Australian Government
Department of Immigration and Border Protection

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

Senate Legal and Constitutional Affairs Legislation Committee

November 2015

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1. Introduction

The Department of Immigration and Border Protection welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) inquiry into the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the Bill), following the introduction of the Bill into the House of Representatives on 14 October 2015.

2. Terms of reference

The Bill was referred to the Committee by the Selection of Bills Committee in its Report No. 13 of 2015 on 15 October 2015. The Committee has been requested to consider the following issues in relation to the Bill:

- whether the Bill narrows the definition by which someone can access complementary protection and will potentially see people in genuine need of protection returned to danger; and
- to further investigate potential impacts and unintended consequences of the Bill.

3. Purpose of the Bill

The Bill is a continuation of the Government's protection reform agenda to deliver a more effective and efficient onshore protection status determination process.

Following the passage of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the Legacy Act) in December 2014, and the *Migration Amendment (Protection and Other Measures) Act 2015* (the Protection and Other Measures Act) in March 2015, the Bill amends the statutory framework in the *Migration Act 1958* (the Migration Act) relating to the protection status determination process for persons seeking protection on complementary protection grounds.

Complementary protection is the term used to describe a category of protection for people who are not refugees, but who also cannot be returned to their country of origin, because there is a real risk that they would suffer a certain type of harm that would engage Australia's international *non-refoulement* (non-return) obligations under the International Covenant on Civil and Political Rights (ICCPR) or the Convention Against Torture, and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Specifically, the Bill will amend the Migration Act, to clarify the interpretation of various concepts used to determine whether a person will face a real risk of significant harm so as to give rise to a *non-refoulement* obligation under the ICCPR or the CAT. These amendments will:

- provide that a real risk of significant harm to the person must relate to all areas of the receiving country;
- clarify that a person must face a personal risk of significant harm in the receiving country, rather than a risk that is purely indiscriminate;
- clarify that a person will not face a real risk of significant harm if effective protection measures can be provided to the person by the State or non-State actors in a receiving country; and

- clarify that a person who can take reasonable steps to modify their behaviour so as to avoid significant harm does not face a real risk of that harm as a necessary and foreseeable consequence of their removal to a receiving country, provided that the behaviour modification would not conflict with their identity or core belief system.

The amendments in relation to complementary protection will more closely align the complementary protection framework in the Migration Act with the statutory refugee framework, as inserted by the Legacy Act. Without these amendments, there is an inconsistency between the two frameworks in the Migration Act. Under the current statutory protection visa process, a person may not meet one of the elements of the refugee test, used to determine whether a person has a well-founded fear of persecution, relating to internal relocation alternatives, effective protection and behaviour modification. However, they may then be found to satisfy the complementary protection test because those same elements, used to determine whether a person faces a real risk of significant harm, are currently not aligned. The Bill addresses this inconsistency.

By closely aligning the refugee and complementary protection provisions under the Migration Act, the Bill will restore the Government's intended interpretation of Australia's complementary protection obligations. This is necessary to ensure that, consistent with Australia's international obligations, only those who are in need of Australia's protection will be eligible for a protection visa on complementary grounds.

The Bill also includes technical amendments to the statutory framework in the Migration Act, relating to protection visas and related matters, following the commencement of the Legacy Act and the Protection and Other Measures Act. These amendments will not change the substance of the amended provisions in the Migration Act, but will ensure that they work as originally intended.

The technical amendments in the Bill will:

- clarify the reference to 'protection obligations' in subsection 36(3), by specifying the source of the obligations;
- clarify that the 'country' in subsection 5H(1), which outlines the meaning of *refugee*, is intended to be the same country as the 'receiving country';
- align the statutory provisions relating to protection in another country (third country protection) with the definition of 'well-founded fear of persecution' in section 5J;
- amend subsection 36(2C), to remove duplication between paragraph 36(2C)(b) and subsection 36(1C), which both operate to exclude an applicant from the grant of a protection visa on character-related grounds;
- amend subsection 336F(5), which authorises disclosure of identifying information to foreign countries or entities, to include information pertaining to unauthorised maritime arrivals who make claims for protection as a refugee and fall within the circumstances of subsection 36(1C);
- amend subsection 502(1), which allows the Minister for Immigration and Border Protection (the Minister) to personally make a decision that is not reviewable by the Administrative Appeals Tribunal, to apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person; and
- amend subsection 503(1), which relates to the exclusion of certain persons from Australia, to apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person.

