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Committee Secretary
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Migration Amendment (Complementary Protection and Other Measures) Bill 2015

We welcome the opportunity to comment on the Migration Amendment (Complementary Protection and Other Measures) Bill 2015.

This Bill adversely impacts upon the legislative framework governing complementary protection in Australia. It further entrenches the lack of fairness and departure from Australian and international legal norms which were ushered in by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

Our submission focuses on the impact of these provisions in relation to:

a. Internal relocation;
b. Real risk to be faced personally;
c. Modification of behaviour;
d. Effective protection

We believe that the changes proposed in the current Bill will negatively impact the most vulnerable asylum seekers, create an unreasonable burden of proof and significantly increase the threshold required for complementary protection claims to be recognised.

Our submission on each of these issues is attached. Thank you for the opportunity to contribute to this important inquiry and please do not hesitate to contact Melinda Jackson, Principal Solicitor

Yours sincerely

Kon Karapanagiotidis, CEO

Introduction

1 The Asylum Seeker Resource Centre (**ASRC**) protects and upholds the human rights, wellbeing and dignity of asylum seekers. We are the largest provider of aid, advocacy and health services for asylum seekers in Australia. Most importantly, at times of despair and hopelessness, we offer comfort, friendship, hope and respite.

2 We are an independent, registered non-governmental agency and we do not receive any direct program funding from the Australian Government. We rely on community donations and philanthropy for 95 per cent of our funding. We employ over 70 staff and rely on over 1000 dedicated volunteers. We deliver services to over 1,500 asylum seekers at any one time.

3 Our submission is based on 14 years of experience working with asylum seekers in Victoria.

Executive Summary

4 The ASRC opposes the passage of the Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (**the Bill**). If passed, these changes will further entrench the lack of fairness inherent in the earlier set of reforms under the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (**the Caseload Act**). The ASRC strongly opposed the passage of the Caseload Act[1] and has seen first-hand the impact of such amendments on the refugee status determination process in Australia.

5 Whilst the Bill aims[2] to align the existing framework for complementary protection under the *Migration Act 1958* with the statutory refugee protection framework created by Schedule 5 to the Caseload Act, the ASRC believes the Bill extends beyond technical amendments designed to ensure consistency, and instead substantially risks refugees being returned to their home countries in breach of Australia's non-refoulement obligations under international law.

6 As set out below, the ASRC's submission focuses on four of the most concerning elements of this Bill, each of which alters the statutory framework:

a. Internal relocation;
b. Real risk to be faced personally;
c. Modification of behaviour;
d. Effective protection.

7 In addition to these changes to refugee status determination, the ASRC anticipates that the significant number of undefined new terms, and the intentional displacement of international jurisprudence, will lead to substantial numbers of people seeking judicial review before the Federal Circuit Court (FCC) and subsequently on appeal to the Federal Court and the High Court. This vast increase in litigation is likely to severely and adversely impact upon the FCC's already stretched resources, with no commensurate increase in funding, will lead to protracted waiting times and inefficient caseload management.

The legal framework for complementary protection

8 It is well established that Australia owes protection obligations to individuals who have a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group. 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

[1] Asylum Seeker Resource Centre, 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), 31 October 2015
[2] Explanatory Memorandum, Migration Amendment (Complementary Protection and Other Measures) Bill 2015,

has protection obligations under the Refugees Convention as amended by the Refugees Protocol.' The amendments in Schedule 5 to the Caseload Act codified and modified such principles under the Refugees Convention. As mentioned above the ASRC strongly opposed the passage of these amendments, which derogate from Australia's international human rights obligations by redefining what it means to be a refugee. The ASRC notes that Australia is a signatory to the Refugees Convention, which prohibits reservations to Article 1 (containing the definition of a refugee).

9 Australia's protection obligations also arise under other international instruments. Australia is a signatory to the *International Covenant on Civil and Political Rights* (**ICCPR**), the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**CAT**) and the *Convention on the Rights of the Child* (**CROC**), which all require nations not to return people to countries where they face a real risk of:

- Torture
- Cruel or inhuman treatment or punishment
- Degrading treatment or punishment
- Arbitrary deprivation of life
- The death penalty

10 The principle of non-refoulement; that is, that individuals seeking asylum not be returned to harm in their country of origin or another country, also extends to our obligations under these conventions. In March 2012, these non-refoulement obligations under the ICCPR, CAT and CROC were codified within the Migration Act as complementary protection.

