, C-201/12, [5.2.2].

⁵³ Administrative Appeals Tribunal, *Guide to Refugee Law* at 6-9, available at: <http://www.mrt-rtt.gov.au/Resources/Guide-to-refugee-law.aspx>, citing *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 per Gummow, Hayne and Crennan JJ at [32]; per Kirby J at [100]-[103].

⁵⁴ See art 6 of the *International Covenant on Economic, Social and Cultural Rights*, which provides for the right to work.

⁵⁵ *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, [102] per Kirby J.

complementary protection framework. As such, the Law Council does not support this proposed amendment.

Recommendation:

- **The proposed amendments at Items 1, 11 and 16 are not passed**

Effective protection

56. Items 13-14 broaden the application of 'effective protection' which currently applies to people otherwise eligible to refugee status, to people otherwise eligible for complementary protection with amendments to subsection 5LAA(4), paragraph 5LA(1)(a) and subsection 5LA(2).

57. Section 5LA was introduced by the Caseload Act, following Senate amendments to the Caseload Bill. In respect of the introduction of the 'effective protection' condition in the Caseload Bill, UNHCR stated that it:⁵⁶

...considers that not all sources of possible protection are tantamount to State protection, and that there can be no hard-and-fast rules to this assessment, as this requires a factual assessment of circumstances on the ground...

...It would, in UNHCR's view, be inappropriate to equate national protection provided by States with the exercise of a certain administrative authority and control over territory by international organizations on a transitional or temporary basis. Under international law, international organizations do not have the attributes of a State. In practice, this generally has meant that their ability to enforce the rule of law is limited.⁵⁷

58. As above, the Law Council considers that these objections to the statutory requirement that effective protection measures should negate protection obligations toward refugees, apply equally to those people who would otherwise be eligible for complementary protection. The Law Council therefore opposes this proposed amendment.

Recommendation:

- **The proposed amendments at Items 13-14 are not passed**

Exclusion clauses

59. In introducing the statutory complementary protection framework by the Complementary Protection Act, the Government also introduced subsection 36(2C), which set out the grounds on which a person may be excluded from complementary protection. These grounds are based on the exclusion clauses at Articles 1F and 33(2) of the Refugee Convention. The Complementary Protection Act therefore imported a

⁵⁶ UNHCR Caseload Bill submission, [33]-[34].

⁵⁷ United Nations High Commissioner for Refugees, *UNHCR Annotated Comments on EC Council Directive*, 28 January 2005, p.18; *Sufi and Elmi v United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011.

standard into the complementary protection framework that does not exist under international law.

60. Item 16 of the Bill inserts a new subsection 36(2C). The effect of this change is the removal of the current exclusions on the grounds of national security and criminal activity at existing paragraph 36(2C)(b).
61. Item 32 amends paragraph 503(1)(c) to extend the exclusion of people from Australia to people refused complementary protection on character grounds.
62. The Law Council notes that under international law, the absolute and non-derogable nature of the *non-refoulement* obligations under the ICCPR, Second Optional Protocol to the ICCPR, CROC and CAT prohibit a State from returning a person to a place where they would face torture, cruel and inhuman or degrading treatment or punishment. Therefore, unlike the Refugee Convention, the ICCPR, Second Optional Protocol to the ICCPR, CROC and CAT do not permit the exclusion of certain people on any grounds if to do so would risk *refoulement*.
63. This is reflected in international jurisprudence. For example, in considering Article 3⁵⁸ of the *Convention for the Protection of Human Rights and Fundamental Freedoms* in *Chahal v UK*, the European Court of Human Rights upheld the absolute nature of the prohibition on torture, or inhuman or degrading treatment or punishment. That Court has consistently re-affirmed and re-asserted this position, and the position has also been 'adopted and strengthened by developments in European, national and international law.'⁵⁹
64. Internationally, States do not consistently or clearly apply a certain practice in respect of removing non-citizens who cannot claim refugee protection but cannot be removed owing to the State's complementary protection obligations. However, States must ensure that the human rights of the people within its jurisdiction are upheld.⁶⁰ The Law Council notes that UNHCR has stated that:⁶¹
- ...any denial of international protection on the grounds that the applicant is a threat to national security, public order or public interest requires these criteria to be clearly defined and applied in a rigorous, transparent and consistent manner.*
65. The Law Council also identifies the possibility that a large cohort of people may be indefinitely (and under international law, possibly arbitrarily) detained due to this exclusion, and whilst the Government seeks to find a suitable place to which they may be deported.
66. The Law Council therefore opposes the current exclusions to complementary protection in the Migration Act, and opposes the proposed construction in the Bill.