4. Content of the Bill

4.1 - Strengthening the complementary protection framework

A criterion for the grant of a protection visa is that the Minister (or delegate) is satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned, there is a real risk that a person will suffer significant harm. This is set out in paragraph 36(2)(aa) of the Migration Act.

New subsection 5LAA that will be inserted by the Bill provides the circumstances in which there is a real risk that a person will suffer significant harm.

Currently, under subsection 36(2A) of the Migration Act, a person will suffer significant harm if:

- the person will be arbitrarily deprived of his or her life; or
- the death penalty will be carried out on the person; or
- the person will be subjected to torture; or
- the person will be subjected to cruel or inhuman treatment or punishment; or
- the person will be subjected to degrading treatment or punishment.

The Bill moves the content of current subsection 36(2A) into new subsection 5LAA(3). In doing so, there is no change to the content or intended meaning of current subsection 36(2A).

New subsections 5LAA(1), (4) and (5) in the Bill, establish equivalent concepts and standards to the complementary protection framework, that currently apply under the existing refugee framework in the Migration Act. These provisions, together with new subsection 5LAA(2), are based on the existing complementary protection provisions in the Migration Act and cover the key elements of the 'real risk' threshold that must be considered, namely that to satisfy the complementary protection criteria in the Migration Act:

- the real risk of significant harm needs to relate to all areas of a country;
- in relation to claims arising from situations of generalised risk, the person needs to face the real risk of significant harm personally;
- there are no available effective protection measures against significant harm in the country; and
- a person is unable to reasonably modify their behaviour, so as to avoid a real risk of significant harm, because to do so would conflict with their identity or core belief system.

4.1.1 - Real risk of significant harm in the entire country

New paragraph 5LAA(1)(a) provides that a necessary element of the real risk of significant harm is that the real risk relates to all areas of the receiving country. This amendment aligns the criteria for complementary protection with the criteria under the refugee framework in existing paragraph 5J(1)(c) of the Migration Act.

This amendment clarifies that, in relation to complementary protection, a person who could relocate to a safe part of the receiving country upon their return to that country would be found not to have a real risk of significant harm. In considering whether a person can relocate to another area of the receiving country, a decision-maker will continue to apply policy guidelines to take into

account whether the person can safely and legally access an 'internal flight alternative' (the ability to find safety in another part of their home country), such that it would mitigate a 'real risk' of 'significant harm' to the person. It is also the Government's intention that the 'reasonableness' of relocation in light of the individual circumstances of the person is no longer a part of the test to establish internal flight alternatives. This modified test is consistent with Australia's *non-refoulement* obligations under the ICCPR and CAT.

This amendment is consistent with international commentary about these *non-refoulement* obligations which confirms that consideration should be given to whether the person will face a real risk of significant harm in the entire country. Furthermore, it indicates that a risk of harm to the entire territory of the State must exist, with no internal flight alternative. As such, the aim of new paragraph 5LAA(1)(a) is to ensure that this approach is both applied to an assessment of complementary protection claims and applied consistently with Australia's *non-refoulement* obligations, as reflected in the Migration Act. An assessment is not required to determine whether the internal flight alternative would provide the person with ideal or preferred living circumstances. Such considerations go beyond the requirements of Australia's *non-refoulement* obligations because these aspects fall short of the definition of 'significant harm', as outlined under new subsection 5LAA(3) and do not amount to a 'real risk' of significant harm.

This amendment further clarifies the Government's intention that the approach will no longer encompass the consideration of whether relocation is 'reasonable', in the sense of being practicable for a person to relocate. The Government considers that, in interpreting whether it is reasonable for a person to relocate to another part of their country in the refugee context, Australian case law has broadened the scope of the principle beyond what is necessary to take into account the practical realities of relocation. For example, as a result of cases such as *SZATV* and *Randhawa v MILGEA* (1994) 52 FCR 437, when assessing internal relocation options, decision-makers are now required to consider aspects such as a potential diminishment in quality of life or financial hardship which may result from the relocation. These factors, in the Government's view, go beyond what is necessary to establishing a real risk of significant harm. Similarly, in adopting this approach when assessing complementary protection claims, the Government considers those aspects which fall short of the type of harm which amounts to significant harm to be outside the scope of the assessment of a real risk of significant harm. It is therefore the Government's intention that new paragraph 5LAA(1)(a) no longer include consideration of whether it would be reasonable for a person to relocate within their country.