11 These provisions were a vital addition to the Migration Act as before their introduction, asylum seekers who did not meet the definition of a refugee under the Refugees Convention could only access protection by seeking Ministerial Intervention via the discretionary powers contained in the *Migration Act 1958*. Such Ministerial Intervention powers are non-compellable and not-reviewable, which therefore increased the risk that Australia would breach its non-refoulement obligations and send people back to harm. The introduction of a robust and fair complementary protection regime has significantly enhanced Australia's ability to fairly and transparently afford protection to those who are owed it, outside of the refugee determination process.

12 Since the introduction of complementary protection provisions, the ASRC has worked with many clients who have benefited from the framework, including people who were at risk of arbitrary deprivation of life or having the death penalty carried out on them, and victims of human trafficking.

13 Whilst the numbers of people granted permanent visas under the complementary protection provisions since their introduction on 24 March 2012 is relatively low,[3] the legislation had provided a critical safety net for people who fell outside the Refugees Convention definition. It is important to remember the significance of the decision to grant a visa under complementary protection grounds: protection is the difference, for these people, between life and death.

14 In light of the relatively recent introduction of the provisions, and the fractional number of people found to be owed protection obligations under the complementary protection framework, the ASRC believes it is critical for the Government to conduct a careful and detailed analysis of the impact of the

[3] According to the Andrew & Renata Centre for International Refugee Law, "[t]he number of protection visas granted on complementary protection grounds is extremely low. According to the most recent figures from the Immigration Department, in September 2013, only 55 out of 1,200 protection visas granted onshore were on complementary protection grounds. It is therefore misleading to claim, as the Immigration Minister has, that the complementary protection system is open to 'widespread abuse' and adds 'another product to the people smugglers' shelf' Andrew & Renata Kaldor Centre for Refugee Law, "Factsheet: Complementary Protection" Published 25 July 2015 http://www.kaldorcentre.unsw.edu.au/publication/complementary-protection

proposed changes prior to rushing amendments which may be disproportionate and exceed their stated aims.

Changes proposed under the current Bill

15 The current Bill seeks to align the complementary protection provisions in the *Migration Act 1958* with other changes made to the refugee determination process passed in December 2014 under the Caseload Act. However, now as was the case then, the changes proposed are deeply problematic and significantly undermine Australia's ability to provide a fair and reasonable determination process to the most vulnerable people.

16 Our particular concerns with elements of the Bill are set out below. In considering the impact of this Bill generally, as noted above, the complementary protection provisions have been an important safety net for people who fell outside of the Refugees Convention definition but who were still at risk of harm. With the passage of the Caseload Act and the extraordinary derogation from the Refugees Convention, the ASRC believes that many more asylum seekers will not meet the codified refugee criteria, for example, the narrowed definition of membership of a particular social group. As such, a principled approach to an assessment of Australia's international human rights obligations is mandatory in ensuring the proper functioning of this safeguard, as it was originally intended.

Internal relocation

17 Under the proposed amendments,[4] an applicant must demonstrate that there is a real risk that they will suffer significant harm in a country where the 'real risk of harm relates to all areas of the country'. This is broader than the existing law in two fundamental respects: the notion of reasonableness is specifically removed, and decision makers have far broader scope for considering particular places where an applicant may relocate.

18 This marks a significant departure from the relocation test under the current complementary protection provisions. 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*,[5] 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.

19 Currently, Australian decision makers are required to determine whether the real risk of significant harm is localised, whether the original risk of harm or another new risk of harm would be present in another proposed area, and then consider the reasonableness of relocation to other parts of the country.[6]

20 In considering the reasonableness of relocation under the existing test, the High Court found in *SZATV*[7] that what is reasonable depends on the particular circumstances of the individual applicant and the impact upon that person of relocation of the place of residence within the country of nationality. Further, the High Court held in *Al-Amidi v MIMA*[8] that the factors to be considered in determining reasonableness should include the person's age and resourcefulness, the norms of civil and political rights, and familial and health considerations.

