# Chapter 2

# Key issues

2.1 This chapter focuses on the policy rationale for the Bill followed by discussion of key issues raised by submitters and witnesses in relation to the provisions of the Bill. The issues raised can be grouped into four categories:

- internal relocation and risk of harm;
- effective protection measures;
- behavioural modification; and
- merits review.

2.2 Finally, the chapter concludes with the committee's view and recommendations.

## Policy rationale for the Bill

2.3 Conflicting views were raised during the inquiry regarding the policy rationale for the Bill, and its necessity. For example, in the Explanatory Memorandum (EM), the government stated in relation to the refugee framework and the complementary protection framework in the *Migration Act 1958* (the Act) that:

> Without these amendments, there is an inconsistency between the two frameworks. Under the current process, a person may not meet one of the elements of the refugee test relating to internal relocation, effective protection and behaviour modification under the current refugee framework. However, they may then be found to satisfy the complementary protection test because those same elements are currently not aligned. This Bill addresses this inconsistency.[1]

2.4 The majority of submissions disagreed with this rationale. They stated that the test under the refugee framework and the test under the complementary protection framework must be different. For example:

> Refugee Legal respectfully submits that this policy rationale is fundamentally flawed. The legal tests governing whether a person is owed protection on refugee grounds are, and must be, different from those for complementary protection grounds. If the two tests were not different in scope then complementary protection would naturally be obsolete.[2]

2.5 Professor Michelle Foster questioned the need for the proposed amendments, given the small number of people that have been granted visas on complementary protection grounds. Professor Foster remarked:

> One of the things that is interesting is that, as we have just heard, the numbers are very low…they constitute a very small percentage of the

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1 Explanatory Memorandum (EM), p. 31.

2 Refugee and Immigration Legal Centre (RILC), *Submission 16*, p. 3.

> overall number of protection visas that are issued. So from a political perspective it is a little bit hard to know why this is so imperative…In addition, these provisions are involving us in departing significantly from our international obligations.[3]

2.6 The Department of Immigration and Border Protection informed the committee that:

> Since 24 March 2012, when the complementary protection act came into effect, there have been in total 15,643 protection visas granted. Of that, we believe—and I will confirm this once we can run the data and wash it properly—that probably less than 200 are under the provision of complementary protection, so it is a very small number.[4]

2.7 The department subsequently confirmed that '[t]here have been a total of 216 visas granted to persons who have been found to meet the criteria for a protection visa on complementary grounds (as at 9 February 2016)'.[5]

2.8 At the public hearing, the department reiterated the government's policy rationale and its position that the Bill is in line with Australia's international legal obligations and:

> will not increase the likelihood of returning people to situations that will engage Australia's *non-refoulement* obligations. While the bill will restore the government's intended interpretation of the concepts used to determine whether a person will face a real risk of significant harm…the application of each of these concepts by decision makers is subject to a number of qualifications to ensure that people in genuine need of protection will continue to meet the complementary protection criteria in the Migration Act.[6]

## Internal relocation and risk of harm

2.9 Currently, for the purpose of satisfying the conditions for complementary protection under paragraphs 36(2B)(a) and (c) of the Migration Act, 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:

- 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; or,
- the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

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3 Professor Michelle Foster, Director of the International Refugee Law Research Programme, University of Melbourne, *Committee Hansard*, 5 February 2016, p. 8.

4 Mr David Wilden, First Assistant Secretary, Department of Immigration and Border Protection (DIBP), *Committee Hansard*, 5 February 2016, p. 29.

5 DIBP, *Answer to question on notice*, 5 February 2016 (received 12 February 2016).

6 Mr Wilden, DIBP, *Committee Hansard*, 5 February 2016, p. 28.

2.10 In the Bill, subsection 36(2B) would be repealed (Item 16) and replaced by paragraphs 5LAA(1) and 5LAA(2) (Item 11). According to the proposed subsections, there is a real risk that the person will suffer significant harm in a country if:

- the real risk relates to all areas of the country; and,
- the real risk is faced by the person personally (if the real risk is faced by the population of the country generally, the person must be at a particular risk for the risk to be faced by the person personally).