4.1.2 - Person at risk of significant harm personally

New paragraph 5LAA(1)(b) provides that there is a real risk that a person will suffer significant harm in a country if the real risk is faced by the person personally. New subsection 5LAA(2) clarifies the intention and effect of paragraph 5LAA(1)(b) by providing 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.

The purpose of this amendment is to clarify that complementary protection is only available where the real risk of significant harm is faced by a person personally, rather than being an indiscriminate risk of harm (such as generalised violence) faced by the population in the receiving country generally.

Consistent with international jurisprudence regarding the interpretation of the ICCPR and the CAT, specifically in relation to claims arising from situations of heightened danger or violence, this amendment clarifies that such circumstances would not constitute a personal risk of 'significant harm' unless there were a further factor or characteristic indicating that the individual themselves, or a class of persons that they belong to, are the intended target of such violence, which in turn, increases the likelihood of the individual to face a 'real risk' of 'significant harm'.

Therefore, while the existence of a consistent pattern of human rights violations in a country may create an environment where such violations may be condoned or more easily carried out, international jurisprudence states that to be eligible for complementary protection, specific grounds must exist that indicate that the individual concerned would be personally at risk of 'significant harm'.

There may be instances, 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. For instance, a 'real risk' of being arbitrarily killed could arise from the threat of guerrilla militants who are systematically moving through a particular region of a country and committing genocide against entire populations without discrimination. 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.

The intended interpretation and application of the amended provision is that while the existence in the relevant country of a consistent pattern of gross, flagrant or mass violation of human rights is a relevant consideration, this, of itself, does not constitute a real risk of significant harm for the purposes of complementary protection. The intent is that in such cases, additional grounds must be adduced by the applicant to show that he or she is at a particular risk. However, this does not mean that the person must be individually targeted. For example, the removal of a person to a country where random criminal violence was prevalent would not constitute a personal risk of significant harm to a person unless there was some factor or characteristic to show why the person or a class of persons might be targeted, or unless the risk was so high that the risk truly was real and personal for the population. This will require an assessment by decision makers of the actual level of risk specifically posed to a particular person, as part of which the existence of serious and indiscriminate human rights violations will be a relevant factor.

This amendment is not intended to elevate the risk threshold for those people who are facing removal to countries where there is a generalised risk of violence. It is only intended to put beyond doubt that the real risk must be faced by the person personally, irrespective of whether there is generalised violence in the country. Currently, paragraph 36(2B)(c) of the Migration Act provides that a non-citizen will not suffer significant harm in a country if the Minister is satisfied that the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally. New paragraph 5LAA(1)(b) and new subsection 5LAA(2) will make the policy intention clearer on this issue. Contrary to the intention in respect of current paragraph 36(2B)(c), some decision makers have erroneously reasoned that harm that is faced by a population of a country generally will therefore be faced personally by each of the residents, or that where significant harm is faced by everyone in the country of origin/region of a country, a particular applicant is necessarily excluded from protection. Neither of these interpretations were the Government's intention. This amendment is seeking to restore the intended operation of the provision.

4.1.3 - Effective protection and complementary protection

New subsection 5LAA(4) provides that there is not a real risk that a person will suffer significant harm in a country if effective protection measures against significant harm are available to the person in the country. This amendment replaces current paragraph 36(2B)(b) of the Migration Act and aligns the criteria for complementary protection with the criteria under the refugee framework in existing subsection 5J(2) of the Migration Act.

This amendment clarifies that a person will not face a real risk of significant harm if effective protection measures are available to the person through State or non-State actors in a receiving country. The level of protection offered by a country to a person must be sufficient so as to mitigate a 'real risk' of 'significant harm' to them, however it does not need to provide them with 'perfect' or preferred circumstances under which the person might wish to live.

Similar to considerations that decision-makers take into account when assessing the possibility of an alternative flight option in-country, international jurisprudence on the interpretation of these obligations indicates that a 'real risk' of harm may not arise in circumstances where there are effective safety or enforcement mechanisms offered by state or non-state actors internally that would assist the person to avoid a threat of significant harm towards them.