21 The ASRC notes that elimination of the 'reasonableness' element of internal relocation departs from the UNHCR's *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within*

[4] Proposed new paragraph 5LAA (1)(a) (Items 11 and 16 of the Bill)
[5] *MZYXS v MIAC [2013] FCA 614 (Marshall J, 21 June 2013)*
[6] SZATV v MIAC (2007) 233 CLR 18 at [24]
[7] SZATV v Minister for Immigration and Citizenship (2007) 233 CLR 18
[8] Al-Amidi v MIMA [2000] FCA 1081

the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. In relation to this issue, the ASRC endorses the concerns raised by the UNHCR in its submission[9] on the Caseload Bill, and regards the UNHCR's policy guidelines as authoritative guidance on this issue.

22 The ASRC reiterates the concerns it raised when changes to the relocation test were proposed under the Caseload Bill in 2014 - that the removal of the need to consider reasonableness and vital individual factors would result in unconscionable outcomes for asylum seekers. The ASRC considers that the current relocation test is a robust assessment which carefully considers the circumstances of the applicant and which correctly identifies those to whom relocation is available. In 14 years of working with asylum seekers, the ASRC has encountered hundreds of decisions which conduct a thorough scrutiny of relocation and indeed many decision makers refuse applicants on this basis alone. As noted by Kirby J in the key case of *SZATV*, invocation of the internal protection alternative is 'extremely common' in any case where a refugee applicant leaves a country which is 'large or even middling in size.'[10]

23 In particular, the proposed changes forcing relocation to any area of a receiving country, irrespective of its reasonableness for any particular applicant, will have a disproportionate impact on women, many of whom, in the ASRC's years of experience, have been victims of domestic violence, trafficking or sexual abuse. Many of these women lack education and/or the means to support themselves independently, and may suffer mental health issues as a result of their trauma. The vast majority of refugee producing countries do not have legal or practical safety nets to support women, and there is a significant risk such women will fall into destitution or exploitation if forced to relocate to areas where they lack the social and family networks that are crucial for survival. Under the new framework, it is open for decision makers to consider gender as an individual factor which will not be taken into account when applying the test of internal relocation.

24 Further, many asylum seekers suffer from significant mental and other health issues, which require access to the quality and consistent medical treatment. Again, there is a significant risk that asylum seekers returned to their country and forced to relocate away from support networks and basic services may not be able to access such treatment, or be able to afford it even if the requisite level of care is available in their country. The ASRC notes that the current relocation test envisages factors such as access to psychological treatment in a proposed area of relocation, and a decision maker may find that denial of such treatment (for a non-Convention reason or due to lack of access) may expose a refugee to an unacceptable risk of another serious harm, or diminish their quality of life so substantially so as to be unreasonable.

25 In practice, the ASRC is highly concerned that the proposed amendments will unfairly shift the onus onto the applicant to disprove why they cannot relocate to one or more particular areas. In its experience of interviews under the statutory refugee protection regime, the ASRC senses that decision makers may select obscure, remote or patently impractical places, or may present applicants with lengthy lists of 'available areas for relocation.' This places an impossibly high evidentiary burden on the applicant to disprove their capacity to relocate to every possible region of the country. The UNHCR has previously commented that establishing country-wide persecution imposes an "impossible burden and one which is patently at odds with the refugee definition."[11]

[9] 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

[10] *SZATV v MIAC* (2007) 233 CLR 18 at 31 [40]

[11] UNHCR, *The Internal Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (Apr 2001)

26 Under the proposed test, the ASRC believes there would be nothing to prevent women, children and other groups susceptible to exploitation (such as those with disability or mental health issues) being required to relocate to remote areas that are devoid of support networks, difficult to access and lack even basic services or economic opportunities. This may result in refoulement and the unacceptable outcome of the most vulnerable of people living without the means to live a safe, decent and fulfilling life.

27 While the Explanatory Memorandum characterises such concerns as merely 'quality of life or financial hardship'[12] issues, for the most vulnerable of applicants there is a very serious risk that a failure to consider the reasonableness of relocation will expose them to new forms of serious harm and persecution, rather than just trivial inconvenience or discomfort.