2.11 These amendments would therefore remove the requirement to consider whether it is *reasonable* for a person to relocate to another part of the country to avoid harm; and further, if the real risk of significant harm is faced by the population generally, it would be necessary to show that a person is at *particular risk*.

***Reasonableness***

2.12 The LCA submitted that if the Bill were passed, and an individual was required to demonstrate that 'the real risk relates to all areas of a country', it would shift the onus to the applicant to disprove why they could not relocate to particular areas. Further, decision makers could effectively present applicants with lists of 'available areas for relocation,' which would place a high evidentiary burden on the applicant.[7]

2.13 The Refugee and Immigration Legal Centre (RILC) also emphasised the burden this would impose on individuals:

> Under the current law, if they are not at the same level of risk in another part of the country then the decision maker would have to consider whether or not it would be reasonable for them to relocate there. But now under the current changes proposed by the bill, the legal onus is on the person to show there is a real risk that they would suffer significant harm in all parts of the country, every single location.[8]

2.14 The United Nations High Commissioner for Refugees (UNHCR) contended that 'international law does not require threatened individuals to exhaust all options within their own country first before seeking asylum' and recommended that the reasonableness consideration in the legislation be maintained:

> UNHCR recommends the revision of this proposed amendment to ensure that the complementary protection framework, as codified in the Migration Act, requires consideration of the reasonableness of the proposed area of internal flight or relocation consistent with existing State practice and a correct legal interpretation of Australia's obligations under international law. Further, that it does not require significant harm to be experienced throughout the country prior to flight from the country of origin or habitual residence.[9]

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7 Law Council of Australia (LCA), *Submission 2*, p. 10.

8 Mr Greg Hanson, Solicitor, RILC, *Committee Hansard*, 5 February 2016, p. 20.

9 United Nations High Commissioner for Refugees (UNHCR), *Submission 8*, p. 8.

2.15 It was submitted that removing the reasonableness requirement 'from Australian law would put the Australian system at odds with the test applied by the developed world',[10] including comparable overseas countries, such as 'the European Union, New Zealand and the United Kingdom'.[11]

2.16 Regarding the potential consequences of this amendment for the individuals concerned, the Castan Centre for Human Rights Law emphasised the serious potential consequences that could result, and asserted that if this aspect of the Bill were passed, the consequences for some applicants would be of the 'utmost gravity':

> The Committee should also be aware that, if an applicant who would meet the current requirements is denied protection due to the changes proposed in the 2015 Bill, the consequences will by definition be of the utmost gravity (arbitrary deprivation of life, execution, torture or other cruel, inhuman or degrading treatment or punishment). Given that complementary protection is reserved for a small minority of the overall protection caseload, there is no justification to expose applicants to potential consequences such as these.[12]

2.17 Organisations that provide legal advice to refugees were also critical of the Bill. For instance, the Refugee Advice and Casework Service (RACS) submitted that the provisions of the Bill would be 'extremely dangerous' for these individuals, and that the internal relocation provisions of the Bill would

> permit a person to be deemed not to face a real risk of serious human rights abuses even when they do. This results in the refusal of a protection visa application and in most cases the result that the person must be removed from Australia.[13]

2.18 RACS was also concerned that statements about the intention and operation of the Bill occurred only in the EM and not in the Bill:

> …it is important for the legislation to mean what it says and to say what it means. And we should not be relying on policy directions to ensure that such fundamental decisions are being made properly and particularly when, as the parliament, there is an opportunity to make sure that this works in the way that is intended, if it is the parliament's intention for a decision maker to have to consider whether it would be legal to access that place where you are not going to suffer harm, whether it would be safe for you to access that area, then it really should be in the words of the section.[14]

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10 RILC, *Submission 16*, p. 5.

11 NSW Society of Labor Lawyers, *Submission 10*, p. 5. RILC, *Submission 16*, p. 5, also refers, in this regard, to the United States, the Republic of Ireland and Canada.