Currently, paragraph 36(2B)(b) of the Migration Act provides that a person is taken not to face a real risk of suffering significant harm if they could obtain protection from an authority of the receiving country such that there would not be a real risk that the person will suffer significant harm. It has always been the intention that an assessment of protection measures under paragraph 36(2B)(b) should include an assessment of the system of State protection provided in the receiving country, including functioning criminal law and justice systems, and the availability of an effective police force. It is also relevant that protection need not be provided exclusively by the State, but may be effected by Non-State actors, for example, the United Nations or friendly forces.

Furthermore, it has always been the intention that consideration must be given to whether the person is able to access the effective protection measures in their individual circumstances. If the person is unable to access state protection that would normally be effective but in their particular circumstances is not, for example, in a domestic violence case because the perpetrator of the harm has close links to the police force, then this provision will not apply and the person may be entitled to complementary protection.

4.1.4 - Modifying behaviour to avoid significant harm

New subsection 5LAA(5) provides that there is not a real risk that a person will suffer significant harm in a country if the person could take reasonable steps to modify his or her behaviour to avoid a real risk that the person will suffer significant harm in that country. However, this Bill explicitly (see 5LAA(5)(c)(i-vi)) does not include behaviour modification that would:

- conflict with a characteristic that is fundamental to person's identity or conscience; or
- conceal an innate or immutable characteristic of the person; or
- require a person to do any of the following:
    - alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - conceal his or her true race, ethnicity, nationality or country of origin;
    - alter his or her political beliefs or conceal his or her true political beliefs;
    - conceal a physical, psychological or intellectual disability;
    - enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;

- alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

This amendment aligns the criteria for complementary protection with the criteria under the refugee framework in existing subsection 5J(3) of the Migration Act and clarifies that, in accordance with Australia's *non-refoulement* obligations, a 'real risk' of 'significant harm' does not crystallise where a person could take reasonable steps to modify their behaviour so as to avoid a real risk of significant harm arising, other than a modification that would conflict with the person's innate or immutable characteristics, or which is fundamental to the person's identity or conscience (such as sexual orientation, religious beliefs or political beliefs).

This amendment is intended to reflect the Government's view that some harm could be brought about by a person's own voluntary actions, for example, by breaking the law upon their return to the country, and that in some circumstances it is reasonable to expect a person not to engage in such action in order to avoid a real risk of harm.

The effect of new subsection 5LAA(5) is that a person who could avoid a real risk of significant harm in a country by taking reasonable steps to modify his or her behaviour, would be found not to have a real risk of significant harm. This is provided that the modification of behaviour required to avoid the harm does not conflict with a characteristic that is fundamental to the person's identity or conscience, or conceal an innate or immutable characteristic of the person. The reference in new paragraph 5LAA(5)(a) to 'conscience' is intended to encompass aspects such as religion, political opinion and moral beliefs. A modification in behaviour which is contrary to any aspect of 'conscience' will not necessarily indicate that the person could not take reasonable steps to avoid a real risk of significant harm. Only a modification of behaviour that is fundamental to the person's conscience will be relevant for the purposes of new paragraph 5LAA(5)(a).

The reference in new paragraph 5LAA(5)(b) to an 'innate' characteristic is intended to include inborn characteristics, which could be genetic. Innate characteristics could include aspects such as the colour of a person's skin, a disability that a person is born with or a person's gender. The reference in new paragraph 5LAA(5)(b) to an 'immutable' characteristic is intended to encompass a shared common background that cannot be changed. This could be an attribute which the person has acquired at some stage of his or her life such as the health status of being HIV positive, or a certain experience such as being a child soldier, sex worker or victim of human trafficking. For example, a person who faces a real risk of significant harm because of their previous history as a prostitute may not be able to avoid a real risk of significant harm by merely ceasing prostitution work in the future because it is often difficult for a person to disavow themselves of their background and personal profile as a former prostitute. New section 5LAA would therefore not preclude a finding of a real risk of significant harm in respect of that person.

This provision is concerned with reasonable modification only. In the complementary protection context, a person may be able to modify their behaviour in a manner that would not conflict with their identity or core belief system (for example, by refraining from engaging in an occupation that carries risk where it is reasonable for the person to find another occupation) and could thereby avoid the risk of significant harm. If this is the case, they do not require Australia's protection as their return would not place them at risk of harm and therefore not engage Australia's *non-refoulement* obligations – a risk of harm would only arise if they chose to undertake certain actions.