28 In addition, the new undefined terms in the Bill such as 'area' will be likely to lead to vast numbers of people seeking judicial review on similar grounds, being the nature and size of an 'area', whether travel to an area may be a relevant consideration, and whether legality and safety of access must be taken into account. The ASRC believes that policy guidance is insufficient direction for decision makers, and that the result will be inconsistent primary administrative decision making, combined with limited merits review, which ultimately leads to larger numbers of complex legal matters before the Federal Circuit Court.

Case study 1 – Where relocation is unreasonable and will result in harm

Maryan is a young woman from Lebanon. When she was a teenager she was forced by her family to marry a man from her village. She was not allowed to continue her schooling or work. Soon after the marriage her husband began beating her. He would beat and rape her regularly.

After years of physical and sexual abuse, the husband's family stated their intention to carry out ritual circumcision on Maryan's 8 year old daughter through the common practice of female genital mutilation when she reached the age of 10.

In the meantime, Maryan's husband was granted a student visa to Australia. Maryan and their daughter came to Australia with him as dependents on the visa. Six weeks after their arrival, Maryan was beaten severely by her husband after she raised objections to their daughter going through FGM upon their return to Lebanon.

After contacting a lawyer and applying for protection it was found by DIBP that both Maryan and her daughter would face a real chance of persecution upon return to their village. While it was found that Maryan's husband or his family would not be likely to be able to harm Maryan if she relocated, she was granted protection because after applying the 'reasonableness' consideration, it was found Maryan would be highly unlikely to be able to find work due to her lack of education and work experience, and consequently would face homelessness and sexual exploitation if she moved away from her village.

With the cumulative effect of the narrowed refugee criteria and the proposed changes, Maryan's claims may be considered under complementary protection (as she may be unable to prove that she belongs to a particular social group). The proposed changes to relocation mean that Maryan would have to establish that her husband or his family would be able to harm her wherever she moved to in Lebanon. This is an unreasonably high burden and one that Maryan would likely have failed. As a result, if Maryan's case was assessed against the proposed changes she and her daughter would have been returned to Lebanon where they would have been at high risk of sexual exploitation.

[12] Explanatory Memorandum, Migration Amendment (Complementary Protection and Other Measures) Bill 2015, [60].

Real risk to be faced personally

29 Proposed section 5LAA(1)(b) would insert that the real risk of significant harm that a person would suffer in a country must be 'faced by the person personally'. Proposed section 5LAA(2) provides that 'if the real risk is faced by the population of the country generally, the personal must be at a particular risk for the risk to be faced by the person personally'.

30 Under the current legislation, the risk will not be real where the risk is 'one faced by the population generally and is not faced by the applicant personally': s36(2B)(c). Item 16 of the Bill repeals this provision and in doing so substantially changes the legal framework.

31 According to the Department's current guidance[13] on complementary protection, it is not necessary that a person be 'singled out' or targeted. As noted in *SZSFF*[14], '[w]hat is ultimately required is an assessment of the level of risk to the individual and the prevalence of serious human rights violations is a relevant consideration in that assessment.' The ASRC notes and supports the submission by the Andrew & Renata Kaldor Centre for International Refugee Law at the University of NSW on the extent to which the higher threshold that would be established by the proposed provisions is inconsistent with comparative law and international practice. On this basis, the ASRC strongly disagrees with the Government's statement in the Explanatory Memorandum that the provision is consistent with international jurisprudence of the ICCPR and CAT.[15]

32 The proposed provision will have very significant implications for individuals being returned to situations where gross and indiscriminate violence is rife. While the Explanatory Memorandum states that 'it is not intended that this amendment will elevate the risk threshold of those people who are facing removal to countries where there is a generalised risk of violence'[16], it later states that even in circumstances of 'patterns of gross, flagrant or mass violations of human rights', additional grounds would still need to be adduced to demonstrate that an applicant is at particular risk.[17] This represents a higher standard than that previously required under Australian law, and could lead to perverse outcomes where people seeking asylum could be returned to countries such as Syria, where active fighting and the risk of death is an everyday reality, on the basis that the risk is not personally targeted.

33 The ASRC is concerned that in practice, this will again result in an unfair burden on applicants and encourage decision makers to seek particular evidence that a person's refugee claims are stronger than those of others from their country; i.e. that they have a higher individual profile. 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 be tempted to assess applicants relatively against others from their country,

34 This proposed test is also likely to require judicial determination, as it deliberately displaces international jurisprudence and it will therefore be open to Australian courts to define these new terms. As mentioned above, this will severely impact on already strained judicial resources in the Federal Circuit Court in particular.