12 Castan Centre for Human Rights Law, *Submission 1*, p. 6.

13 Refugee Advice and Casework Service (RACS), *Submission 8*, p. 3.

14 Mr Scott Cosgriff, Senior Solicitor, RACS, *Committee Hansard*, 5 February 2016, p. 24.

2.19 The department told the committee that the removal of the reasonableness test was necessary because judicial interpretation of the Migration Act has broadened the scope of the relevant provisions beyond what is intended:

> This is now necessary, as various judicial interpretation issues have arisen in the current legislative framework, which has resulted in the broadening of Australia's complementary protection obligations in a way that goes beyond current international law interpretations. The bill will, therefore, restore the government's intended interpretation of the complementary protection provisions of the Migration Act so as to ensure that only those who are in need of Australia's protection will be eligible for a protection visa on complementary protection grounds.[15]

2.20 In relation to relocating a person to another area of a country, the department advised the committee that the proposed amendments replicate the current framework[16] and:

> In considering whether a person can relocate to another area of a receiving country, such that it would mitigate a real risk of significant harm to the person, decision makers will continue to take into account avenues of safety and lawfulness of access from the point of return to the place of safety, in line with policy guidelines. This policy is consistent with the domestic legal interpretation. Furthermore, this approach has already been implemented in paragraph 5J(1)(c) of the Migration Act in relation to the refugee framework, and decision makers are receiving ongoing training and policy guidance to assist them in determining whether relocation is safely and legally accessible.[17]

2.21 The department also indicated that it would be amenable to 'lifting some of the words such as "safe" and "legal" out of the explanatory memorandum' if doing so strengthened the Act.[18]

***Particular risk***

2.22 Witnesses at the hearing asserted concerns with proposed amendment 5LAA(2), which would require that 'if the real risk is faced by the population of the country generally, the person must be at a particular risk'.

2.23 For example, it was argued that there is confusion between the wording in the Bill and the EM. The LCA stated that the Bill is unclear with respect to whether a person must demonstrate they are individually targeted in order to qualify for complementary protection:

> The explanatory memorandum says that the intention is not necessarily that the person be exposed to a risk above and beyond that of other persons and that it is intended to comprehend the situation of indiscriminate violence,

15 Mr Wilden, DIBP, *Committee Hansard*, 5 February 2016, p. 28.

16 Mr Wilden, DIBP, *Committee Hansard*, 5 February 2016, p. 33.

17 Mr Wilden, DIBP, *Committee Hansard*, 5 February 2016, pp 28–29.

18 Mr Wilden, DIBP, *Committee Hansard*, 5 February 2016, p. 33.

> such as is currently the case in Syria. But the language that appears in the subsection on 'particular risk' is not consistent with the language of the EM. That will lead, if it is enacted, to terrible difficulties in interpretation.[19]

2.24 The Australian Human Rights Commission (AHRC) stated the provision is 'confusing and ambiguous on the issue of whether a person must show they have been individually targeted'.[20] An example was provided to illustrate the AHRC's concerns about this aspect of the Bill:

> I think this example of the mass murder of people would be one where if everyone of that group is being murdered, how would you show that it is particularly addressed to you? You probably could not, so I guess that is a way of explaining it. It is a very dramatic example, but it is a powerful one in the sense that it can be very difficult to show that you have individually been attacked.[21]

2.25 In its submission, the department informed the committee that:

> This amendment is not intended to elevate the risk threshold for those people who are facing removal to countries where there is a generalised risk of violence. It is only intended to put beyond doubt that the real risk must be faced by the person personally, irrespective of whether there is generalised violence in the country. Contrary to the intention in respect of current paragraph 36(2B)(c), some decision makers have erroneously reasoned that harm that is faced by a population of a country generally will therefore be faced personally by each of the residents, or that where significant harm is faced by everyone in the country of origin/region of a country, a particular applicant is necessarily excluded from protection. Neither of these interpretations were the Government's intention.[22]

## Effective protection measures

2.26 According to paragraph 36(2B)(b) of the Act, 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'.

2.27 The Bill would repeal this subsection and replace it with subsection 5LAA(4) (Item 11). According to the proposed subsection 'there is not a real risk that a person will suffer significant harm in a country if effective protection measures against significant harm are available to the person in the country'.

