



Australian  
Human Rights  
Commission

# Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (Cth)

**AUSTRALIAN HUMAN RIGHTS COMMISSION  
SUBMISSION TO THE SENATE LEGAL AND  
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

26 November 2015

ABN 47 996 232 602  
Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
General enquiries 1300 369 711  
Complaints info line 1300 656 419  
TTY 1800 620 241

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

## Table of Contents

	<b><i>Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Legislation Committee.....</i></b>	<b><i>1</i></b>
1	Introduction.....	3
2	Summary .....	3
3	Recommendations.....	4
4	<i>Non-refoulement</i> obligations .....	5
5	Internal relocation.....	7
5.1	<i>Proposed amendments</i> .....	7
5.2	<i>Existing provisions</i> .....	10
6	'Particular risk' .....	11
7	Behaviour modification .....	13
8	'Effective protection measures' .....	15

## 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Australian Government's Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (Cth) (Bill).

## 2 Summary

2. The Commission welcomes the opportunity to provide a submission to this inquiry. The Commission also welcomes the decision by the Government not to proceed with the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (Cth).<sup>1</sup> That Bill would have repealed the complementary protection provisions from the *Migration Act 1958* (Cth) (Migration Act). The decision not to proceed with that Bill is in line with the recommendation made by the Commission and others to this Committee in January 2014.<sup>2</sup>
3. In relation to the present Bill, the Minister has said that 'the government considers that the best way forward is for the complementary protection provisions to remain in the Migration Act but be modified slightly as per the terms of this Bill'.<sup>3</sup> This submission addresses four ways in which the Government proposes to modify Australia's complementary protection obligations.
4. This Bill proposes to change the way in which decisions are made about whether Australia owes protection obligations to a person because, for example, they face a real risk of torture or arbitrary killing in another country.
5. The Explanatory Memorandum (EM) suggests that the proposed changes 'strengthen the statutory complementary protection framework'.<sup>4</sup> In fact, these changes would weaken protections for asylum seekers in at least four ways.
6. First, even if a person demonstrated that they were at real risk of significant harm in another country, Australia would not have protection obligations if this risk did not extend to 'all areas' of the country. This means that if there is at least one area anywhere in the country in which the person would not face a real risk of significant harm, then the person would not be entitled to protection by Australia. This would be the case regardless of whether the person:
  - a. had ever been to this place;
  - b. could reasonably relocate to this place in light of the person's individual circumstances;
  - c. could safely relocate to this place; or
  - d. could legally relocate to this place.
7. Secondly, if the whole population of a country faces a real risk of significant harm, Australia could still send a person to such a country unless the person showed that they were 'at a particular risk'. The Government suggests that this

does not require the person to be individually targeted. However, the legislation is ambiguously drafted and the explanatory materials are unhelpful, contradictory and compound the problems with the text of the legislation itself.

8. Thirdly, a person will not be entitled to protection in Australia if the person could take reasonable steps to modify their behaviour in another country to avoid a real risk of harm there. The Commission considers that it is a dangerous approach for the Government to take to seek to return people to a country where they face a real risk of harm, on the basis that it would be possible to hide the characteristic that would lead them to be harmed.
9. Fourthly, if a person has established that they face a real risk of significant harm in a country and that the state cannot provide effective protection, they will not be entitled to protection until a further investigation has been undertaken to determine whether other non-state actors could provide protection instead.
10. These changes involve more than a slight modification of Australia's complementary protection obligations. They will significantly weaken protections for asylum seekers and increase the risk of *non-refoulement*. The Commission recommends that these amendments not be passed and that related provisions dealing with assessment of refugee claims be repealed.

### **3 Recommendations**

11. The Australian Human Rights Commission makes the following recommendations.

#### **Recommendation 1**

The Commission recommends that proposed s 5LAA(1)(a), which requires that a person face a real risk of significant harm in 'all areas' of a country in order to engage Australia's complementary protection obligations, not be passed.

#### **Recommendation 2**

The Commission recommends that existing s 5J(1)(c), which requires that a person face a real chance of persecution in 'all areas' of a country in order to engage Australia's protection obligations to refugees, be repealed.

#### **Recommendation 3**

The Commission recommends that proposed ss 5LAA(1)(b) and (2), which require that a person demonstrate that they are 'at a particular risk' in circumstances where the population of the country generally faces a real risk of significant harm, not be passed.