[13] Procedures Advice Manual 3 (PAM3), Protection visas - Complementary Protection Guidelines: 39 Personal risk and generalized violence, accessed 27 November 2015
[14] *SZSFF v Minister for Immigration and Border Protection* [2013] FCCA 1884 [34].
[15] CP Bill EM, [63].
[16] Explanatory Memorandum, Migration Amendment (Complementary Protection and Other Measures) Bill 2015, [69].
[17] Explanatory Memorandum, Migration Amendment (Complementary Protection and Other Measures) Bill 2015, [70].

Modification of behaviour

35 Proposed section 5LAA(5) would insert the requirement that a person must take reasonable steps to modify their behaviour so as to avoid a real risk that they will suffer significant harm in their country. This test was introduced in relation to the refugee determination process by the Caseload Act.

36 The ASRC reiterates its concerns outlined in its submission on the Caseload Bill that this test shifts the onus on the applicant to change their behaviour in order to avoid harm. A principled approach to refugee law requires that responsibility should be on oppressive regimes and other actors not to inflict harm, rather than on an individual to avoid it.

37 This proposed test, and the one that currently operates in relation to modification of behaviour in relation to the refugee determination process, expressly seeks to avoid the judicial consideration of this issue in the High Court. The leading High Court authority on modification of behaviour is *S395*[18]. In *S395*, the High Court noted the inherent connection between personal freedoms and the fundamental principle of the rule of law:

> *"Subject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person's associations or particular mode of life. This is the underlying assumption of the rule of law."*[19]

38 The Court further noted that

> *"Persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action."*[20]

39 A similar approach has been taken in the UK and other commonwealth jurisdictions, acknowledging that an assessment of what an applicant *could* do is irrelevant and that the central question to be asked is what would happen to the person upon return to their home country.

40 In the second reading speech for the proposed Bill, the Minister for Immigration and Border Protection stated that *'there have been instances of several persons having been found to meet the complementary protection criterion on a wide variety of grounds, such as selling adult movies and drinking or supplying alcohol in countries which severely punish those activities'*[21] or *'where they have been involved in serious crimes in the home countries, or are fleeing their home countries due to their association with criminal gangs'*[22].

41 However, the changes proposed are disproportionate to address such issues and further impact upon claimants with non-physical attributes forming the basis of their claims for protection. The ASRC is concerned regarding the impact on people such as couples involved in inter-caste marriages, HIV positive applicants who might be required to behave discreetly when accessing antiretroviral therapy, and people who have been employed in particular occupations who are deemed able to change their occupation.

42 While the proposed provision does not require a person to make a modification that would 'conflict with a characteristic that is fundamental to the person's identity or conscience' or 'conceal an innate or immutable characteristic', the decision maker will have discretion to determine what falls within the

[18] *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
[19] *Appellant S395/2002 v MIMA* (2003) 216 CLR 473
[20] *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh and Kirby JJ at [40].
[21] House of Representatives, Migration Amendment (Complementary Protection and Other Measures) Bill 2015, Second Reading Speech, Wednesday 14 October 2015.
[22] House of Representatives, Migration Amendment (Complementary Protection and Other Measures) bill 2015, Second Reading Speech, Wednesday 14 October 2015.

bounds of these terms. While a person may not be expected to change a fundamental belief or attribute, the proposed provisions may still result in findings that a person should dress more conservatively, or be less outspoken in certain situations, show less public affection, or moderate their language. Further, consideration of what a person *could* do is also a very different consideration to what a person *would* actually do if returned.

43 Furthermore, the notion of 'fundamental' is not defined in the Bill and this will likely be subject of significant judicial consideration. Whilst the Government's aim is to ensure consistency, the number of new undefined terms such as this will inevitably lead to litigation, which in ASRC's experience is an inefficient manner of processing large numbers of people seeking asylum.

Case study 2 – is a profession 'fundamental' to your identity?

Farid is a nurse from Pakistan. He works throughout Pakistan assisting international medical staff provide health care to people. Whilst working in the Taliban controlled areas on the border of Afghanistan, Farid was abducted by the Taliban and tortured because of his work and because he was working with an international NGO.