2.28 Effective protection measures are defined in section 5LA of the Migration Act and refer to protection against persecution or significant harm that could be provided

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19 Dr Sarah Prichard SC, Chair, National Human Rights Committee, LCA, *Committee Hansard*, 5 February 2016, pp 3–4.

20 Professor Gillian Triggs, President, Australian Human Rights Commission (AHRC), *Committee Hansard*, 5 February 2016, p. 11.

21 Professor Triggs, AHRC, *Committee Hansard*, 5 February 2016, p. 13.

22 DIBP, *Submission 18*, p. 7.

to the person by the relevant state or a party or organisation (including an international organisation) that controls the relevant state or a substantial part of it, and that are willing and able to offer such protection.

2.29 Submissions to the inquiry were critical of this aspect of the Bill, particularly with respect to the role of non-state actors. The joint submission from the Kaldor Centre for International Refugee Law and the International Refugee Law Research Programme asserted that non-state actors would not be able to provide adequate protection because they:

- do not meet a key condition for providing protection, namely being a party to the Refugee Convention or relevant human rights treaties, and/or having an established practice of compliance with their provisions;
- are not legally bound by any international human rights treaties and cannot be held accountable under them;
- are unlikely to have been in a stable position over a sufficient period of time to establish a practice of compliance with international standards; or be able to provide protection on an on-going and continuous basis; and
- are unlikely to be able to have the undisputed control of territory and administrative authority to enforce the rule of law and guarantee human rights.[23]

2.30 The AHRC submitted that if a person has established that they face a real risk of significant harm in a country, and the state cannot provide effective protection, it is 'inappropriate to inquire into whether or not other non-state actors could provide protection instead'.[24] The AHRC also stated that great difficulties would exist for decision-makers in Australia 'to make an accurate assessment as to how durable any protection by non-state actors might be'.[25]

2.31 At the hearing, the department stated that the existence of state actors such as police and a functioning judicial system would be considerations when determining whether there is effective protection. The department stated that the issue of non-state actors and effective protection needs to be:

> …looked at through the prism of: what are the individual circumstances of the person, the place, et cetera? So it is not a binary thing where, if there are police, they go back. It is a case of: are there police; non-state actors; what are the circumstances; how do they relate to that person? And you come right back to our international obligations, which are, as we have stated many times, that we will not *refoule* someone if they are at risk in any of those circumstances.[26]

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23 Kaldor Centre for International Refugee Law and Institute for International Law and the Humanities, *Submission 4*, pp 8–9.

24 AHRC, *Submission 3*, p. 15.

25 Professor Triggs, AHRC, *Committee Hansard*, 5 February 2016, p. 11.

26 Mr Wilden, DIBP, *Committee Hansard*, 5 February 2016, p. 34.

## Behaviour modification

2.32 Subsection 5LAA(5) of the Bill would provide that there will not be a real risk that a person will suffer significant harm if the person could take reasonable steps to modify their behaviour to avoid a real risk of harm, other than 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 of the person.

2.33 The joint submission from the Kaldor Centre for International Refugee Law and the International Refugee Law Research Programme considered this provision to be contrary to international law. The joint submission stated that the provision 'effectively puts the onus on an applicant to avoid significant harm, a position that is fundamentally at odds with international human rights law'.[27] At the hearing, Professor Foster argued that this provision would place a burden on individuals to change their life in ways that are contrary to established human rights, 'distorting the whole framework of international law':

> So you could have the Taliban saying, "You can't go to school" or "You can't work in this job" and that somehow, as an individual, you have to modify your behaviour in relation to a threat that is coming from a non-elected, non-government body that has absolutely no reasonable basis to expect you to modify.[28]

2.34 The LCA also raised concerns that the provisions of the proposed Bill do not identify employment as 'a characteristic fundamental to the person's identity or conscience', or 'innate and immutable', and there is no provision providing that an applicant should not be expected to change their occupation to avoid harm. The Law Council noted that:

> in many cases, a refugee applicant's occupation may have developed over their lifetime and may be their only skill…in many asylum-producing countries and for many applicants, there is little or no opportunity to gain other skills or seek education or training in order to change occupation.[29]

2.35 Dr Sarah Pritchard, from the Law Council of Australia, discussed the 2007 High Court case *SZATV v Minister for Immigration and Citizenship*[30] (in which the occupation in question was journalism). Dr Pritchard postulated that this may account for the fact that occupation is not listed as an exception under subsection 5LAA(5),

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27 Kaldor Centre for International Refugee Law and Institute for International Law and the Humanities, *Submission 4*, p. 7.

28 Professor Michelle Foster, Director of the International Refugee Law Research Programme, University of Melbourne, *Committee Hansard*, 5 February 2016, p. 10.

29 LCA, *Submission 2*, p. 14.

30 (2007) 233 CLR 18.

stating that it is this decision that 'provides the background, one speculates, to the enactment of this modification approach':

> In that case the tribunal had found that, although the applicant might not be able to work as a journalist in the country—which had been the source of the feared persecution—internal relocation was a realistic option for that journalist. The High Court unanimously held in that case that the tribunal had, in effect, impermissibly expected the appellant journalist to move elsewhere, not work as a journalist and live discreetly so as not to attract the adverse attention. That is an example of practising one's profession. One's occupation is understood to be essential and intrinsic to one's identity and is an aspect of one's human rights. That example, where the High Court found the tribunal's ruling to be impermissible, would not be comprehended by the examples given in the bill.[31]

2.36 With regard to a person being required to modify their occupation, the minister argued in his second reading speech that the amendment was necessary because there have been instances where people have:

> …met 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…There have also been several persons who have been found to meet the complementary protection criteria where they have been involved in serious crimes in their home countries, or are fleeing their home countries due to their association with criminal gangs.[32]

2.37 The department advised the committee that subsection 5LAA(5) of the Bill contains a reasonableness test, as outlined in the EM.[33] The department stated:

> the behaviour modification provision in proposed subsection 5LAA(5) is concerned with reasonable modification only so as to avoid a real risk of significant harm and does not include a modification that relates to the person's religion, political opinion or moral beliefs. If such characteristics are fundamental to the person's identity or conscience or are innate or immutable. In the complementary protection context, a person may be able to modify their behaviour in a manner that would not conflict with their identity or belief system—for example, by refraining from engaging in an occupation that carries risk where it is reasonable person to find another occupation and could, thereby, avoid the risk of significant harm. If this is the case, they should not necessarily be provided with protection as their return would not, in itself, engage non-refoulement obligations. The risk of harm would only arise if they chose to undertake actions.
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> …

31 Dr Pritchard SC, LCA, *Committee Hansard*, 5 February 2016, p. 10.

32 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 14 October 2015, p. 11121.

33 EM, p. 17.

> The issue is if someone can safely modify without having all those impacts, as we said, to the core of who they are then they should be able to do that. The legislation says if a person could take reasonable steps to modify his or her behaviour so there is actually a reasonableness test in in that element…if you had a specific occupation in one part of the country and you could change that occupation, it would go back to the test of: is it innate to who you are? Is it impacted by your political opinions? They are lenses we would look through before we would come to any determination.[34]

## Merits review

2.38 Under section 502 of the Migration Act, the minister can determine that certain persons are 'excluded persons' who do not have access to merits review of a decision from the Administrative Appeals Tribunal (AAT). Proposed subsection 36(2C) would extend this provision to include persons who have been refused a protection visa on complementary protection grounds on the basis of their character.

