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Submission by Immigration Advice and Rights Centre
Migration Amendment (Complementary Protection and Other Measures) Bill 2015

The Immigration Advice and Rights Centre ("IARC"), established in 1986, is a community legal centre in New South Wales that specialises in the provision of advice, assistance, education, training, and law and policy reform in immigration law. IARC provides free and independent immigration advice. IARC produces *The Immigration Kit* (a practical guide for immigration advisers), the *Visa Cancellation Kit*, client information sheets (including in relation to protection visa applications, Administrative Appeal Tribunal appeals and requests for Ministerial intervention) and conducts education/information seminars for members of the public. Our clients are low or nil income earners, frequently with other disadvantages including low level English language skills, disabilities, past torture and trauma experiences and domestic violence victims.

IARC welcomes the opportunity to provide submissions on the *Migration Amendment (Complementary Protection and Other Measures) Bill* 2015 ("Bill"). IARC maintains serious concern about some of the proposed changes in the Bill and, in particular, opposes the introduction of items 11 and 31.

Real risk that a person will suffer significant harm

Item 11 in Part 1 of Schedule 1 seeks to redefine the operation of the internal relocation principal with respect to the Complementary Protection provisions. The relevant part provides

(1) *For the purposes of the application of this Act and regulations to a particular person, there is a real risk that the person will suffer significant harm in a country if:*
   a. *the real risk relates to all areas of the country; and*
   b. *the real risk is faced by the person personally.*
(2) *For the purpose of paragraph (1)(b), 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 them personally.*

The real risk must relates to all areas of the country

There is at present no legislative requirement for a person seeking protection to demonstrate that the real risk of significant harm they fear relates to all areas of a receiving country. Rather, s 36(2B)(a) of the *Migration Act* 1958 (Cth) ("Act") adopts what is commonly referred to as the "relocation test".

The relocation test is a critical assessments in the protection visa process because it is considered only after a finding has been made that there is a real risk that an asylum seeker would suffer significant harm in a place of reference. It is a test that considers a broad range of circumstances relevant to each individual asylum seeker in order to establish whether it would be reasonable, in the sense of it being practicable, for them to relocate to another part of the receiving country. The current test is not narrow; it is a test which considers a range of factors particular to each asylum seeker's personal circumstances. It acknowledges that no two asylum seekers are the same or share the same capacity to relocate.

The Bill replaces the "reasonableness" test with a requirement that those seeking protection demonstrate the risk of harm they fear is country-wide and directed at them on a personal level. The threshold is significantly higher and will prove extremely difficult, if not impossible, for many people to establish. In providing guidance on how the new definition would operate the explanatory memorandum to the Bill states:

> *"In considering whether a person can relocate to another area, a decision maker is required to take into account whether the person can safely and legally access the area upon returning to the receiving country"*[1]

IARC considers this statement to be inconsistent with text of the Bill. It is well settled that statements about legislative intention made in explanatory memoranda or by the Minister, however clear, cannot overcome the words of the statue[2]. In our view, proposed s. 5LAA(1)(a) would not permit the consideration of general safety or access. Other examples that could not be considered include:

- Where a safe area of the country is surrounded by hostile forces which prevents the person from being able to travel or move freely;
- Where an area of the country is considered safe however the applicant must travel through dangerous areas in order to get there;
- Where parts of the country are inhospitable – such as a desert, mountain or jungle;
- Where parts of the country have limited or no amenities, government services or employment opportunities;
- Where parts of the country are involved in civil conflicts;
- Where parts of the country are governed by communities with different language, culture or traditions;

[1] See paragraph [55].
[2] See for example *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 French CJ, Gummow, Hayne, Crennan and Kiefel JJ at [31] referring to Gummow J in Wik People v Queensland

- Where parts of the country are unsafe due to health risks (such as ebola or malaria);
- Where a person cannot access an area because of a physical disability.

IARC is particularly concerned that the new relocation principle will disadvantage vulnerable applicants fearing harm from non-state actors, such as single or separated women and mothers, women at risk of an honour killing and women at risk of female genital mutilation. The two examples below may help illustrate the difference between how the relocation test is currently being applied and how the test may be applied under the proposed changes.