⁵⁸ Mirroring art 7 of the ICCPR, art 3 provides that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

⁵⁹ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 312.

⁶⁰ See for example: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, paras 111-12. See also: Associate Professor Jane McAdam, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Amendment (Complementary Protection) Bill 2009, 28 September 2009, [121].

⁶¹ United Nations High Commissioner for Refugees, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Migration Amendment (Complementary Protection) Bill 2009, 30 September 2009, [49].

Recommendation:

- **The proposed amendments at Items 16 and 32 are not passed; and**
- **The existing exclusion clauses relating to complementary protection are removed.**

Disclosure of applicant's information to certain countries, placing them at risk⁶²

67. Section 336F of the Migration Act authorises the disclosure of identifying information to foreign countries or specified bodies in other countries or international organisations for a broad range of purposes set out in subsection 5A(3).
68. Item 24 of the Bill would amend subsection 336F(5) to broaden the circumstances in which personal identifiers may be disclosed to foreign countries to include where information pertains to unauthorised maritime arrivals who make claims for protection as a refugee, but is a person in respect of whom the Minister considers, on reasonable grounds, to be a danger to Australia's security or convicted of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence) and be a danger to the Australian community.
69. Under section 336F the information would be permitted to be disclosed to the person's originating country or to a third country.
70. The Law Council considers this amendment to be problematic in the context of the other amendments proposed by the Bill that restrict the application of complementary protection. The holistic effect of these amendments is that a person could be returned to a country where, but for the application of the Bill, they would have a claim under the complementary protection framework, pursuant to the standards set by international instruments to which Australia is party. If passed, this particular amendment would permit Australian authorities to disclose information about this person to the country from which they face a real risk of significant harm, or to a third country that may disclose such information to the originating country. It is possible that such information could be used against this person and their associates upon their return to this country and result in significant harm. This would be contrary to Australia's *non-refoulement* obligations.
71. The Law Council recommends that the Committee consult with the Privacy Commissioner on the appropriateness of this amendment. Review by the INSLM in terms of its effectiveness, necessity and proportionality insofar as it relates to Australia's counter-terrorism laws is also appropriate.
72. The Law Council suggests, as has the Privacy Commissioner, that it would be appropriate to include a mechanism in the Migration Act to ensure that the foreign country will handle this information appropriately.⁶³

⁶² A number of the points expressed in this section have previously been made by the Law Council in its Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment Strengthening Biometrics (Integrity) Bill 2015, 10 April 2015, available at: http://www.lawcouncil.asn.au/lawcouncil/images/2968_-_Strengthening_Biometrics_Integrity_Bill_2015.pdf.

73. The Attorney-General's Department and the Privacy Commissioner's *Review of Personal Identifier Provisions Introduced In 2004 to the Migration Act 1958 (PIP Review)* noted that this may involve, for example, establishing administrative arrangements, undertakings, memorandums of understanding or other protocols with the foreign country regarding the personal information handling practices for personal information transferred to that country under section 336F.⁶⁴ The review also noted that such arrangements should be publicly available and include easily accessible complaint handling and accountability mechanisms.⁶⁵
74. However, given the sensitivity of biometric information, there should also be an express legislative provision in the Migration Act that only permits disclosure to a foreign country or agency where it protects the information in a way that is consistent with the APPs.

Recommendations:

- **The Privacy Commissioner consider the relevant provisions in the Bill, given that a broad range of personal identifiers will be able to be legally disclosed in respect of a wider range of non-citizens;**
- **The INSLM consider subsections 336F(5) and 36(1C) in terms of effectiveness, necessity and proportionality insofar as it relates to Australia's counter-terrorism laws. This should also happen if the Bill is enacted; and**
- **Amend the Migration Act to only permit disclosure to a foreign country or agency where it protects the information in a way that is consistent with the APPs.**

Restricted access to merits review

75. Item 26 of the Bill amends subparagraph 411(1)(d)(i) such that a decision to cancel a protection visa on new subsection 36(2C) grounds (i.e. in respect of complementary protection) is *not* a Part 7-reviewable decision. Part 7 of the Migration Act applies to decisions reviewable by the Administrative Appeals Tribunal (AAT) in its Migration and Refugee Division. However, Part 7 sets out a number of exceptions, including decisions to refuse or cancel a visa that would be or was granted on complementary protection grounds, on the basis of the exclusion clauses that already apply to complementary protection at existing subsection 36(2C). Item 16 of the Bill repeals existing subsection 36(2C).
76. Item 31 of the Bill restricts access to merits review for people seeking complementary protection where the Minister has decided not to grant a protection visa on grounds of national interest at subparagraph 502(1)(a)(ii). This situation already exists elsewhere in the Migration Act, pursuant to paragraphs 36(2C)(b) and 411(1)(c)(i). Item 16 of the Bill repeals existing subsection 36(2C).

⁶³ Department of Immigration and Citizenship, *Final Report: Review of Personal Identifier Provisions Introduced in 2004 to Migration Act 1958*, 11 September 2009, 52.

⁶⁴ *Ibid* 62.

⁶⁵ *Ibid*.

77. As outlined in its submission on the Caseload Bill, the Law Council's *Asylum Seeker Policy* provides that safeguards to protect against *refoulement* include access to a robust and independent system of merits review for all administrative decisions concerning protection status.⁶⁶ The Law Council therefore considers that merits review is a vital element of the legal process which assists correct decisions to be made.
78. The Law Council's Policy also states that the rule of law requires that protection determination processes should include procedural fairness guarantees, such as the right to present and challenge evidence, and be accompanied by the provision of independent legal advice.⁶⁷
79. In that submission, the Law Council referenced the analysis of the Migration Amendment (Protection and Other Measures) Bill 2014 by the Parliamentary Joint Committee on Human Rights (**PJCHR**). The PJCHR stated that Ministerial discretion proposed by the Bill – which subsequently received Royal Assent on 13 April 2015 – was not sufficient to protect against the risk of *refoulement* or satisfy the 'independent, effective and impartial' review standards under the ICCPR and the CAT.⁶⁸
80. The Law Council considers that review by the AAT provides a critical chance for people to properly argue their case, particularly in circumstances where the visa has been denied or cancelled on national security grounds, and where that applicant cannot review information that led to the decision on the basis of national security concerns. The unsuccessful result of such cases may lead to indefinite detention, and the Law Council therefore considers it imperative that there is adequate oversight of such decisions.
81. For these reasons, the Law Council opposes the further restrictions on access to merits review proposed by this Bill. Rather than the passage of these provisions, the Law Council recommends that merits review is made available to all people who are refused a protection visa or whose visa has been cancelled.

Recommendation:

- **The proposed amendments at Items 26 and 33 are not passed; and**
- **Provide merits review to all people who are refused a protection visa or whose visa has been cancelled.**

Victims of human trafficking

82. The Law Council acknowledges and welcomes successive Governments' work to combat human trafficking, slavery and slavery-like conditions in Australia. It notes that individuals in this particular cohort are often eligible for complementary protection where they are unable to claim protection under the Refugee Convention.
83. As Anti-Slavery Australia stated in its submission to this Committee on the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, based on its experiences with these victims:

⁶⁶ Law Council of Australia, *Asylum Seeker Policy* (5 September 2014) '(LCA Policy)', [7(b)(iii)].

⁶⁷ *Ibid* [9(e)].

⁶⁸ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Ninth Report of the 44th Parliament; Bills introduced 23 - 26 June 2014; Legislative Instruments received 7 - 20 June 2014*, 15 July 2014, 45-46.

...many people who have experienced trafficking and slavery in Australia do not fit the criterion for a protection visa as persons to whom Australia has protection obligations under the Refugees Convention. Victims of human trafficking and slavery have often experienced serious harm such as physical and psychological abuse, many have had their movement and finances monitored and controlled, they may have received threats of violence towards themselves and their families who are often known to their traffickers, and have a real fear of further violence if returned to their country of origin.⁶⁹

84. The Law Council considers that, contrary to the Government's work to support such victims, the proposed changes to the complementary protection framework in the Bill would have a detrimental effect on this particular cohort of people who are regularly found to engage Australia's complementary protection obligations.

⁶⁹ Anti-Slavery Australia, Submission to the Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, 22 January 2014, 3, available at: [http://www.antislavery.org.au/images/pdf/Publications/2014%20-%20Submission%20to%20the%20Senate%20Legal%20and%20Constitutional%20Affairs%20Committee%20Inquiry%20into%20Migration%20Amendment%20\(Regaining%20Control.pdf](http://www.antislavery.org.au/images/pdf/Publications/2014%20-%20Submission%20to%20the%20Senate%20Legal%20and%20Constitutional%20Affairs%20Committee%20Inquiry%20into%20Migration%20Amendment%20(Regaining%20Control.pdf).

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 Law Firms Australia, 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 Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. 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 members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark AM, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

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