Refugee Legal:

12 February 2016

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600
Sent by email to: legcon.sen@aph.gov.au

Dear Dr Dunstone,

***RE: Senate Legal and Constitutional Affairs Inquiry into Migration Amendment (Complementary Protection and Other Measures) Bill 2015** (the Bill) (the Inquiry) – evidence provided at public hearing on 5 February 2016*

We refer to the above matter.

In this regard, we wish to make further submissions by way of response to oral testimony, as follows. On 5 February 2016, Messrs David Manne and Gregory Hanson appeared on behalf of Refugee Legal (formerly known as the Refugee & Immigration Legal Centre) to give oral testimony at the Inquiry.

In evidence provided by Refugee Legal to the Committee – as accurately recorded in the Hansard Proof – our Mr Manne described the proposed changes to 'internal relocation' principle as the "Mount Everest test", in the following terms:

> *Mr Manne: It is what we would actually call the Mount Everest test, this one. This new legal onus would impose a burden which, for most people, would be as unattainable as scaling Mount Everest. Secondly, if the summit of Everest was the only place in Tibet or Nepal that was safe, a person could be denied protection. It is an extreme example, but that is the extent of it.*
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> *CHAIR: Thanks. What I want to be clear on in my own mind, because I want to put these to the department and see if they have got an answer—I think I am probably almost equipped to be able to put to them in simple language the point that I think is being made.*[1]

[1] Proof Committee Hansard, Senate Legal and Constitutional Affairs Committee – Inquiry into *Migration Amendment (Complementary Protection and Other Measures) Bill 2015, 5 February 2016, p 20.*

Defending the rights of refugees.

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In response to this, the following oral testimony from the Department of Immigration and Border Protection (**the Department**) disputed this analysis, as follows:

> *Senator HANSON-YOUNG: I guess that is one of the reasons the previous panel of witnesses said that we need the ability to assess the reasonableness of whether somebody can be removed, even if it is somewhere else in their country, because we need to have the ability to assess people's cases from a case-by-case perspective.*
>
> *Mr Wilden: We absolutely agree: cases should be on a case-by-case perspective. I think the challenge there is—to go back to a statement made earlier—that,* ***if you go to the explanatory memorandum, which explains the safe and legal, I would perhaps challenge Mr Manne's perspective that this bill could allow us to resettle someone on the top of Mount Everest. That is not safe so, by definition, they would not be returned there.*** **[emphasis added]**[2]

Refugee Legal submits that statement made by Mr Wilden is fundamentally incorrect, and without legal foundation. In turn, it is entirely at odds with the written submissions and oral evidence received by the Committee from leading legal academics and practitioners with expertise in immigration and refugee law. Put simply, the proposed change would require an applicant to demonstrate a real risk of significant harm in *all* areas of their country. In turn, a decision-maker would be prohibited from considering the basic practical realities of relocation, including whether the said area would safely, practically and/or legally accessible, and whether they could subsist there. Thus, 'safety' would only be relevant to whether a person would be at real risk being personally targeted for significant harm either en route to, or at the summit of Mount Everest. There is, of course, no evidence to support such a risk.

In addition, we also refer the Committee to legal analysis provided by the Government's own independent merits review legal body – the Administrative Appeals Tribunal's Legal Services Section of its Migration and Refugee Division, responsible for preparing and maintaining *The Guide to Refugee Law in Australia* (**the Guide**). While the Guide does not advise or provide guidance on the amendments proposed by the Bill, in relation to the equivalent provision governing the refugee criteria - which is identical to that proposed in the Bill for complementary protection - it relevantly states:

> *However, for protection visa applications lodged on or after 16 December 2014, the concept of relocation as understood in the Refugees Convention context will not be relevant to determination of whether that person is a "refugee". For those cases, a "refugee" is defined not under the Refugees Convention, but in s.5H(1) of the Act. That provision, as qualified by s.5J(1)(c), requires that* ***the real chance of persecution relates to all areas of the receiving country.***[1] ***Unlike the relocation principle as***

[2] Ibid, p 30.

> ***developed under the Refugees Convention, there does not appear to be scope to consider the reasonableness of requiring a person to move to an area that is free from the chance of persecution.***[2] ***If a decision-maker concludes that there is no real chance of persecution in a particular area of the country, the applicant will not meet the definition of a refugee.***
>
> *There is, however, no such parallel restriction for the complementary protection criterion. Relocation remains a relevant consideration for determination of that criterion for applications made both before and after 16 December 2014.*
>
> *[Footnote]*
>
> *2. The* ***Explanatory Memorandum to*** *the Bill which introduced the definition states that the Government's intention is that the "statutory implementation of the "internal relocation" principle not encompass a "reasonableness" test". It further states that when determining whether a person can relocate to another area of the country where they do not have a real chance of persecution,* ***a decision-maker should take into account whether the person can safely and legally access the area****: Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, (p.10).* ***However, given the clear terms of the statute, it is difficult to see where such a consideration would arise.*** [3] [emphasis added]

The above issue is not a matter of mere semantics. Rather, our "Mount Everest test" analogy goes to the heart of one of the fundamental problems with the amendments in the Bill; namely, the manifestly unjust, harsh, dangerous and absurd consequences which would follow from the proposed changes to the internal relocation test.

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[3] *The Guide to Refugee Law in Australia*, Administrative Appeals Tribunal, Migration and Refugee Division, Chapter 6 – Relocation (updated December 2015) – available at: http://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20Law/Chapter6_Relocation.pdf [accessed 10 February 2016]