#### **Recommendation 4**

The Commission recommends that proposed s 5LAA(5), which requires behaviour modification to avoid a real risk of significant harm, not be passed and that existing s 5J(3) be repealed.

#### **Recommendation 5**

If recommendation 4 is not accepted, the Commission recommends that amendments be made to the Explanatory Memorandum to make clear that the protections for asylum seekers in s 5LAA(5)(c) are additional to the protections in paragraphs (a) and (b) of that section.

#### **Recommendation 6**

The Commission recommends that the references in existing s 5LA to protection by non-state actors be repealed.

### **4      *Non-refoulement obligations***

12. Australia has international obligations not to return people to countries where they have a well-founded fear of persecution or where there is a real risk that they would suffer significant harm such as torture or arbitrary killing. These obligations are referred to as *non-refoulement* obligations.
13. The definition of ‘non-refoulement obligations’ in s 5(1) of the *Migration Act 1958* (Cth) recognises that Australia’s obligations are sourced in a number of international instruments including the Refugee Convention, the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).
14. To the extent that the protection obligations arise under instruments other than the Refugee Convention, they are commonly referred to as ‘complementary protection’.
15. The most significant of Australia’s *non-refoulement* obligations arise under:
  - a. Article 33(1) of the Refugee Convention:

No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
  - b. Article 6(1) of the ICCPR:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his or her life.
  - c. Article 6 of the ICCPR and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.

d. Article 7 of the ICCPR:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

e. Article 3 of the CAT:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

16. Article 33(1) of the Refugee Convention and Article 3 of CAT refer explicitly to *non-refoulement*. In a series of cases, the United Nations Human Rights Committee has found that signatories to the ICCPR are subject to a *non-refoulement* obligation in cases involving potential breaches of Articles 6 and 7 of that Convention.<sup>5</sup>
17. The United Nations Human Rights Committee summarised the position under the ICCPR in the following way:

... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>6</sup>
18. The United Nations Committee Against Torture summarised the position under article 3 of CAT in the following way:

The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present.<sup>7</sup>
19. In the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (Legacy Act), the Government sought to codify its protection obligations to refugees by establishing new, and narrower, definitions of ‘refugee’, ‘well-founded fear of persecution’ and ‘membership of a particular social group’.<sup>8</sup> The exercise of codification does not change Australia’s obligations at international law, but it does change the way in which Australian decision makers assess whether the requirements for protection have been met. The risk in codifying a narrower interpretation of Australia’s protection obligations is that it increases the risk that people who

do not meet the narrower definitions but who in fact are refugees will be returned to situations of persecution.

20. The current Bill proposes to undertake the same codification exercise in relation to Australia's complementary protection obligations. Again, the proposed codification would narrow the grounds on which people would qualify for Australia's protection.

## **5 Internal relocation**

### **5.1 Proposed amendments**

21. The Bill proposes to weaken the protections for asylum seekers by providing that even if a person demonstrated that they were at real risk of significant harm in another country, Australia would not have protection obligations if this risk did not extend to 'all areas' of the country.<sup>9</sup>
22. The Commission made submissions about the 'internal relocation principle' in response to the Legacy Bill.<sup>10</sup> Those submissions apply equally to the amendments proposed in this Bill.
23. Currently, s 36(2B)(a) of the Migration Act provides that a person will be taken not to have a real risk of significant harm in a country if the Minister is satisfied that 'it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm'. That is, if it is reasonable for the person to relocate to a place where they would be safe, then Australia does not have protection obligations to the person.
24. The current position is consistent with international law. The United Nations *Refugee Handbook* has provided since 1979 that:

The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.<sup>11</sup>

(emphasis in original)

25. The Bill proposes to repeal s 36(2B)(a) and replace it with a lesser form of protection in s 5LAA(1)(a).
26. Proposed s 5LAA(1)(a) would significantly dilute the existing protections by requiring an asylum seeker to demonstrate that he or she faced a real risk of significant harm in 'all areas' of the relevant country. This means that if there is at least one area anywhere in the country in which he or she would not face a real risk of significant harm, then the person would not be entitled to protection by Australia. This would be the case regardless of whether the person:

- a. had ever been to this place;
  - b. could reasonably relocate to this place in light of the person's individual circumstances;
  - c. could safely relocate to this place; or
  - d. could legally relocate to this place.
27. The EM provides that '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'.<sup>12</sup> This is not a requirement of the legislation and in fact appears to be inconsistent with a plain wording of the legislation. This inconsistency is frankly acknowledged in the instructions given by the Department of Immigration and Border Protection (the Department) to decisions makers in relation to the equivalent clause in s 5J(1)(c). These instructions say:
- There is nothing in the plain wording of s 5J(1)(c) that expressly requires consideration of safe and lawful access to a safe area of the receiving country.<sup>13</sup>
28. On the basis only of the EM for the Legacy Bill, the Department then provides some guidance in these instructions on how a decision maker could consider issues of safe access to a 'safe area'.
29. Legislation should mean what it says. It is highly unsatisfactory to attempt to fix defects in legislation through instructions to decisions makers which do not have their source in any legislative requirement. In practice, if mistakes are made in a primary decision and non-legislative instructions are not followed, a court on judicial review will be required to apply the terms of the legislation, not departmental policy.
30. The appropriate course here is to amend the legislation so that it properly reflects the exceptions to the internal relocation principle.
31. The unqualified way in which the internal relocation principle is expressed in proposed s 5LAA(1)(a) is not a codification of existing law. In fact, it is contrary to Australian authority dealing with the issue. If enacted, it would weaken protections for asylum seekers and increase the risk of a breach of Australia's *non-refoulement* obligations.
32. In *SZATV v Minister for Immigration and Citizenship*, the High Court (prior to the enactment of s 5J(1)(c)) held that a well-founded fear of persecution need not always extend to the whole territory of a person's country of nationality in order for that person to qualify as a refugee.<sup>14</sup> In cases where the internal relocation principle arises, the issue is whether it is reasonable, in the sense of practicable, for the person to relocate.<sup>15</sup> Further, what is reasonable must depend upon the particular circumstances of the person and the impact upon that person of relocation.<sup>16</sup> The High Court confirmed the correctness of this approach in *SZSCA v Minister for Immigration and Border Protection*.<sup>17</sup>

33. In the EM, the Minister suggests that the Government's interpretation of Australia's *non-refoulement* obligations, although contrary to judgments of the High Court of Australia, is supported by international jurisprudence. The Minister does not identify the particular international law decisions that he prefers in this instance.
34. In his second reading speech in relation to this Bill, the Minister indicated that Australia has sought to align its legislation 'with the practices of other like-minded countries, including New Zealand, Canada, the United States of America and many European countries', in dealing with protection issues.<sup>18</sup> Removing the requirement of 'reasonableness' from the internal relocation principle in proposed s 5LAA(1)(a) is contrary to the practices of these countries when dealing with refugee claims.
35. The United States Code of Federal Regulations relevantly provides in §208.13 dealing with 'Establishing asylum eligibility':
- An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, **if under all the circumstances it would be reasonable to expect the applicant to do so.**
- (emphasis added)
36. The House of Lords has adopted the 'reasonableness' requirement in the UNHCR Refugee Handbook referred to above.<sup>19</sup> As to the use of this test in 'like-minded countries', the House of Lords said:<sup>20</sup>
- This reasonableness test of internal relocation was readily and widely accepted. It was applied by the Federal Court of Appeal in Canada in *Rasaratnam v Canada (Minister of Employment and Immigration)* [1992] 1 FC 706, 711 and again in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4th) 682. It has been applied in Australia and New Zealand.
37. To reject any consideration of the reasonableness of relocation, as this Bill proposes to do, would place Australia at odds with the jurisprudence of these countries.
38. The EM itself is inconsistent when it comes to the significance of internal relocation. On the one hand, it advocates a requirement that the risk must be faced in 'all areas' of a country. On the other hand, when considering whether a person faces an individual risk from generalised violence, the EM says:
- It may be possible ... 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 for them **if they come from that region.**
- (emphasis added)
39. The significance of the emphasised words is that ordinarily you would expect a person to return to the area where they come from. In assessing whether a State owes protection obligations to that person, you would next consider

whether the person would face a real risk of serious harm in that place and, if so, whether it is reasonable for them to relocate to another area where they would not face that risk. If the terms of s 5LAA(1)(a) were applied, then there would be no reason to focus attention on the area where a person is from.