EXAMPLE ONE – CURRENT TEST

Clara is a Hazara woman with a child from Quetta, Pakistan. She applies for Protection because she fears returning to her husband who has subjected her to years of physical and sexual abuse. Clara has approached the police in Pakistan numerous times but has been told that they will not intervene in family matters. Clara's daughter has a psychological and developmental disorder and a hole in her heart which means she needs access to specialist health care and a school that can accommodate her learning and physical needs.

The decision maker accepts that if Clara were to return to Quetta that she would continue to be at risk of significant harm. When assessing whether Clara could relocate to another part of Pakistan the decision maker considers Clara's personal circumstances. The decision maker considers that Islamabad could be an option but finds that:

- Clara would not have family or other support in the predominately Pashtun city; and
- she would be marginalised as a single mother; and
- both her and her daughter would be vulnerable to criminal gangs because they do not have a male protector; and
- Islamabad does not have medical facilities or schools that can accommodate her daughter's needs.

The decision maker is satisfied that it would not be reasonable to expect Clara to relocate to Islamabad.

EXAMPLE TWO – NEW TEST

Sarah is a national of Guinea who arrived in Australia as the holder of a student visa. She has applied for a Protection visa on the basis that her family is trying to force her to undergo female genital mutilation. The decision maker assesses Sarah as facing a real risk of significant harm if she returns to her country, however, forms the view that her family and/or community would not pursue her if she moved to Kailahun district. Sarah argues that she cannot relocate to Kailahun because of the current epidemic of the Ebola virus disease there. While acknowledging that Sarah cannot enter Kailahun district without exposing herself to the virus the decision maker finds that the threat from the virus would not meet the definition of 'significant harm' and, in turn, the requirement of s. 5LAA(1)(a). Sarah is denied a protection visa.

We submit that Australia's non-refoulement obligations under Convention against Torture ("CAT") and the International Covenant on Civil and Political Rights ("ICCPR") are absolute and the proposed amendments will abrogate these obligations. IARC opposes the changes to the existing principle of internal relocation.

Modification of behaviour

Proposed s. 5LAA(5) seeks to deny protection 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 an innate or immutable characteristic, or which is fundamental to the person's identity or conscience.

IARC's objection to this requirement is in line with the submission the Refugee and Immigration Legal Centre made to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill* 2014 which addressed the imposition of the same requirement to the meaning of a well-founded fear of persecution under the Act.

> *The Bill makes an exception where the modification would conflict with a fundamental characteristic or conceal an innate or immutable characteristic. The fact that the exception depends on a decision-maker deciding for another person what is fundamental to their identity or conscience and what they can be expected to hide is inappropriate and will lead to arbitrary and subjective decision-making which would result in Australia breaching its human rights obligations.*[3]

For the reasons stated above IARC does not support the introduction of s. 5LAA(5).

Denial of merits review

Item 31 seeks to give power to the Minister to declare a person to be an "excluded person" and deny them the ability to seek merits review at the Administrative Appeals Tribunal where they have been refused a protection visa on certain character grounds. The Statement of Compatibility with Human Rights to Explanatory Memorandum observes that while merits review can be an important safeguard, there is no express requirement for it under the ICCPR or the CAT and that all persons impacted would nevertheless have access to judicial review.

The difficulty with this argument, of course, is that judicial review can only consider the lawfulness of the Minister decision and cannot explore whether the Minister's decision to refuse a visa is factually correct or preferable. It is our respectful submission that the Administrative Appeals Tribunal is appropriately placed to review the merits of a decision to refuse a person a protection visa on character grounds. The denial of merits review becomes even more critical when a decision to refuse a visa can result in refoulement or indefinite detention. This is the reality for an IARC client who despite having satisfied the complementary protection requirements had his protection visa refused because of a drink driving offence and is now facing indefinite detention. Before dismissing the need for merits review it should be recalled that the Minister's approach to cancelling visas under the character provisions has in recent times been described by the Federal Court as "*taking a sledgehammer to crack a nut*"[4]. IARC opposes the introduction of item 31.

[3] Submission 165 – Submission to the Senate Legal and Constitutional Affairs Committee: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, at 4.5.3
[4] See *Stretton v Minister for Immigration and Border Protection* (No 2) [2015] FCA 559 at [60] and *Eden v Minister for Immigration and Border Protection* [2015] FCA 780 at [34]

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We thank the Committee for the opportunity to comment.

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