Farid was able to escape and continued to work in Karachi as a nurse with an international NGO and continued to assist people receive health care. After four months of working in Karachi he was again abducted by extremists because he was involved with an international NGO. He was beaten and tortured for three weeks. His abductors threatened to behead him if he did not agree to stop his practises of western medicine.

Farid managed to escape and travelled immediately to Australia. The RRT accepted that he was a refugee and that although he could avoid harm by stopping his work as a nurse, it was likely he would continue this work and would be harmed as a result. Farid was granted a protection visa.

Under the proposed changes it is uncertain as to whether Farid's activities of providing health care in connection with an international NGO would be considered 'fundamental' to his identity or whether he would be expected to modify this aspects of his behaviour in order to avoid harm.

Effective protection

44 The proposed amendments seek to align the effective protection test for complementary protection with that considered as part of the refugee determination process. Items 13-14 of the Bill expand the application of 'effective protection' which currently applies to people otherwise eligible to refugee status, to those people who may be eligible under complementary protection provisions.

45 Under the current framework for assessing complementary protection claims under the *Migration Act 1958*, a decision maker must consider whether effective protection will be provided by the state. Section 36(2B) states that "there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that … the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm." The High Court has stated that the question is whether the state has failed or is unable to provide effective protection from persecution.[23]

46 The proposed provisions would widen this to include the provision of protection by non-state actors. This significantly broadens the test of effective protection to actors which could conceivably include groups including local militia or gangs. The new framework may require asylum seekers to seek

[23] *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 430

protection from small organisations or NGOs who have little impact and whose can be inconsistent and often come at a significant cost.

47 Asylum seeker groups who will be affected by this change include women fleeing domestic violence, forced marriage and honour killings who decision makers might view as a group who could access safe houses or women's sanctuaries.

48 Decision makers will also have to make a determination about the durability of the support, which in the case of non-state actors may be impossible to ascertain with any certainty.

49 Further, while the current test for effective state protection in relation to complementary protection requires a detailed examination of the individual circumstances of the applicant, the proposed test is more focused on structural issues, including the presence of an appropriate criminal law, a reasonably effective police force and an impartial judicial system. While the proposed test does require that the applicant be able to access the protection, there is less scope of the decision-maker to examine the individual circumstances of the applicant to understand how like it would be that the state could or would afford protection in their specific circumstances. Once again, the ASRC notes that the concepts of an 'effective police force' or 'impartial judicial system' will be open for judicial interpretation and may lead to inconsistency of decision making, prior to clarification by the courts.

Case study 3 – are women fleeing brutal domestic violence in PNG adequately protected by domestic violence organisations or women's shelters?

Jessica is a young woman from the Central Highlands in PNG. She was forced to marry a local tribal leader when she was 16 years old and suffered long term abuse and rape during her marriage, leading to multiple hospitalisations. She saved her money and fled from her home during the night, escaping to Port Moresby, hiding in churches before travelling to Australia.'

Jessica had attempted to seek help from the local police in PNG many times. They always turned her away because her husband was very powerful and they told her that her problems were not their concern.

Jessica was accepted as refugee as the Administrative Appeals Tribunal (AAT) as a woman at risk of continued domestic violence. The AAT found that the authorities in PNG were not willing or able to protect her from this harm as domestic violence was viewed as a 'family matter' not a police matter.

Due to recent changes to Australia's refugee law, women like Jessica may need to rely on complementary protection to prevent them being returned to a live of ongoing abuse and rape. Under the proposed changes to complementary protection, women like Jessica would lose this safety net and may be refused protection in Australia on the basis of being able to access effective protection from non-state actors that would be completely insufficient and render them vulnerable to continued abuse. Whilst women's shelters and NGOs battling violence against women in PNG are doing noble work, they are not able to offer protection to all victims of domestic violence, nor are they able to offer long term protection.

Conclusion

50 The ASRC reiterates its opposition to changes to the refugee determination framework which detract from Australia's international human rights obligations and further endangers refugees being returned to their home countries. The proposed amendments dramatically alter the complementary protection framework, which has proved successful in saving dozens of refugees from being returned to countries where they face significant harm. The ASRC believes this Bill should not be passed.