40. The approach taken in drafting and explaining the proposed changes in this Bill reveals a lack of coherence. The EM does not demonstrate a clear understanding of what is sought to be achieved.
41. As described above:
  - a. the plain words of s 5LAA(1)(a) are at odds with instructions given to departmental officers;
  - b. despite those instructions, there is no legislative requirement that a person be able to safely or legally access a safe area;
  - c. proposed s 5LAA(1)(a) would remove the requirement at international law, recognised by the High Court of Australia and by superior courts of similar countries, that any internal relocation be reasonable in the circumstances.
42. If passed, this section would weaken protections for asylum seekers and increase the risk of a breach of Australia's *non-refoulement* obligations. The Commission submits that section 5LAA(1)(a) should not be passed.

### **Recommendation 1**

The Commission recommends that proposed s 5LAA(1)(a), which requires that a person face a real risk of significant harm in 'all areas' of a country in order to engage Australia's complementary protection obligations, not be passed.

## **5.2 Existing provisions**

43. The problems identified above are also present in existing s 5J(1)(c) which was introduced in the Legacy Act. The section provides that a person will only have a well-founded fear of persecution in a country if they have a real chance of persecution for a Convention reason and that real chance of persecution relates to 'all areas' of the country.
44. For the reasons given in the Commission's submissions in relation to the Legacy Bill and for the reasons set out above, the Commission submits that s 5J(1)(c) should be repealed.

### **Recommendation 2**

The Commission recommends that existing s 5J(1)(c), which requires that a person face a real chance of persecution in 'all areas' of a country in order to engage Australia's protection obligations to refugees, be repealed.

## 6 'Particular risk'

45. The Bill also proposes to weaken the protections for asylum seekers by providing that if the whole population of a country faces a real risk of significant harm, Australia could still send a person to such a country unless the person also showed that they were 'at a particular risk'.<sup>21</sup>
46. Currently, s 36(2B)(c) of the Migration Act provides that a person will be taken not to have a real risk of 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' (emphasis added).
47. The current position is generally consistent with international law (although note the comments in paragraph 55 below as to how it has been interpreted by Australian decision makers, which demonstrates the problems that can arise when seeking to codify international law obligations). Under the ICCPR, there must be substantial grounds for believing that a person is at a real risk of irreparable harm in the relevant country. Under CAT, there must be substantial grounds for believing that the person would be in danger of being subjected to torture.
48. In determining whether there are such grounds, a relevant consideration is the existence of 'a consistent pattern of gross, flagrant or mass violations of human rights' (CAT, article 3(2)). That is, a risk that applies to the whole population of a country can be evidence that a person will face a real risk of serious harm if sent there. In each case, the relevant assessment will be of the risk that the individual faces.
49. The Bill proposes to repeal s 36(2B)(c) and replace it with a lesser form of protection in ss 5LAA(1)(b) and (2).
50. Proposed s 5LAA(1)(a) would dilute the existing protections by requiring an asylum seeker to demonstrate that if a risk is faced by the population of a country generally, the person must also be 'at a particular risk' in order for a finding to be made that the person will suffer significant harm.
51. The Government says that 'this does not mean that the person must be individually targeted'.<sup>22</sup> The Commission agrees that this is the correct approach.<sup>23</sup> It is also the approach that is taken, for example, in the United States in dealing with assessment of refugee status where the regulations provide:

In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

- (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.<sup>24</sup>

52. However, despite the statement in the EM that a person need not show that they are singled out or targeted, the ordinary reading of the requirement that a person show they are ‘at a particular risk’ (in circumstances where it is already established that the population of the country generally faces a real risk) suggests that the person *will* have to demonstrate that they have been individually targeted.
53. This reading of the section is supported by other parts of the EM. For example, elsewhere in the EM the Government says:
- a. ‘claims arising from situations of heightened danger or violence ... would not constitute a personal risk of ‘significant harm’ unless there were a further factor or characteristic indicating that the individual themselves [is] **the intended target** of such violence’;<sup>25</sup> and
  - b. ‘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 ... **might be targeted**’.<sup>26</sup>
- (emphasis added)
54. The EM suggests that this amendment ‘seeks to make the policy intention clearer on this issue’.<sup>27</sup> In fact, it does the opposite. The section itself is confusing and ambiguous. The accompanying explanatory material is inconsistent and contradictory. On balance, the gloss added by proposed ss 5LAA(1)(b) and (2) is not helpful and distracts from the proper assessment facing the decision maker. These proposed amendments should not be passed.
55. However, the Commission does agree with the observation in the EM that some decision makers in Australia appear to have erroneously reasoned that where significant harm is faced by everyone in the country of origin or relevant region then a particular applicant is necessarily excluded from protection.<sup>28</sup> It is clear from the Department’s *Procedures Advice Manual* that this interpretation of s 36(2B)(c) was not intended.<sup>29</sup>
56. The Commission submits that the best way in which to address both the problematic drafting of proposed ss 5LAA(1)(b) and (2) and the problematic interpretation of existing s 36(2B)(c) is to delete ss 5LAA(1)(b) and (2) from the Bill and retain item 16 which has the effect of also deleting s 36(2B)(c).
57. The result would be that the decision maker would need to undertake the exercise required by international law, namely to assess whether there are substantial grounds for believing that there is a real risk of significant harm to a person if the person is sent to a particular country. One way that this could be demonstrated would be to show that the person faces a real risk of significant harm that is particular to him or her. Another way that this could be

demonstrated would be to show that the person, as a member of a group that faces a real risk of significant harm, also faces the same risk.

58. In order to achieve this result, it is necessary to amend the proposed section in the Bill. Amending the EM or departmental instructions will not be sufficient to address this issue.

### **Recommendation 3**

The Commission recommends that proposed ss 5LAA(1)(b) and (2), which require that a person demonstrate that they are 'at a particular risk' in circumstances where the population of the country generally faces a real risk of significant harm, not be passed.

## **7 Behaviour modification**

59. Proposed s 5LAA(5) is based on s 5J(3) of the Migration Act which was introduced by the Legacy Act. The sections provide that a person will not be entitled to protection in Australia if the person could take reasonable steps to modify their behaviour in another country to avoid persecution or a real risk of significant harm there.
60. The Commission made submissions about s 5J(3) to this Committee during its consideration of the Legacy Bill.<sup>30</sup> As the Commission said at the time, it is a dangerous approach for the Government to take to seek to return people to a country where they have a well-founded fear of persecution (or a real risk of significant harm), on the basis that it would be possible to hide the characteristic that would lead them to be persecuted (or harmed).
61. As recently as November 2014, prior to the passage of the Legacy Bill the following month, the High Court confirmed that focussing on an assumption about how the risk of persecution might be avoided diverts a decision maker from the real task under the Refugee Convention of determining whether there would be a real chance of persecution (or a real risk of significant harm under complementary protection provisions).<sup>31</sup>
62. At the time the Legacy Bill was considered by this Committee, s 5J(3) only contained the protections in paragraphs (a) and (b). Following its consideration by the Committee, the section was amended (with the support of both the Government and the Opposition) to include further protections in s 5J(3)(c). These provide that a person will not be required to do any of the following:
- (i) 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;
  - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
  - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
  - (iv) conceal a physical, psychological or intellectual disability;

- (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
  - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
63. For the reasons given in the Commission's submission in relation to the Legacy Bill, the Commission's primary position is that these sections should not form part of the Migration Act. If they are to remain in the Act, the impact of the additional protections introduced in paragraph (c) should be recognised and expanded on in the EM. This issue is dealt with below.
64. There are three categories describing circumstances in which a person will not be required to modify their behaviour, set out in paragraphs (a), (b) and (c) of each of s 5LAA(5) and s 5J(3).
65. The first category is that a person will not be required to modify their behaviour if this would conflict with a characteristic that is fundamental to the person's identity or conscience.
66. The second category is that a person will not be required to conceal an innate or immutable characteristic they have. The Commission notes the Government's intention, as expressed in the EM, that an 'immutable characteristic' could be a historical experience, such as being a child soldier, sex worker or a victim of human trafficking. The person may no longer be a sex worker, for example, but if people who had formerly been sex workers are at risk of serious harm, then this historical attribute would amount to an immutable characteristic (presumably on the basis that the past cannot be changed). The Commission supports this expansive interpretation of the meaning of an 'immutable characteristic'.
67. The Commission understands that the protections for asylum seekers in paragraph (c) apply in addition to, and without limiting, the protections in paragraphs (a) and (b). Each of the three paragraphs are expressed as alternatives. Paragraphs (a) and (b) set out circumstances where a person will not be required to modify his or her behaviour to avoid persecution. Without limiting those circumstances, a person will also not be required to modify his or her behaviour to avoid persecution in the circumstances set out in paragraph (c).
68. So, for example, a person will not be required to demonstrate that any of the circumstances in paragraph (c) would *also* conflict with a fundamental characteristic of the person's identity or conscience or conceal an innate or immutable characteristic of the person.
69. There is currently little detail in the EM on the meaning of paragraph (c) and its relationship to the other two paragraphs.<sup>32</sup> It is likely that this has arisen because the amendment which introduced s 5J(3)(c) occurred during debate at the Committee stage and was not reflected in the EM for the Legacy Bill.<sup>33</sup> Relevant paragraphs of the EM for the present Bill seem to have been cut and pasted from the EM for the Legacy Bill which at that stage did not include paragraph (c).<sup>34</sup>

70. So that there is no risk of misinterpretation of this section (and its counterpart in s 5J(3)) the Commission recommends that, if these sections are to remain in the Migration Act, appropriate amendments be made to the EM to make clear that the protections in paragraph (c) are additional to the protections in paragraphs (a) and (b).

#### **Recommendation 4**

The Commission recommends that proposed s 5LAA(5), which requires behaviour modification to avoid a real risk of significant harm, not be passed and that existing s 5J(3) be repealed.

#### **Recommendation 5**

If recommendation 4 is not accepted, the Commission recommends that amendments be made to the Explanatory Memorandum to make clear that the protections for asylum seekers in s 5LAA(5)(c) are additional to the protections in paragraphs (a) and (b) of that section.

### **8 ‘Effective protection measures’**

71. Finally, the Bill proposes to weaken the protections for asylum seekers by extending the concept of effective state protection to non-state actors.<sup>35</sup>
72. Currently, s 36(2B)(b) provides that a person will be taken not to have a real risk of significant harm in a country if the Minister is satisfied that the person could obtain protection from an authority of the country against this risk.
73. The Bill proposes to repeal s 36(2B)(b) and replace it with a lesser form of protection in s 5LAA(4).
74. Proposed s 5LAA(4) would dilute the existing protections by providing that person will not have a real risk of significant harm in a country if ‘effective protection measures’ as defined in existing s 5LA are available. This includes protection by either State or non-State actors.
75. The Commission made submissions about effective state protection in response to the Legacy Bill.<sup>36</sup> For the reasons given in those submissions, the Commission considers that the extension of this concept to non-state actors is inappropriate.
76. If a person has established that he or she faces a real risk of significant harm in a country and that the state cannot provide effective protection, then it appears inappropriate to inquire into whether or not other non-state actors could provide protection instead.

#### **Recommendation 6**

The Commission recommends that the references in existing s 5LA to protection by non-state actors be repealed.

- <sup>1</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 2015, p 6 (The Hon Peter Dutton MP, Minister for Immigration and Border Protection).
- <sup>2</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (Cth)*, 30 January 2014, recommendation 1. At <http://www.aph.gov.au/DocumentStore.ashx?id=6a2d64ab-3869-4e4e-a74b-600b070a7f50&subId=32277> (viewed 23 November 2015).
- <sup>3</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 2015, p 6 (The Hon Peter Dutton MP, Minister for Immigration and Border Protection).
- <sup>4</sup> Explanatory Memorandum, Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (Cth), p 1.
- <sup>5</sup> United Nations Human Rights Committee, *GT v Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996 (1997) at [8.1]-[8.2]; *ARJ v Australia*, Communication No. 692/1996, UN Doc CCPR/C/60/D/692/1996 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993) at [13.1]-[13.2]; *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991 (1994) at [14.1]-[14.2]; *Cox v Canada*, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993 (1994) at [16.1]-[16.2]; *Judge v Canada*, Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003) at [10.2]-[10.7]; *Nakrash and Qifen v Sweden*, Communication No. 1540/2007, UN Doc CCPR/C/94/D/1540/2007 (2008) at [7.3]; *Bauetdinov v Uzbekistan*, Communication No. 1205/2003, UN Doc CCPR/C/92/D/1205/2003 (2008) at [6.3]; *Munaf v Romania*, Communication No. 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009) at [14.2].
- <sup>6</sup> United Nations Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) at [12].
- <sup>7</sup> United Nations Committee Against Torture, *General Comment on the implementation of article 3 of the Convention in the context of article 22*, UN Doc A/53/44 Annex IX (1998) at [7].
- <sup>8</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)*, 31 October 2014, at [38]-[40]. At <http://www.aph.gov.au/DocumentStore.ashx?id=e50d519a-f240-4c6e-8f7e-baa7e3af7c33&subId=301611> (viewed 18 November 2015).
- <sup>9</sup> Proposed s 5LAA(1)(a), Bill, Sch 1, item 11.
- <sup>10</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)*, 31 October 2014, at [38]-[40].
- <sup>11</sup> United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (first published 1979, reissued 2011), UN Doc HCR/1P/4/ENG/REV. 3 at [91]. At <http://www.unhcr.org/3d58e13b4.html> (viewed 19 November 2015).
- <sup>12</sup> EM at [55].
- <sup>13</sup> Department of Immigration and Border Protection, *Procedures Advice Manual, PAM3: Refugee and Humanitarian – Refugee Law Guidelines – 8.3 Safe and legal access*.
- <sup>14</sup> *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18.
- <sup>15</sup> *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 26 [23] (Gummow, Hayne and Crennan JJ), 42 [79]-[81] (Kirby J) and 49 [105] (Callinan J).
- <sup>16</sup> *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 27 [24] (Gummow, Hayne and Crennan JJ), 42 [79]-[81] (Kirby J) and 49 [105] (Callinan J).
- <sup>17</sup> *SZSCA v Minister for Immigration and Border Protection* [2014] HCA 45 at [21]-[28] (French CJ, Hayne, Kiefel and Keane JJ).
- <sup>18</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 2015, p 6 (The Hon Peter Dutton MP, Minister for Immigration and Border Protection).
- <sup>19</sup> *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 at [7] and [20] (Lord Bingham of Cornhill).
- <sup>20</sup> *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 at [8] (Lord Bingham of Cornhill).
- <sup>21</sup> Proposed ss 5LAA(1)(b) and (2), Bill, Sch 1, item 11.
- <sup>22</sup> Statement of Compatibility with Human Rights at [26].

- <sup>23</sup> For an articulation of this approach in Australia, see *SZSFF v Minister for Immigration and Border Protection* [2013] FCCA 1884 at [34] (Lloyd-Jones J).
- <sup>24</sup> US Code of Federal Regulations: 8 CFR §208.13(b)(2)(iii).
- <sup>25</sup> EM at [62].
- <sup>26</sup> EM at [71].
- <sup>27</sup> EM at [70].
- <sup>28</sup> EM at [70]. See, for example, *SZSSY v Minister for Immigration and Border Protection* [2014] FCA 1144 at [91] (Jagot J); *SZSPT v Minister for Immigration and Border Protection* [2014] FCA 1245 at [14] (Rares J); *SZTES v Minister for Immigration and Border Protection* [2015] FCA 719 at [23] and [71] (Wigney J).
- <sup>29</sup> Department of Immigration and Border Protection, *Procedures Advice Manual, PAM3: Refugee and Humanitarian – Protection Visas – Complementary Protection Guidelines – 39 Personal risk and generalised violence*: ‘If the applicant does personally face a real risk of significant harm, the fact that the population generally also faces that harm does not mean that the non-citizen should somehow be excluded from receiving protection’.
- <sup>30</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)*, 31 October 2014, at [49]-[56].
- <sup>31</sup> *Minister for Immigration and Border Protection v SZSCA* [2014] HCA 45 at [17] (French CJ, Hayne, Kiefel and Keane JJ).
- <sup>32</sup> See, for example, paragraphs 81 and 82 of the EM and paragraph 35 of the Statement of Compatibility with Human Rights.
- <sup>33</sup> Commonwealth, *Parliamentary Debates*, Senate, 4 December 2014, p 10,363.
- <sup>34</sup> Compare paragraphs 1190, 1191, 1193 of the EM to the Legacy Bill with paragraphs 80, 82, 83 of the present Bill.
- <sup>35</sup> Proposed ss 5LAA(4), Bill, Sch 1, item 11.
- <sup>36</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)*, 31 October 2014, at [41]-[48].