2.39 The Immigration Advice and Rights Centre (IARC) explained that judicial review is only able to consider the lawfulness of the minister's decision, not whether or not a decision of the minister's to refuse a visa is factually correct. Their submission went on to criticise an approach that would limit the application of merits review, and provided an example of the impact this can have on an individual applicant:

> 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.[35]

2.40 The LCA also raised concerns that this amendment would significantly limit the scope for review of decisions, stating that the:

> AAT provides a critical chance for people to properly argue their case, particularly in circumstances where the visa has been denied or cancelled on national security grounds, and where that applicant cannot review information that led to the decision on the basis of national security concerns...and the Law Council therefore considers it imperative that there is adequate oversight of such decisions.[36]

2.41 The department explained in relation to the proposed removal of merits review:

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34 Mr Wilden, DIBP, *Committee Hansard*, 5 February 2016, pp 29 and 34.

35 Immigration Advice and Rights Centre (IARC), *Submission 13*, p. 4.

36 LCA, *Submission 2*, p. 19.

> It is only in that area of character. It is not a blanket removal…It is where the minister makes a personal decision in the national interest. It aligns with current practice, where the minister makes a personal character decision in the national interest that is not subject to merits review but it will always be subject to overriding judicial view…In terms of consistency, what it has done is align anyone looking at complementary protection who triggers characters concerns. It is a ministerial [decision] which is not open to merits review…What this provision does is extend it also to the complementary protection framework.[37]

2.42 The department's submission also noted in relation to this aspect of the Bill that:

> This amendment will ensure consistency in the Minister's powers when dealing with non-citizens of serious character concern. As such, it is expected it will only be used in limited situations where there is a clear national interest reasons to limit access to merits review. All persons impacted by the personal decisions made by the Minister will continue to have access to judicial review.[38]

## Committee view and recommendations

2.43 The committee supports the Commonwealth government's objective of ensuring Australia has an effective and efficient complementary protection status determination process, and agrees with the need to reduce the likelihood that those who have previously been involved in criminal activity will be granted protection.[39] The committee also acknowledges that judicial interpretation of the relevant provisions has broadened the scope of the complementary protection framework beyond what the government considers to be intended by the current legislation.

2.44 However, the committee is swayed by some of the concerns raised during the course of the inquiry, particularly those in relation to internal relocation within a country and the risk of harm faced by a person, as well as the appropriateness of a person being required to change their occupation as a reasonable step to avoiding harm.

### *Internal relocation and risk of harm*

2.45 As discussed elsewhere in this chapter, submitters and witnesses outlined concerns about a person being internally relocated in a country so as to avoid being at risk and the reasonableness of this requirement. It was also suggested to the committee that Australia may be in breach of its international obligations if this aspect of the Bill were passed in its current form.

2.46 The committee agrees that it may be unreasonable to require a person to relocate to certain areas in a country so as to avoid the risk of harm when matters such

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37 Mr Wilden and Mr Simon Duke, Director, DIBP, *Committee Hansard*, 5 February 2016, p. 35.

38 DIBP, *Submission 18*, p. 12.

39 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 14 October 2015, p. 11121.

as the ability to safely access and / or subsist in that area are taken into account. While the department argued that matters to be taken into account by the decision maker can be found in the EM, the committee notes that the department itself indicated it was amenable to the inclusion of the words 'safe and legal'.[40] The LCA was concerned that the Bill so amended would still put people at risk of *refoulement* and would be contrary to domestic legal interpretation; however, the LCA conceded:

> …if the committee is minded to recommend the passage of the Bill, the Law Council suggests
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> - the inclusion of "reasonableness" in the text, with the addition of:
>   - an explanatory note in the in the *Migration Act 1958* (Cth); or
>   - a section 499 direction on "reasonableness" factors; or
>   - at a minimum, stronger policy guidance in this regard.
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>   Such an amendment would ensure the Department's intention to remove "quality of life" considerations; or
> - the inclusion of the words "safely, legally and practically" accessible in subsection 5LAA(1).[41]

2.47 In light of evidence from the department and the LCA, the committee is of the view that, if the government intends for the decision maker to take into account the ability of a person to safely and legally access or relocate to an area within a country, this should be reflected in the Bill. The committee notes that this could be achieved by amending 5LAA (Item 11) to insert 'safely and legally accessible' or alternatively by amending Item 16 of the Bill so that paragraph 36(2B)(a) of the Act is retained but where 'reasonable' is replaced with 'safe and legal'.