4.2 – Technical amendments

Technical amendments in the Bill are necessary to resolve issues relating to the protection visa framework in the Migration Act, which have become apparent since the commencement of the Legacy Act and the Protection and Other Measures Act. As previously discussed, these amendments will not change the substance of the amended provisions in the Migration Act, but will ensure that they work as originally intended.

4.2.1 - Clarifying the reference to 'protection obligations' in subsection 36(3)

This amendment will clarify that the reference to 'protection obligations' in subsection 36(3) of the Migration Act, which refers to protection in a third country, is to obligations relating to both refugee protection and complementary protection.

This amendment does not change the substance of subsection 36(3) of the Migration Act, but puts beyond doubt the position as it currently exists.

4.2.2 – Clarifying that the 'country' in subsection 5H(1), which outlines the meaning of refugee, is intended to be the same country as the 'receiving country'

This amendment will clarify that the 'country' in subsection 5H(1) is intended to be the same country as the 'receiving country', by referring directly to the definition of 'receiving country' in subsection 5(1) of the Migration Act.

The definition of 'refugee' was recently inserted into the Migration Act by the Legacy Act. The 'receiving country' is, for a person who has a country of nationality, the country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country, and for a person who has no country of nationality, it is the country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country. It is most commonly also the country against which the applicant for a protection visa is seeking protection.

Following the commencement of the Legacy Act, the potential for some confusion to arise about the interaction between the definition of 'refugee' and the definition of 'receiving country' in the Migration Act has become apparent. To avoid this issue and reduce the associated risk of error by decision-makers, this provision will amend the definition of 'refugee' to use the recently amended 'receiving country' definition.

This amendment does not change which country or countries a person will be assessed against for the purpose of determining whether they meet the definition of 'refugee' in subsection 5H(1).

4.2.3 - Aligning the statutory provisions relating to protection in another country (third country protection) with the definition of 'well-founded fear of persecution' in section 5J

These amendments will clarify that the definition of 'well-founded fear of persecution' in section 5J of the Migration Act, applies to the provisions relating to protection in another country, or third country protection, in subsections 36(3) to (7) of the Migration Act.

Specifically, under subsection 36(3), Australia is taken not to have protection obligations towards a person if they have 'not taken all possible steps to avail himself or herself of a right to enter and reside in' any country apart from Australia, unless one of the exceptions in subsections 36(4) to (5A) applies to the person. The exception in subsection 36(4) relates to the person having a well-founded fear of persecution or facing a real risk of significant harm in the third country and the exception in subsections 36(5) and 36(5A) relates to the person being returned by that third country to another country where he or she has a well-founded fear of persecution or faces a real risk of significant harm.

The intention is that the definition of 'well-founded fear of persecution' in section 5J applies to subsections 36(3) to (7), however, due to different terminology in the current legislation there is a risk that these provisions do not interact as intended. There is therefore some ambiguity relating to the interaction of the definition of 'well-founded fear of persecution' with the provisions dealing with protection in another country, which these amendments will resolve. In providing consistent language in these sections and subsections, these amendments will ensure that the existing provisions in the Migration Act work as originally intended.

4.2.4 - Streamlining subsection 36(2C)

This amendment will remove the duplication between paragraph 36(2C)(b) and subsection 36(1C) in the Migration Act, which both operate to exclude an applicant from the grant of a protection visa on character-related grounds.

Existing paragraph 36(2C)(b) prevents a person from satisfying the complementary protection criterion for a protection visa if the Minister considers, on reasonable grounds, that the non-citizen is a danger to Australia's security; or the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.
The content of this paragraph is replicated in subsection 36(1C), which was inserted into the Migration Act by the Legacy Act. Subsection 36(1C) applies to all protection visa applicants, regardless of the grounds on which the applicant seeks protection. For this reason, paragraph 36(2C)(b) is no longer required and will be repealed by the Bill. The Bill also makes other technical amendments as a consequence of this amendment to subsection 36(2C).

This amendment is technical in nature and does not change in any way the grounds on which a person can be taken to be ineligible for a protection visa.

4.2.5 - Amending subsection 336F(5) relating to authorising disclosure of identifying information to foreign countries or entities

This amendment will provide a technical fix to subsection 336F(5), as a consequence of the insertion of new subsection 36(1C) into the Migration Act by the Legacy Act. Subsection 336F(5) relates to authorising the disclosure of identifying information to foreign countries.

This amendment will give effect to the Government's intention that identifying information collected from a non-citizen in Australia (such as biometric information) should be able to be disclosed to a foreign country or entity, if the information relates to a person who makes a claim for protection as a refugee, but is found not to engage Australia's *non-refoulement* obligations under the Refugees Convention because of certain matters. Those matters are that the person is a person in respect of whom there are reasonable grounds for considering that they are a danger to Australia's security or is a person who, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious

Australian offence or serious foreign offence), is a danger to the Australian community. This reflects Article 33(2) of the Refugees Convention.

Disclosure of this type of information is limited to circumstances where the Secretary of the Department of Immigration and Border Protection or the Australian Border Force Commissioner has provided written authorisation to a specified officer to disclose specified identifying information to specified countries/bodies/organisations.

This amendment will therefore give effect to the Government's intention and will align the circumstances where information may be authorised to be disclosed in relation to a person who makes refugee claims outside of the protection visa process, with those where a person makes them in the protection visa process. This amendment will bring about consistency with other provisions in the Migration Act.

While this provision will facilitate in some instances the disclosure of personal information to a foreign government without the person's consent, such action will only be made if it is proportionate to the ends sought, including maintaining the integrity of Australia's migration programme, and other purposes, as outlined at subsection 5A(3) of the Migration Act.

4.2.6 – Expanding the scope of subsection 502(1) to relate to persons seeking complementary protection

Section 502 of the Migration Act provides the Minister with the power, in certain circumstances, to declare a person to be an 'excluded person', in the sense of being excluded from merits review. These circumstances apply where the Minister has made a personal decision to refuse, under section 65 of the Migration Act, a protection visa on character-related grounds. Because of the seriousness of the circumstances giving rise to the making of that personal decision by the Minister, it is in the national interest that the person be declared an 'excluded person'. As a consequence of being declared an 'excluded person', a person is not able to seek merits review of a decision at the Administrative Appeals Tribunal.

Currently section 502 applies in respect of persons who have been refused the grant of a protection visa on refugee grounds for reasons relating to the character of the person. The Government now considers it appropriate to extend the scope of section 502 to also apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person. The amendments to section 502 will give effect to this policy.

This amendment will ensure consistency in the Minister's powers when dealing with non-citizens of serious character concern. As such, it is expected it will only be used in limited situations where there is a clear national interest reasons to limit access to merits review. All persons impacted by the personal decisions made by the Minister will continue to have access to judicial review.

4.2.7 – Expanding the scope of subsection 503(1) to relate to persons seeking complementary protection

Section 503 of the Migration Act relates to the exclusion of certain persons from being able to return to Australia. A person who is affected by this provision is not entitled to enter Australia or be in Australia at any time during the period determined under the regulations. Currently, section 503 applies in respect of persons who have been refused the grant of a protection visa on refugee grounds for reasons relating to the character of the person, and has been removed from Australia.

The Government now considers it appropriate to extend the scope of section 503 to also apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person. The amendments to section 503 will give effect to this policy.

In the event that a person is refused complementary protection on a character-related ground and is subsequently removed from Australia to a safe third country, or chooses to depart Australia voluntarily, the amendment will ensure that person can be excluded from Australia as per the existing arrangements for non-citizens refused a protection visa on character-related grounds.

5. Discussion

Two principal issues of concern have been raised in relation to the Bill, which are to be considered by the Committee, as per the terms of reference to this inquiry. The Department seeks to address both of these issues in turn.

5.1 - Does the Bill narrow the definition by which someone can access complementary protection?

The Bill will not alter the criterion for a protection visa on complementary protection grounds, under paragraph 36(2)(aa) of the Migration Act. That is, there will be no change to the test that in each case there must be substantial grounds for believing that, as a necessary and foreseeable consequence of being returned, there is a real risk that a person will suffer significant harm of a particular type, consistent with the ICCPR and the CAT, namely:

- the arbitrary deprivation of life;
- having the death penalty carried out;
- being subjected to torture;
- being subjected to cruel or inhuman treatment or punishment; or
- being subjected to degrading treatment or punishment.