2.48 The committee therefore recommends that the government amend the Bill either at Item 11 to insert 'safely and legally accessible' into proposed subsection 5LAA or at Item 16 to retain paragraph 36(2B)(a) of the Act and replace 'reasonable' with 'safe and legal', as appropriate.

**Recommendation 1**

**2.49 The committee recommends that the government amend the Bill either at Item 11 to insert 'safely and legally accessible' into proposed subsection 5LAA or at Item 16 to retain paragraph 36(2B)(a) of the Act and replace 'reasonable' with 'safe and legal', as appropriate.**

2.50 Concerns were also raised during the course of the inquiry about proposed subsection 5LAA(2), and the requirement that if a real risk is faced by the population of the country generally, the person must be at a personal and particular risk.

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40 Mr Wilden, DIBP, *Committee Hansard*, 5 February 2016, p. 33.

41 LCA, *Answers to written questions on notice*, 10 February 2016 (received 15 February 2016), p. 3.

Submitters and witnesses argued that the text of the Bill in this regard was inconsistent with the EM.

2.51 As discussed at paragraph 2.25, the department explained that 'this amendment is not intended to elevate the risk threshold for those people who are facing removal to countries where there is a generalised risk of violence' but rather 'put beyond doubt that the real risk must be faced by the person personally, irrespective of whether there is generalised violence in the country'. The department reasoned that the amendment is required because some decision makers have erroneously interpreted paragraph 36(2B)(c) of the Act.[42]

2.52 The committee notes that, in response to a written question on notice, the LCA advised:

> Although the Law Council considers that it is deleterious to further define the elements of the complementary protection framework, beyond that which exists under international law, the Law Council considers that the Department's policy intent, as expressed in its evidence and the Explanatory Memorandum, could be reflected in subsection 5LAA(2), either as an amendment to the subsection or as an explanatory note in the Migration Act.[43]

2.53 The LCA further indicated it would be supportive of an approach similar to that in the United States of America.[44]

2.54 Given the concerns about inconsistency between subsection 5LAA(2) and the EM, the committee recommends that the government consider clarifying the extent of the risk to which a person must be exposed, beyond the general risk that exists in relation to people in a particular country.

**Recommendation 2**

**2.55 The committee recommends that the government consider clarifying the extent of the risk to which a person must be exposed, beyond the general risk that exists in relation to people in a particular country, under proposed subsection 5LAA(2).**

***Behaviour modification***

2.56 Some submitters and witnesses opined that an individual should not be expected to alter their occupation in order to avoid harm. They argued that in many cases, a person's occupation may be fundamental to their identity, their only skill, and opportunities to retrain in another field may be limited or non-existent.

2.57 The committee accepts these concerns, but also agrees with the government's view that in certain circumstances it is not unreasonable for a person to be required to

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42 DIBP, *Submission 18*, p. 7.

43 LCA, *Answers to written questions on notice*, 10 February 2016 (received 15 February 2016), pp 4–5.

44 LCA, *Answers to written questions on notice*, 10 February 2016 (received 15 February 2016), p. 5.

change their occupation (for example, where the person's occupation may be criminal such as selling alcohol in countries where that is prohibited). On the basis of the department's evidence that a decision maker applying subsection 5LAA(5) must take into account the reasonableness of behaviour modification, and for the sake of clarity, the committee recommends that the government consider amending paragraph 5LAA(5)(c) of the Bill so that a person is not required to modify their occupation unless that occupation comprises criminal activity, association with criminal gangs or would in any other way imperil their safety on returning to their country.

**Recommendation 3**

**2.58 The committee recommends that the government consider amending paragraph 5LAA(5)(c) of the Bill so that a person is not required to modify their occupation unless that occupation comprises criminal activity, association with criminal gangs or would in any other way imperil their safety on returning to their country.**

2.59 Subject to the issues identified above and the preceding recommendations, the committee recommends that the Senate pass the Bill.

**Recommendation 4**

**2.60 Subject to the preceding recommendations, the committee recommends that the Bill is passed.**

**Senator the Hon Ian Macdonald**
**Chair**