Furthermore, the Bill does not amend the risk threshold for assessing Australia's *non-refoulement* obligations under the ICCPR and the CAT. The 'real chance' risk threshold for assessing complementary protection in the Migration Act will remain intact. It currently applies to both the refugee and complementary protection contexts and is not amended in either context by the Bill.

Rather, the Bill will clarify the interpretation of the already existing concepts in the Migration Act that are used to determine whether a person will face a real risk of significant harm so as to give rise to a *non-refoulement* obligation under the ICCPR or the CAT.

It is the Government's position that this is now necessary, as since the introduction of complementary protection into Australia's protection visa processes in March 2012, various judicial interpretation issues have arisen in the current legislative framework which has resulted in the broadening of Australia's complementary protection obligations in a way that goes beyond current international law interpretations. As a result, there have been instances in which an individual's claims have been found to meet the complementary protection criterion, despite the fact that the Government, consistent with its international obligations, did not intend for the legislation to cover such cases.

The Bill will therefore restore the Government's intended interpretation of the complementary protection provisions in the Migration Act, so as to ensure that only those who are in need of Australia's protection will be eligible for a protection visa on complementary protection grounds.

While the Bill makes several changes to the statutory complementary protection framework it does not affect the substance of Australia's adherence to its *non-refoulement* obligations. Australia's *non-refoulement* obligations under the ICCPR and the CAT are absolute and cannot be derogated from. The Government will continue to comply with these obligations and Australia remains bound by them as a matter of international law.

5.2 - Will the Bill result in people in genuine need of protection being returned to danger?

The Bill will not increase the likelihood of returning people to situations that will engage Australia's *non-refoulement* obligations.

While the Bill will restore the Government's intended interpretation of the concepts used to determine whether a person will face a real risk of significant harm, the application of each of these concepts by decision-makers is qualified by certain limitations, to ensure that people in genuine need of protection will continue to meet the complementary protection criteria in the Migration Act. These qualifications are set out below against each of the key elements that determine whether a person will face a real risk of significant harm.

Real risk of significant harm in the entire country

In considering whether a person can relocate to another area of the receiving country, such that it would mitigate a 'real risk' of 'significant harm' to the person, in line with policy guidelines decision-makers will consider whether the person can safely and legally access an internal flight alternative (the ability to find safety in another part of their home country). That is, decision makers will continue to apply policy guidelines to take into account avenues of safety and lawfulness of access from the point of return to the place of safety. If an internal flight alternative exists, but a person is unable to safely and legally access this, then they are not likely to be excluded from complementary protection.

In the complementary protection context, it is logical to establish the safe and lawful access to a place of safety on return under new paragraph 5LAA(1)(a), otherwise it would be difficult to conclude that the real risk of significant harm does not exist in relation to all areas of the receiving country.

Person at risk of significant harm personally

While the Bill puts beyond doubt 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. For example, the removal of a person to a country where random criminal violence was prevalent would not constitute a personal risk of significant harm to a person unless there was some factor or characteristic to show why the person or a class of persons might be targeted, or unless the risk was so high that the risk truly was real and personal for the population. 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.

Effective protection measures

It has always been the policy intention that consideration must be given by decision-makers to whether a person is able to access the effective protection measures in their individual circumstances. If the person is unable to access state protection that would normally be effective but in their particular circumstances is not, for example, in a domestic violence case because the perpetrator of the harm has close links to the police force, then this provision will not apply and the person may be entitled to complementary protection.

Modifying behaviour to avoid a real risk of significant harm

This provision is concerned with reasonable modification only, so as to avoid a real risk of significant harm, and does not include modification that would:

- conflict with a characteristic that is fundamental to a person's identity or conscience; or
- conceal an innate or immutable characteristic of the person; or
- require a person to do any of the following:
    - alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - conceal his or her true race, ethnicity, nationality or country of origin;
    - alter his or her political beliefs or conceal his or her true political beliefs;
    - conceal a physical, psychological or intellectual disability;
    - enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

The tests being amended by the Bill to determine whether a person will face a real risk of significant harm reflect Australia's interpretation of its international obligations, and guidance will be provided to decision-makers to ensure that the tests are applied in a manner consistent with those obligations. Any person found to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations.