



Submission

Migration Amendment (Protection and Other Measures) Bill 2014



Andrew & Renata Kaldor
Centre for International
Refugee Law

Never Stand Still

Law

4 August 2014

Dear Committee Secretary,

The Andrew & Renata Kaldor Centre for International Refugee Law welcomes the opportunity to provide a submission to the Committee's Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014.

The Kaldor Centre is the world's first research centre dedicated to the study of international refugee law. Based in the Faculty of Law at the University of NSW, it was established in 2013 with the aim of bringing a principled, evidence-based approach to refugee law and policy in Australia.

In summary, our assessment of the Migration Amendment (Protection and Other Measures) Bill 2014 is that:

- certain provisions in the Bill create a significant risk that Australia's international legal obligations will be violated, including obligations under the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), and the Convention on the Rights of the Child (CRC);
- the Bill is premised on a misunderstanding of refugee status determination and unduly interferes with the independence and functions of the Refugee Review Tribunal; and
- there is little or no justification for the changes proposed in the Bill.

If we can provide further information, please do not hesitate to contact us:
kaldorcentre@unsw.edu.au.

Yours sincerely,

Professor Jane McAdam
Director

Dr Joyce Chia
Senior Research Associate

T: +61 (2) 9385 4075 F: +61 (2) 9385 1175 E: kaldorcentre@unsw.edu.au
W: www.kaldorcentre.unsw.edu.au Twitter: <http://twitter.com/kaldorcentre>

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Executive Summary

1. The Migration Amendment (Protection and Other Measures) Bill 2014 proposes a number of significant changes to the current system of determining refugee status in Australia, including:
 - changing the standard of proof required to obtain protection from the risk of torture; cruel, inhuman or degrading treatment or punishment; the death penalty; or arbitrary deprivation of life (known as ‘complementary protection’);
 - denying protection to asylum seekers who have, or are thought to have, provided false identity, citizenship or nationality documents;
 - imposing a legal burden of proof on asylum seekers to establish their need for protection;
 - enabling the Temporary Safe Haven visa to be used as a bridge to temporary protection visas so far disallowed by the Senate;
 - preventing an asylum seeker in Australia from being granted refugee status on the basis that they are a family member of a person who has already been granted protection; and
 - empowering the Refugee Review Tribunal (RRT) to dismiss a claim if the asylum seeker fails to appear; make adverse inferences (ie draw conclusions adverse to the asylum seeker) if new evidence is submitted; and issue ‘guidance decisions’ and practice directions.
2. These changes, individually and together, will have adverse effects on asylum seekers. This detailed submission seeks to assist the Committee in understanding the effects of these complex changes.
3. In our view, these changes create significant risks that certain of Australia’s international legal obligations will be breached, including:
 - the obligation not to return a person to any place where they face a real chance of persecution or other forms of significant harm (*non-refoulement*), arising under international refugee law and international human rights law;¹
 - the obligation not to penalise asylum seekers for irregular entry;²
 - obligations to ensure equality before the law, the right to a fair hearing, and the principle of non-discrimination;³

¹ The obligation arises under Convention Relating to the Status of Refugees (Refugee Convention), 189 UNTS 150 (opened for signature 28 July 1951, entered into force 22 April 1954), art 33; International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 3; CRC (CRC), 1577 UNTS 3 (opened for signature 20 November 1989, signed 2 September 1990), art 37; Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 15.

² Refugee Convention, art 31.

³ ICCPR, arts 2, 14, 16, 26; CRC, arts 2, 37; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1249 UNTS 13 (opened for signature March 1980, entered into force 3 September 1981), arts 2, 5; CRPD, arts 5, 12, 13.

- obligations to respect the principle of family unity and the right to a family life;⁴
 - obligations to ensure that refugees have access to Refugee Convention rights, as well as the rights set out in human rights treaties relating to work, health care, social security, education, and so on;⁵
 - the obligation to ensure that asylum seekers and refugees are not rendered destitute, in violation of the prohibition on cruel, inhuman or degrading treatment;⁶ and
 - the obligation to ensure that the ‘best interests of the child’ is a primary consideration in any decision affecting a child,⁷ and to ensure that the other rights in the Convention on the Rights of the Child are respected.
4. In our view, these changes are based on a misunderstanding of the nature of refugee status determination. The Bill seeks to turn an inquisitorial, administrative process into a judicial process—but without providing appropriate judicial safeguards, due process, or recognising the special vulnerability of asylum seekers.
 5. We express particular concern about the breadth of the provisions, including the fact that the Bill will apply retrospectively (affecting asylum seekers who have already lodged a protection application).
 6. Finally, the Explanatory Memorandum does not adequately justify why the changes are proposed. In our view, they are more likely to create rather than reduce practical problems.

For convenience, the table below summarises our concerns with, and recommendations relating to, each provision. Part 1 of the submission then sets out some general considerations, including: Australia’s international legal obligations, the nature of refugee status determination, and the retrospective application of the proposed amendments. Part 2 of the submission then sets out, in respect of each of the proposed changes, the effect of the proposed change, our concerns about those changes, and our recommendations.

| Change | Concerns | Recommendations |
|--|---|---|
| Complementary protection – change to threshold | Inconsistent with international law and comparative State practice; may lead to <i>refoulement</i> ; in practice requires decision-maker to engage in ‘mental gymnastics’ – inefficient and cumbersome. | No change to existing law. |
| Fraudulent documents – denial of protection | Violates article 31 of the Refugee Convention; creates significant risk of <i>refoulement</i> ; significant adverse impact. | No change to existing law. If adopted, limit breadth of provisions and require procedural fairness and guidance on ‘reasonable explanation’. |
| Legal burden of | Inconsistent with international law; | No change to existing law. |

⁴ ICCPR, arts 17, 23; CRC, art 10; International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 10.

⁵ Refugee Convention, arts 17–19, 21, 22, 24; ICESCR, arts 6, 9, 12, 13.

⁶ ICCPR, art 7; CAT, art 3; CRC, art 37; CRPD, art 15.

⁷ CRC, art 3; see also CRPD, art 7.

| Change | Concerns | Recommendations |
|---|--|--|
| proof imposed | misunderstands refugee status determination; significant adverse impact on asylum seekers, given nature of flight. | If adopted, limit scope of application and seek further information on availability of legal advice and support, and proposed 'fast track' procedures. |
| Temporary protection – facilitating temporary protection visas | Respect for international obligations cannot be guaranteed if protection dependent on exercise of Ministerial discretion; reduced rights may lead to destitution; frustrating Parliament's rejection of temporary protection visas.. | No change to existing law. |
| Family reunion – family members of recognised refugees denied protection | Inconsistent with principle of family unity; significant adverse impact, especially on children. | No change to existing law. |
| Power to dismiss application for failure to appear | Creates real risk of <i>refoulement</i> ; inconsistent with equality before the law. | No change to existing law. |
| Adverse inference if claims or evidence presented 'late' | Inconsistent with equality before the law; undue interference with Tribunal's independence and purpose; significant adverse impact on vulnerable asylum seekers. | No change to existing law. If adopted, provision should confer discretion rather than direct Tribunal, and should be confined to new claims. |
| Guidance decisions | Risk of blanket approach to particular countries of origins instead of case-by-case analysis; could result in <i>refoulement</i> if not sufficiently attuned to individual circumstances. | If adopted, need to ensure appropriate safeguards and quality of decision-making. |
| Scope of application – retrospective application, and application to administrative processes | Retrospective application cannot be justified; application of 'judicial' provisions wholly inappropriate in administrative context. | If Committee recommends passage, amend to apply only to new applications. |

Part 1: General observations

1.1. International legal obligations relevant to the Bill

7. In our view, the current Bill creates significant risks that certain of Australia's international legal obligations will be violated, including:
 - the obligation not to return a person to any place where they face a real chance of persecution or other forms of significant harm (*non-refoulement*), arising under the Convention relating to the Status of Refugees (Refugee Convention), art 33 and international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), art 7; Convention against Torture (CAT), art 3; the Convention

on the Rights of the Child (CRC), art 37; and the Convention on the Rights of Persons with Disabilities (CRPD), art 15;

- the obligation not to penalise asylum seekers for irregular entry (Refugee Convention, art 31);
 - obligations to ensure equality before the law, the right to a fair hearing, and the principle of non-discrimination (ICCPR, arts 2, 14, 16; 26; CRC, arts 2, 37; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), arts 2, 5; CRPD, arts 5, 12, 13);
 - obligations to respect the principle of family unity and the right to a family life (ICCPR, arts 17, 23; CRC, art 10, International Covenant on Economic, Social and Cultural Rights (ICESCR), art 10);
 - obligations to ensure that refugees have access to Refugee Convention rights, as well as the rights set out in human rights treaties relating to work, health care, social security, education, and so on (Refugee Convention arts 17-19, 21, 22, 24; ICESCR arts 6, 9, 12, 13);
 - the obligation to ensure that asylum seekers and refugees are not rendered destitute if they have insufficient access to work or social security under temporary protection arrangements, in violation of the prohibition on cruel, inhuman or degrading treatment (ICCPR, art 7, CAT art 3, CRC art 37, CRPD, art 15); and
 - the obligation to ensure that the 'best interests of the child' is a primary consideration in any decision affecting a child (CRC, art 3, CRPD, art 7), and to ensure that the other rights in that treaty are respected.
8. Many of these concerns have also been raised by the Parliament's Joint Committee on Human Rights.⁸ To assist the Committee, we explain some of these obligations below.

1.1.1. *Non-refoulement obligations and the requirement of fair procedures*

9. Australia has obligations under the Refugee Convention, the Convention against Torture, and the International Covenant on Civil and Political Rights not to return people to countries where they face a risk of persecution or other forms of significant harm, including arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment. These obligations require Australia not to send a person either directly or indirectly to a country where they are at risk of such harm.
10. By implication, these obligations necessarily require Australia to have appropriate procedures in place to identify those who are at risk of such harm.⁹ This is the purpose of refugee status determination procedures. They should be based on the following principles of procedural fairness:

⁸ Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 23 – 26 June 2014; Legislative Instruments received 7 - 20 June 2014* (15 July 2014), <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/44th/944/index>.

⁹ *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (EC/GC/01/12, 31 May 2001), <<http://www.refworld.org/docid/3b36f2fca.html>>, [5].

- the right to be informed about the procedure;¹⁰
- the right to a reasonable opportunity to prepare a case;¹¹
- the right to be heard;
- the right to an unbiased decision-maker;
- the right to know the case against you, the right to answer it, and the right to have that answer to be considered before a decision is made; and
- the right to have the decision made by the person who heard the evidence.¹²

1.1.2. Article 31 of the Refugee Convention

11. Article 31 of the Refugee Convention requires States not to impose penalties on refugees who arrive 'without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.
12. This provision was included by the drafters of the Refugee Convention on the clear understanding that the very nature of flight means that asylum seekers are often unable to acquire passports and/or visas.¹³ As the High Court in England and Wales has stated:

Although under the Convention subscribing States must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents.¹⁴

13. Article 31:

- applies to those claiming asylum in good faith as well as recognised refugees;
- applies to those using false documents as well as to those entering clandestinely;
- applies to those who come directly from the country of origin, as well as to those who come from another country where their protection, safety and security cannot be assured, including where a person transits an intermediate country for a short period of time without having applied for, or received, asylum there;
- is not restricted only to those who make an asylum claim immediately; and
- applies to a 'refugee showing that he was reasonably travelling on false papers'.¹⁵

¹⁰ The applicant 'should receive the necessary guidance as to the procedure to be followed': Executive Committee of the United Nations High Commissioner for Refugees, *Determination of Refugee Status* (ExCom Conclusions No. 8 (XXVIII), 12 October 1977).

¹¹ Ibid.

¹² United Nations High Commissioner for Refugees, *Building in Quality: A Manual on Building a High Quality Asylum System* (September 2011), <<http://www.refworld.org/docid/4e85b36d2.html>>, 12.

¹³ This is discussed in detail in Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford, 2007), 384.

¹⁴ *R v Uxbridge Magistrates Court and Another, Ex parte Adimi* [2001] QB 667 (High Court (Divisional Court)), [3].

¹⁵ Guy Goodwin Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003); *R v Asfaw* [2008] 1 AC 1061 (House of Lords); *Adimi*, above n 14.

1.1.3. Equality before the law and non-discrimination

14. Article 14(1) of the ICCPR guarantees all people the right to equality before courts and tribunals, including asylum seekers and refugees. This includes access to the courts, equality of arms (meaning the same procedural rights are to apply to all parties unless differences can be objectively and reasonably justified), and non-discriminatory treatment.¹⁶
15. The guarantee is violated when an 'individual's attempts to access the competent courts or tribunals are systematically frustrated', either in fact or in law, as well as when distinctions are made regarding 'access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds'.¹⁷
16. This guarantee is complemented by the prohibition of non-discrimination (art 2), the recognition of everyone as a person before the law (art 16), and the recognition that all persons are equal before the law and are entitled without discrimination to the equal protection of the law (art 26).
17. Article 16 of the Refugee Convention also provides that refugees shall have 'free access to the courts of law' in the territory of all contracting States, a guarantee which also applies to asylum seekers.¹⁸

1.1.4. Rights of children

18. One of the fundamental principles of the Convention on the Rights of the Child is the child's right to have his or her best interests taken into account as a primary consideration in all actions or decisions that concern him or her.¹⁹ The obligation includes legislative, judicial and administrative proceedings.²⁰ It applies both to actions or decisions about the child, as well as to actions or decisions that affect the child (for instance, actions or decisions about the child's parents).
19. One of the factors that must be considered in this context is the child's right to family life (protected under article 16 of the CRC), and the principle that a child shall not be involuntarily separated from his or her parents, except when such separation is in the child's best interests (article 9). Importantly:

When the child's relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.²¹

¹⁶ UN Human Rights Committee, *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial* (CCPR/C/GC/32, 23 August 2007).

¹⁷ UN Human Rights Committee, above n 16.

¹⁸ James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), 645.

¹⁹ UN Committee on the Rights of the Child, *General Comment No 14: On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, Para 1)* (CRC/C/GC/14_, 29 May 2013), [1].

²⁰ *Ibid*, [27]–[31].

²¹ *Ibid*, [66].

20. Another factor that must be considered in assessing the child's best interests is the 'child's situation of vulnerability', including 'disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse'.²²

1.1.5. Rights of persons with disabilities

21. The Convention on the Rights of Persons with Disabilities similarly includes rights of equality and non-discrimination (article 5), including equal recognition before the law (article 12) and access to justice (article 13). Importantly, these rights include positive obligations to ensure effective access to justice.

1.2. Understanding refugee status determination

22. In our view, the Bill is premised on a misunderstanding of the way refugee status determination operates.²³ Refugee status determination is an inquisitorial process, not an adversarial one. That means that, unlike a judge who hears evidence from both sides and decides between them, in refugee cases the decision-maker actively inquires into the matter to satisfy him or herself of the matters required to make the decision. Yet, the Bill treats refugee status determination as though it were an adversarial process, without including any of the safeguards that are inherent in such an approach. It is therefore important to note the salient features of refugee status determination in Australia that differentiate it from an adversarial process, explained in more detail below:

- the focus of the inquiry is not on what has happened in the past, but rather on an evaluation of future risk;
- the asylum seeker is in a position of special vulnerability, compared to the 'average' litigant;
- refugee status determination occurs in a unique evidentiary context;
- legal burdens and standards of proof are inappropriate in this context; and
- the differences between the RRT and comparable tribunals overseas.

1.2.1. Evaluation of future risk, not past facts

23. In contrast to judicial proceedings, which generally relate to past events, consideration of protection claims requires an evaluation of *future* risk.²⁴ As the High Court of Australia has recognised, this makes it inappropriate to approach refugee status determination in an unduly legalistic way:

The humanitarian purpose of the Convention, the fact that questions of refugee status will usually fall for executive or administrative decision and in circumstances which will often not permit of the precise ascertainment of the facts as they exist in the country of nationality serve ... to curb enthusiasm for judicial specification of the content of the expression 'well-founded fear' as it is used in the Convention. Perhaps all that can usefully be said is that a decision-maker should evaluate the mental and emotional state of the applicant and the objective circumstances so far as they are capable of ascertainment, give proper weight to any credible account of those circumstances given by the applicant and reach an honest and reasonable

²² Ibid, [75].

²³ References to 'refugee status determination' here include determination of complementary protection needs.

²⁴ While past persecution may be good evidence of future persecution, it is not determinative: see, eg, *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510, [192].

decision by reference to broad principles which are generally accepted within the international community.²⁵

24. Similar comments apply to the determination of complementary protection (see below under Part 2, section 1.5).

1.2.2. Special vulnerability

25. Asylum seekers are in a particularly vulnerable position. Many suffer from mental health issues related to the circumstances they have fled and events they have witnessed, which may impact on their ability to recount their fears in a lucid manner. Often they do not speak English and have to rely on interpreters, which can create its own challenges. They may be accustomed to different social or cultural norms, affecting the way they interact with decision-makers and others. They are unfamiliar with Australian culture and the Australian legal system.²⁶
26. Importantly, the complex nature of refugee law makes it difficult for asylum seekers to properly understand the refugee status determination process. In Australia, this is compounded by the fact that asylum seekers have very limited access to legal representation and other support services. Given these vulnerabilities, it is unrealistic and unfair to impose on asylum seekers the burdens and standards imposed on the ordinary litigant in court.

1.2.3. Unique evidentiary context

27. Refugee status determination is also unusual in that there is often little reliable independent evidence, for good reason. Most acts of persecution, or threats of harm, are not documented, and even if they are, someone who has fled may not have access to the evidence. Further, many refugees do not have relevant personal documentation at their disposal. As UNHCR notes:
- Often ... an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.²⁷
28. In the refugee context, decision-makers rely on general country information generated by third parties (such as governments and NGOs), their views on the credibility of the asylum seeker, and occasionally on expert evidence.
29. Any requirement that asylum seekers provide proof and evidence of the harm they fear will not only be challenging, but in most cases will be unrealistic. Indeed, it may lead to the perverse outcome that false documents are created, which, if discovered, would likely lead to an adverse finding against the asylum seeker.

²⁵ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, [12] per Gaudron J.

²⁶ See generally United Nations High Commissioner for Refugees and European Refugee Fund of the European Commission, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (May 2013), <<http://www.unhcr.org/51a8a08a9.html>>, ch 3.

²⁷ 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* (rev edn, December 2011), <<http://www.unhcr.org/3d58e13b4.html>>, [196]–[197].

1.2.4. Strict legal rules of proof do not apply

30. For the reasons above, refugee status determination is not governed by strict legal rules of proof. UNHCR states the position as follows:

Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.²⁸

31. Further:

In view of the humanitarian purpose of the examination of an application for international protection and the many and distinctive challenges posed by the nature of status determination, the evidentiary rules that apply to civil and criminal law are frequently inadequate or inappropriate for the credibility assessment in the asylum procedure.²⁹

32. This approach has also been adopted by the High Court of Australia and the UK Supreme Court, as discussed below.

1.2.5. The Refugee Review Tribunal

33. Australia's RRT operates differently from tribunals in comparable jurisdictions in two key respects. First, the RRT is a merits review tribunal, which is designed to 're-make' (rather than consider the errors of) the decision of the Immigration Department. In this respect, it conducts an administrative process of considering all the available evidence and claims, weighing up the evidence, and considering from scratch whether or not the applicant engages Australia's protection obligations. RRT members are independent, but they are not necessarily legally trained. They are not members of the judiciary or judges.
34. Secondly, the RRT employs an 'inquisitorial' rather than an 'adversarial' process. The Immigration Department is not a party to the proceedings, and does not provide evidence or submissions to it. Legal representatives do not argue the case, but may only make submissions at the discretion of the tribunal. This is in contrast to the UK and the US, where the equivalent tribunals and courts are fully fledged judicial bodies employing procedures similar to those of a court. Even in New Zealand, where the procedure is 'primarily inquisitorial' and the case is reconsidered on its merits, the tribunal is a judicial body where the respondent can appear and cross-examine witnesses, although in practice this does not appear to occur often.
35. The RRT was established with the objective of 'providing a mechanism of review that is fair, just, economical, informal and quick', 'not bound by technicalities, legal forms or rules of evidence'.³⁰ This Bill reflects a shift away from this stated intention, without the

²⁸ Ibid, [196]–[197].

²⁹ UNHCR and European Refugee Fund of the European Commission, above n 26, 32.

³⁰ *Migration Act 1958* (Cth) s 420.

safeguards typical in adversarial procedures, such as the right to examine or cross-examine, or the right to contest evidence before the decision-maker.

36. Further, the Bill interferes with the RRT's independence and its task of re-making the decision on its merits by imposing prescriptive rules that constrain its ability to weigh evidence properly and consider the claim holistically. These new rules will create additional layers of complexity without any obvious benefit.

1.3. Retrospectivity

- We also express concern at the fact that the Bill's its provisions are intended to apply retrospectively to applications that have not been 'finally determined', or where a 'decision on review' has not been made.
37. The retrospective effect of the Bill will cause real injustice to some asylum seekers, which in some cases may mean that they are denied protection.
38. In effect, the retrospective operation of these provisions would mean that asylum seekers who:
- have **already** refused or failed to comply with a request to provide identity, nationality or citizenship documents, who have provided 'bogus' documents (as defined by the Act), or who have destroyed or disposed of such documents, will be automatically denied protection visas, even though previously these actions attracted at most an adverse inference;
 - are **already part-way** through a process where no legal burden of proof was imposed may be denied protection, because a legal burden of proof will be imposed on evidence already given;
 - are **already part-way** through a process of claiming complementary protection may be denied protection, because a higher standard of proof will be applied to evidence already given.
39. The retrospective effect of the legislation therefore 'changes the rules of the game' at a point where it is too late for the asylum seeker to do anything about his or her earlier actions.
40. In our view, there is no compelling justification for the retrospective effect of these provisions. They cannot have the intended effect of 'encouraging' such people to put their claims forward earlier and more fully (as suggested in the Explanatory Memorandum). We also note that the Explanatory Memorandum fails to adequately justify this retrospective effect.

1.4. Lack of justification

41. Finally, we draw attention to the general failure of the Explanatory Memorandum to justify any of these changes in any detail. No evidence has been provided as to why these changes are needed. Indeed, it is likely these changes will only produce further litigation and impose further burdens on decision-makers, both at the primary and review stages.
42. As the Parliamentary Joint Committee on Human Rights has observed, if human rights are interfered with, adequate and proportionate justification for such interferences must be provided.

Part 2: Detailed comments on the Bill

1.5. Complementary protection

43. The Bill proposes to insert a ‘more likely than not’ standard of proof in relation to Australia’s *non-refoulement* obligations under the CAT and the ICCPR. In our view, this:
- is inconsistent with international law, creates a real risk of *refoulement*, and adds an unnecessary and unduly complicating domestic gloss to a well-known international standard;
 - is inconsistent with Parliament’s intention;
 - will have a significant adverse impact upon particularly vulnerable people; and
 - has not been justified in the Explanatory Memorandum.
44. We explain the proposed change and the background to the inclusion of complementary protection, before setting out our concerns in more detail.

1.5.1. The proposed change

45. Section 36(2)(aa) was introduced by the [Migration Amendment \(Complementary Protection\) Act 2011](#) (Cth) (‘Complementary Protection Act’). Under section 36(2)(aa), a non-citizen who does not satisfy the refugee definition can still be granted a protection visa where there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed to a receiving country, there is a real risk that the non-citizen will suffer significant harm. This is intended to implement certain of Australia’s *non-refoulement* obligations under the CAT and the ICCPR into domestic law. It is generally known as ‘complementary protection’.
46. The current Bill proposes to amend this threshold test. Proposed section 6A provides that protection will only be forthcoming if ‘it is *more likely than not* that the non-citizen will suffer significant harm if the non-citizen is removed from Australia to a receiving country’ (emphasis added).
47. This provision applies *only* to the assessment of the complementary protection aspect of a claim, not to the assessment of whether a person meets the refugee definition. Further, it will only take effect if an existing Bill before Parliament to remove complementary protection from the statutory framework altogether is not passed.³¹ This change applies to decisions by the Immigration Department and the Refugee Review Tribunal (see Schedule 2, item 8).

1.5.2. International law concerns

48. The legislative framework that ultimately became the Complementary Protection Act was first introduced into Parliament on 9 September 2009 and was considered by the Senate Legal and Constitutional Affairs Committee in a report dated 19 October 2009. The current Director of the Kaldor Centre (which did not yet exist at that time) made a submission to that inquiry,³² which set out in detail the international and comparative

³¹ Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013 (Cth).

³² Jane McAdam, ‘Submission to the Migration Amendment (Complementary Protection) Bill 2009 Inquiry’ (28 September 2009), <<http://www.aph.gov.au/DocumentStore.ashx?id=d52755f5-ea43-4a60-a132-7b9d5c5a9748>>.

law relating to the standard of proof issue. The submission argued that the test should be consistent with international human rights law.³³

49. As explained in that submission, the relevant test in international human rights law is broadly consistent with that applied in Australian refugee law, namely whether there is a 'real chance' of persecution. The High Court of Australia has said that this means there is a 'substantial, as distinct from a remote' chance of persecution occurring, 'regardless of whether it is less or more than fifty per cent'. It may be satisfied even 'though there is only a 10 per chance'.³⁴
50. In our assessment, the 'more likely than not' threshold proposed in the Bill is inconsistent with international law. This view is shared by the Parliamentary Joint Committee on Human Rights.³⁵ UNHCR has also stated that 'there is no basis for adopting a stricter approach to proving risk in cases of complementary protection than there is for refugee protection'.³⁶
51. The UN Committee against Torture—the expert body that oversees the CAT—interprets 'substantial grounds' as involving a 'foreseeable, real and personal risk' of torture.³⁷ The threat of torture does not have to be 'highly probable'³⁸ or 'highly likely to occur', but must go 'beyond mere theory or suspicion' or 'a mere possibility of torture'.³⁹ The danger must be 'personal and present'.⁴⁰ 'Substantial grounds' may be based not only on acts committed in the country of origin prior to flight, but also on activities undertaken in the receiving country.⁴¹ Furthermore, 'it is not necessary that all the facts invoked by the author [of the claim] should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable'.⁴²
52. The UN Human Rights Committee—the expert body that oversees the ICCPR—likewise says that the standard is 'whether a necessary and foreseeable consequence of the deportation would be a *real risk* of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture'.⁴³

³³ Jane McAdam, above n 32. McAdam is the author of the leading monograph on complementary protection: Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007).

³⁴ *Chan*, above n 25, [12], [19], [34].

³⁵ Parliamentary Joint Committee on Human Rights, above n 8, [1192]–[1193].

³⁶ United Nations High Commissioner for Refugees, 'Submission to the Migration Amendment (Complementary Protection) Bill 2009 Inquiry' (30 September 2009), <<http://www.aph.gov.au/DocumentStore.ashx?id=f175865d-d80b-43b6-b845-fda2049ab713>>, [34].

³⁷ See, eg, *EA v Switzerland*, Communication No 28/1995, UN Doc CAT/C/19/D/28/1995 (10 November 1997), [11.5]; *X, Y and Z v Sweden*, Communication No 61/1996, UN Doc CAT/C/20/D/61/1996 (6 May 1998), [11.4]; *ALN v Switzerland*, Communication No 90/1997, UN Doc CAT/C/20/D/90/1997 (19 May 1998), [8.7]; *KT v Switzerland*, Communication No 118/1998, UN Doc CAT/C/23/D/118/1998 (19 November 1999), [6.5]; *US v Finland*, Communication No 197/2002, UN Doc CAT/C/30/D/197/2002 (1 May 2003), [7.8].

³⁸ *Report of the Committee against Torture*, UN GAOR, 53rd Session, Supp No 44, Annex IX, A/53/44 (1998).

³⁹ *EA v Switzerland*, above n 37, [11.3].

⁴⁰ Report of the Committee against Torture, above n 38, Annex IX, [7].

⁴¹ *Aemei v Switzerland*, Communication No 34/1995, UN Doc CAT/C/18/D/34/1995 (9 May 1997), [9.5].

⁴² *Ibid.*, [9.6].

⁴³ Individual opinion by Committee members Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty and Sir Nigel Rodley (concurring) in *Pillai v Canada* (Communication No. 1763/2008), CCPR/C/101/D/1763/2008, (9 May 2011), 22 (emphasis added).

In the 2011 case of *Pillai v Canada*, the Human Rights Committee noted that it had refined this standard over the past decade, bringing it into line with the Committee against Torture and the European Court of Human Rights' 'focus on danger, or risk' of harm,⁴⁴ rather than certainty or probability of harm.

53. Indeed, in *Pillai v Canada*, the Human Rights Committee said that Canada had misunderstood the relevant threshold because it had relied on out-dated international jurisprudence—the same jurisprudence that Australia relies upon to justify its adoption of a higher threshold here. The Committee noted that Canada's misunderstanding of the law may have deprived the asylum seekers in that case from a proper evaluation of their claims under article 7 of the ICCPR. This is precisely our concern with the proposed amendment in the Bill.
54. The UK takes the view that the 'substantial grounds' test incorporated in the EU Qualification Directive (which implements complementary protection) is intended to replicate the 'well-founded fear' standard from the Refugee Convention,⁴⁵ which is lower than the 'balance of probabilities'.⁴⁶
55. The UK Asylum and Immigration Tribunal has interpreted the 'real risk' test as meaning that the risk 'must be more than a mere possibility'—a standard which 'may be a relatively low one'.⁴⁷ It has noted that it would 'be strange if different standards of proof applied' to the assessment of refugee and complementary protection claims.

Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising. ... Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.⁴⁸

It also noted that to impose a higher standard for complementary protection claims was inconsistent with international human rights jurisprudence and, in practical terms, 'would produce confusion and be likely to result in inconsistent decisions'.⁴⁹

56. This approach is also consistent with the Australian interpretation of 'substantial grounds for believing' in extradition law, which does not require a standard as high as 'balance of probabilities'.⁵⁰ As the Federal Court explained in that context, 'the minimum requirement is that the substantial ground of belief be 'not trivial' or merely theoretical...

⁴⁴ Keller et al, above n 43, 22.

⁴⁵ During the drafting of the EU Qualification Directive, Sweden sought to replace 'substantial grounds' with 'well-founded fear' (as per the original draft article 5(2) of the EU Qualification Directive) to ensure that the same proof entitlements were established for beneficiaries of subsidiary protection as for refugees.

⁴⁶ *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958, 994 (Lord Keith); 996 (Lord Bridge, Lord Templeman); 997 (Lord Griffiths); 1000 (Lord Goff).

⁴⁷ *Kacaj v Secretary of State for the Home Department* [2001] INLR 354, [12]. This threshold has also been used in Canada with respect to 'well-founded fear' in Convention refugee claims: *Ponniah v Canada (Minister of Employment and Immigration)* (1991) 13 Imm LR (2d) 241, 245 (FCA).

⁴⁸ *Kacaj*, above n 47, [10]. See also *Bagdanavicius v Secretary of State for the Home Department* [2005] UKHL 38, [30].

⁴⁹ *Kacaj*, above n 47, [15].

⁵⁰ *Cabal v United Mexican States (No 3)* [2000] FCA 1204, [220] (emphasis added).

it is sufficient there be a real chance of prejudice; it does not matter that the chance may be far less than a fifty percent chance.’⁵¹

1.5.3.Canada and the US

57. We note that Canada and the US have adopted a ‘more likely than not’ test, which the Government relies upon for the Bill’s proposed change. However, as noted above, this approach is inconsistent with international law. The UN Human Rights Committee has criticised Canada for this interpretation,⁵² and the UN Committee against Torture has criticised the US in this and in other respects for its inconsistency with its international law.⁵³ It noted that the US adopts a much stricter standard than that reflected in the Committee’s jurisprudence.⁵⁴
58. Instead, the adoption of this higher threshold can be attributed to matters particular to those jurisdictions.
59. In Canada, it had been assumed that the standard applied to complementary protection claims would be identical to the well-founded fear test in refugee law, and indeed it was applied in that way for some time.⁵⁵ However, in 2005 the Federal Court held that the standard for complementary protection claims was ‘more likely than not’. The rationale was as follows. First, the court said that because the relevant section of the Act used almost identical language to article 3 of the CAT, the Committee against Torture’s interpretation of article 3 was highly relevant. Accordingly, the court concluded that the relevant standard was ‘on the balance of probabilities’ or ‘more likely than not’.⁵⁶ As noted above, this interpretation does not accord with the Committee against Torture’s own jurisprudence; with respect, the reasoning is flawed. Secondly, the court said that since this interpretation had been adopted in the Canadian Supreme Court case of *Suresh v Canada (Minister of Citizenship and Immigration)*,⁵⁷ which was heard prior to the complementary protection provisions being incorporated in the Act, it had to be assumed that Parliament intended that this interpretation would be followed. This was notwithstanding the Federal Court’s view that there was ‘no rational sense’ in adopting a higher standard for complementary protection claims.⁵⁸
60. In the US:

⁵¹ *Rahardja v Republic of Indonesia* [2000] FCA 1297, [37].

⁵² Keller et al, above n 43, 22.

⁵³ Committee against Torture, Summary Record of the First Part (Public) of the 424th Meeting, 10 May 2000, 24th Sess, CAT/C/SR.424 (9 February 2001), [17]; Deborah Anker, *Law Of Asylum In The United States, 2013 Ed* (Thomson West, 2013); Banks P Miller, Linda Camp Keith and Jennifer S Holmes, ‘Beyond Grant or Deny: A More Nuanced Ordering of US Asylum Outcomes’ (2013) 97 *Judicature* 172.

⁵⁴ *Ibid* [17].

⁵⁵ See Immigration and Refugee Board of Canada, *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (15 May 2002).

⁵⁶ *Li v Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1, 2005 FCA 1, [18]–[28]. Since this was the interpretation which had been given in *Suresh v Canada (Minister of Citizenship and Immigration)* [2000] FCJ No 5 (FCA), Justice Rothstein said that Parliament could have enacted a lower test had it desired to depart from that interpretation.

⁵⁷ [2002] 1 SCR 3.

⁵⁸ *Li v Canada*, above n 56, [31].

- the higher ‘balance of probabilities’ test applies in a very different asylum context from Australia. Whereas Australia adopts a single assessment process for refugee and complementary protection, leading to one type of protection visa, CAT-based protection in the US is one of three separate avenues through which a person can obtain protection, each of which has distinctive sets of rights;
 - the US procedure imperfectly implements the *non-refoulement* obligation under human rights law, since as it only protects against removal to torture (and not cruel, inhuman or degrading treatment); and
 - the genesis of the standard applied in the US has very particular origins in US historical practice and jurisprudence, which are not relevant to Australia.
61. In relation to the last point, we note that historically the US Attorney-General had the discretion to ‘withhold’ removal in cases where return would result in persecution. In this context, a ‘clear probability standard’ was developed by the administration.⁵⁹ It appears that Congress intended the lower ‘well-founded fear’ standard to apply to all categories when it introduced the *Refugee Act 1980*.⁶⁰ However, the United States Supreme Court subsequently interpreted the legislation to require a ‘more likely than not’ standard in relation to the withholding provision.⁶¹ As a result of this, when the US ratified the CAT, it issued an ‘understanding’ that it would interpret the CAT as importing the standard of ‘more likely than not’.
62. In both Canada and the US, therefore, the decisions reflected at least in part particular factors relevant to Parliamentary intention in those countries, and are inconsistent with international law.

1.5.4. Parliamentary intent

63. When the Bill was reintroduced in 2011, the Explanatory Memorandum to the Act stated, in relation to the standard of proof:

Australia’s *non-refoulement* obligations under the Covenant and the CAT require a high threshold for these obligations to be engaged. In each case, and in order for an applicant to satisfy the criterion in new paragraph 36(2)(aa), the Minister must have substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm. This test is reflected in the views of the United Nations Human Rights Committee in its *General Comment 31* as to when a *non-refoulement* obligation will arise under the Covenant. Australia’s *non-refoulement* obligations under the Covenant and the CAT require that a non-citizen not be removed to a country where there is a real risk they will suffer significant harm. A real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory or suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present. The intention of new paragraph 36(2)(aa), read in conjunction with item 5, is to assess a non-citizen’s protection claims in relation to the destination country to which the non-citizen would be removed, being their country of nationality or former habitual residence.⁶²

⁵⁹ Virginia Smith, ‘Refuge in America: what burden of proof?’ (1984) 17 *John Marshall Law Review* 81, 94–95.

⁶⁰ *Ibid* 100.

⁶¹ *INS v Stevic*, 467 US 407 (1984).

⁶² Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 (24 February 2011), <<http://www.comlaw.gov.au/Details/C2011B00022/Explanatory%20Memorandum/Text>>, [67].

64. This language clearly reflects that used in international law. In this respect, we believe the Explanatory Memorandum to the current Bill is misleading when it suggests that the Bill is merely 'clarifying' the intention of Parliament.⁶³

1.5.5. Suggested need for change

65. The Explanatory Memorandum to this Bill suggests that the proposed change will address the decision of the Full Federal Court in 2013 in [*Minister for Immigration and Citizenship v SZQRB*](#).⁶⁴ In that case, the court held that the test of 'substantial grounds' was the same as the 'real chance' test used to interpret Australia's obligations under the Refugee Convention.⁶⁵
66. However, examination of the case shows that there was no argument before the court on this point. This was because the Immigration Department ultimately withdrew its proposed appeal on this point. The court noted the Immigration Minister's acceptance in *Minister for Immigration and Citizenship v MZYYL*⁶⁶ that the 'real chance' test was the relevant standard in complementary protection cases, and the similar concession made by the Immigration Department in *Santhirarajah v Attorney-General for the Commonwealth of Australia*.⁶⁷ The decision was refused special leave to appeal to the High Court, in part because this ground was not argued before the Full Federal Court.⁶⁸

1.5.6. Relevance of standard of proof

67. In our view, importing common law standards of proof are inappropriate when interpreting international treaties. As Lord Hoffmann observed in *Rehman*, a case before the House of Lords in the UK:

the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But *the question in the present case is not whether a given event happened but the extent of future risk*. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. ... It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interests at stake and the serious consequences of deportation for the deportee.⁶⁹

68. This view was reiterated recently by the UK Supreme Court:

It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. ... the task of the

⁶³ *Migration Amendment (Protection and Other Measures) Bill: Explanatory Memorandum* (2014), <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5303_ems_6ab8fffb-a1dd-4ffa-b95a-2f5852a17590/upload_pdf/395782.pdf;fileType=application%2Fpdf>, [97].

⁶⁴ *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33.

⁶⁵ *SZQRB*, above n 64, [246].

⁶⁶ *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147, [31].

⁶⁷ *Santhirarajah v Attorney-General for the Commonwealth of Australia* [2012] FCA 940. In *SZRTN v Minister for Immigration and Border Protection* [2013] FCA 1156, the Federal Court confirmed that the 'real chance' test was correct and that it would be wrong to apply a 'balance of probabilities' test.

⁶⁸ See High Court transcript, *Minister for Immigration and Citizenship v SZQRB* (13 December 2013), <<http://www.austlii.edu.au/au/cases/cth/HCATrans/2013/323.html>>.

⁶⁹ *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, [56].

decision-maker is to apply the words of the Convention (and the Directive) in the particular case.⁷⁰

69. These remarks have been endorsed very recently by the High Court of Australia.⁷¹

1.5.7.A common standard should be adopted

70. In our view, a consistent threshold for both refugee claims and complementary protection claims best reflects existing international and comparative jurisprudence, Australian extradition law, and Parliament's intent in adopting a complementary protection regime. A common threshold is also the approach taken in the UK and NZ⁷² and is the approach suggested in a recent Discussion Paper prepared in consultation with international refugee law judges.⁷³ It promotes consistency of decision-making, particularly where the decision on refugee status and complementary protection is made together, as in Australia. As the UK Supreme Court has noted:

It would add considerably to the burdens of hard-pressed immigration judges, who are often called upon to decide claims based both on the Refugee Convention and the ECHR at the same time, if they were required to apply slightly different standards of proof to the same facts when considering the two claims.⁷⁴

1.5.8. Particularly vulnerable group

71. Victims of torture are a particularly vulnerable group. Trauma, impaired cognitive function and other mental health impacts may inhibit their ability to engage fully in the refugee status determination process. Torture victims are very likely to find it difficult to raise or discuss their claims, and will often face difficulty in meeting deadlines, gathering evidence, and turning up to interviews or hearings.⁷⁵

72. As UNHCR has explained:

The difficulties facing claimants in obtaining evidence, recounting their experiences, and the seriousness of the threats they face, are all arguments in favour of adopting an approach that is no more demanding for people potentially in need of complementary protection than it is for refugees.⁷⁶

73. The practical effect of this change, therefore, will be to impose further burdens upon already disadvantaged people. This, in turn, creates a real risk that they may be denied protection, in breach of Australia's international legal obligations.

⁷⁰ *Al- Sirri v Secretary of State for the Home Department* (2012) [2013] 1 AC 745, [75] (emphasis added).

⁷¹ *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26, [33]–[36].

⁷² *AK (South Africa)* [2012] NZIPT 800174 (16 April 2012).

⁷³ Allan Mackey and John Barnes, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive: Judicial criteria and standards* (2013), <http://www.iarj.org/general/images/stories/Credo/Credo_Paper_March2013-rev1.pdf>, ch IV.

⁷⁴ *MA (Somalia) v Secretary of State for the Home Department* [2011] 2 All ER 65, [103].

⁷⁵ Jill Hunter et al, *Managing and Understanding Psychological Issues Among Refugee Applicants: Guidelines for Best Practice* (2013),

<http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/images/unsw_refugee_study_resources_manual_v2_-_final_with_cover_21032013.pdf>; Refugee Review Tribunal, *Guidance on Vulnerable Persons*, <<http://www.mrt-rrt.gov.au/Files/HTML/GuidanceOnVulnerablePersons-GU-CD.html>>; UNHCR and European Refugee Fund of the European Commission, above n 26.

⁷⁶ UNHCR, Draft Complementary Protection Visa Model: Australia (UNHCR Comments) (January 2009), [25] http://www.unhcr.org.au/pdfs/UNHCRPaper6Jan09_000.pdf.

1.6. Fraudulent documents

74. The Bill would require asylum seekers to be denied protection visas if:
- the decision-maker considered that they had provided, or caused to be provided, 'bogus' identity, nationality or citizenship documents;
 - they destroyed or disposed of their identity, nationality or citizenship documents, or caused them to be destroyed or disposed of; or
 - they refused or failed to comply with a request to provide such documents without reasonable explanation.
75. In our view, these provisions are likely to have a significant adverse impact on asylum seekers. Further, there is a risk that the consequential effects of these provisions would:
- violate Australia's obligations under article 31 of the Refugee Convention;
 - create a significant risk of *refoulement* in violation of Australia's legal obligations; and
 - deny asylum seekers procedural fairness.

1.6.1. The proposed changes

76. Under existing [section 91W](#) of the *Migration Act*, the decision-maker can request an asylum seeker to provide documents relating to his or her identity, nationality or citizenship. If the asylum seeker 'refuses or fails to comply' with this request without a reasonable explanation, the decision-maker can draw an adverse inference in relation to the applicant's identity, nationality or citizenship, provided the asylum seeker was warned of this possibility at the time of the request. This means that the decision-maker can find that the person does not have the claimed identity, nationality or citizenship, but this finding could be countered by other evidence. There are similar provisions in Canadian⁷⁷ and UK legislation.⁷⁸
77. The Bill proposes to replace section 91W with a section that:
- requires the decision-maker to refuse a protection visa in those circumstances, rather than just draw an adverse inference;
 - extends the provision to cases where an asylum seeker provides 'bogus' documents relating to his or her identity, nationality or citizenship; and
 - extends the provision to cases where an asylum seeker does not provide the 'bogus' documents, but 'causes' the documents to be provided; and
 - introduces a defence that makes it more difficult to establish a 'reasonable explanation', because it introduces an additional requirement that the asylum seeker must produce, or take reasonable steps to produce, documentary evidence of his or her identity, nationality or citizenship.⁷⁹
78. The Bill also introduces a new section (91WA) that requires the decision-maker to refuse a protection visa:

⁷⁷ *Immigration and Refugee Protection Act* (Canada) s 106 (2011).

⁷⁸ *Asylum and Immigration (Treatment of Claimants, etc) Act 2004* (UK) s 8.

⁷⁹ The Bill also changes the test from one where there is a 'reasonable explanation' to one where the decision-maker must be 'satisfied' that there is a reasonable explanation. Conventionally, this change in language reduces the ability to challenge the decision, because the 'more subjective the bureaucrat's powers, the less likely that its limits ... will be breached': see Mark Aronson, Bruce Douglas Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, Lawbook Co, Pyrmont, 2004), 88.

- even where no request for documents is made; or
 - in circumstances where a person destroys or disposes of their identity, nationality or citizenship documents, or causes them to be destroyed or disposed of.
79. The definition of 'bogus' document does not require there to be proof that the document is false, only that the Minister 'reasonably suspects' it to be false. Further, a 'bogus' document itself can be valid, but obtained by a false or misleading statement ('whether or not made knowingly').

1. Breach of article 31 of the Refugee Convention

80. These provisions breach article 31 of the Refugee Convention, which provides that States should not penalise asylum seekers who enter or remain irregularly. Automatic denial of protection would be classified as a 'penalty' under article 31.⁸⁰
81. As discussed above at 1.1.2, article 31 recognises that asylum seekers will often need to use false documentation in order to gain entry. There are many legitimate reasons why asylum seekers may not have documentation at all, or may have false documents. These may include:
- the impossibility of obtaining travel documents as a person persecuted by their own government;
 - the absence of an effective government to provide such documents;
 - the impossibility for stateless persons to obtain such documents;
 - a person being too afraid to approach government authorities to request documentation (since this may place them or their family in danger);
 - a person being too afraid to identify themselves correctly when obtaining documentation (since this may place them or their family in danger);
 - a person having no time to obtain identity documents before fleeing; and
 - people smugglers confiscating documents or requiring asylum seekers to destroy their documents in order to protect the smuggling network.
82. The proposed provisions also reflect unrealistic assumptions about asylum seekers. As UNHCR has noted, it is unrealistic to expect that asylum seekers would:
- know in advance of their flight that documentary or other evidence would be relevant;
 - know what specific documentary evidence would be relevant, take that evidence with them and 'look ... after it carefully and keep ... it in their possession at all times, regardless of the needs of family ... the hazards of the journey, or advice or instructions from others';
 - 'not place trust in the advice of agents or others – but ... place trust in national authorities'; and
 - 'not willingly dispose of or surrender any documentary or other evidence unless subject to coercion or force'.⁸¹
83. Indeed, the proposed provisions may have the perverse effect of encouraging fraud because, as UNHCR has found:

⁸⁰ The term 'penalties' extends beyond criminal penalties to other kinds of penalties: Goodwin-Gill, above n 15.

⁸¹ UNHCR and European Refugee Fund of the European Commission, above n 26, 95.

unreasonably high expectations of applicants to submit documentary evidence may unwittingly encourage applicants to submit documentary evidence, including false documents, in support of all asserted material facts at all costs.⁸²

1.6.2. Risk of *refoulement*

84. The fundamental flaw of these provisions is that there is no legal or logical link between false documentation and the falsity of a claim. As the RRT's Guidance on Credibility correctly states: 'The use of false documents does not necessarily mean that an applicant's claims are untrue.'⁸³
85. Similarly, UNHCR has observed:
- A decision-maker thus cannot disbelieve the statements of an applicant merely because he or she furnishes no documentary or other evidence to confirm or support (aspects of) his or her testimony. ... [A]pplicants' statements about themselves constitute evidence capable of substantiating the application.⁸⁴
86. A direct consequence of the present proposals is that genuine refugees could be denied protection. Protection would be denied to applicants who had destroyed or disposed of documents upon arrival, even if their identities could be established through other evidence. As a result, these provisions clearly create a significant risk that Australia's obligations not to return people to persecution or other significant harm will be breached.
87. This is a real risk, since a large proportion of asylum seekers are known to provide false documents or destroy or dispose of documents upon arrival. These risks are magnified because the provisions are retrospective (as discussed above at 1.3) and because the provisions are drafted too broadly (as discussed below at 1.6.3).
88. We disagree with the suggestion in the Bill's Statement of Compatibility that the existence of discretionary and non-compellable ministerial powers can cure the risk of incompatibility with our international legal obligations. As the Parliamentary Joint Committee on Human Rights has stated, such powers are insufficient to satisfy the standards of 'independent, effective and impartial' review required to meet Australia's *non-refoulement* obligations.⁸⁵

1.6.3. Breadth of the provisions

89. The proposed provisions are also drawn too broadly. In particular, we are concerned at the breadth of the definition of 'bogus' documents, and the vagueness of the 'reasonable explanation' defence.
90. While the definition of 'bogus' documents in the Bill is identical to the way it is already defined in the Act, the proposed changes mean that if an asylum seeker possesses 'bogus' documents, then protection will be denied automatically. At present, having 'bogus' documents simply goes towards the asylum seeker's credibility. Accordingly,

⁸² Ibid 94.

⁸³ Refugee Review Tribunal, *Guidance on the Assessment of Credibility* (March 2012), <<http://www.mrt-rrt.gov.au/Files/HTML/CredibilityGuidance-GU-CD.html>>, [94].

⁸⁴ UNHCR and European Refugee Fund of the European Commission, above n 26, 90–91.

⁸⁵ Parliamentary Joint Committee on Human Rights, above n 8, [1207].

the context and effect of the definition are different, which makes the breadth of the definition particularly problematic.

91. For example, as the Bill is currently drafted, protection could be denied even if documents were genuine. This is because the definition of 'bogus' document only requires that the decision-maker 'reasonably suspects' it to be false. The legislation does not require the decision-maker to provide reasons or evidence for reaching this conclusion, to meet a legal standard of proof, or to give the asylum seeker an opportunity to respond.
92. Further, a 'bogus' document itself can be valid but obtained by a false or misleading statement, 'whether or not made knowingly'. This means that the provisions would apply even if the document were in fact valid (for example, a genuine passport obtained by a misleading statement) and even where the statements made were believed to be true.
93. The provision also would apply to any false document supplied to the asylum seeker by a third party. For example, an asylum seeker could request a relative in the home country to obtain documents, and the relative could (without the asylum seeker's knowledge) supply false documents believing it would assist the person.
94. The defence of 'reasonable explanation' is also poorly drafted. As with the definition of 'bogus' documents, the test is not whether the explanation is objectively reasonable, but whether the decision-maker is satisfied the explanation is reasonable. This makes it difficult to challenge a decision that there is no 'reasonable explanation'. Again, there is no legislative requirement for the decision-maker to justify this decision or to allow the asylum seeker to respond.
95. This is compounded by the fact that there is no guidance as to what might constitute a 'reasonable explanation', other than the suggestion in the Statement of Compatibility that conflict in the home country or statelessness might suffice. Given the significant consequences of the proposed provision, there should at least be greater clarity and guidance about the circumstances in which an asylum seeker has a 'reasonable explanation' for the purposes of the proposed sections.
96. We also note that even where the decision-maker is satisfied that there is a reasonable explanation, the provision still requires a person to take 'reasonable steps' to obtain such information. On its face, this suggests that a stateless person is still required to take some kind of action to obtain documents even where this is not possible. Again, there is a lack of guidance as to what kinds of 'reasonable steps' might be necessary to fulfil this condition.

1.7. Legal burden of proof

97. The Bill in effect imposes upon an asylum seeker a legal 'burden of proof' (that is, the responsibility to provide evidence to establish the claim). In our view, this:
 - is inconsistent with international law;
 - is premised on a misunderstanding of the nature of refugee status determination; and
 - will have a significant adverse impact upon asylum seekers, especially particularly vulnerable groups.

1.7.1. The proposed change

98. Proposed section 5AAA would make it the sole responsibility of an asylum seeker to 'specify all particulars of his or her claim ... and to provide sufficient evidence to establish the claim'. The decision-maker has no responsibility or obligation in this respect. This applies to both refugee and complementary protection claims, and to claims raised in respect of regulations, instruments, and administrative processes under the Act.
99. The current law is that there is no 'legal burden of proof' on either party.⁸⁶ However, there is a 'forensic' burden, in that 'it is for the party propounding a contention to "advance whatever evidence or argument" it wishes in support of that contention, and, in accordance with the requirements of the inquisitorial process, it is then for the Tribunal to decide whether or not the proposition is established.'⁸⁷
100. The High Court has again affirmed recently that domestic law concepts of 'burden of proof' and 'standard of proof' are inappropriate in the context of refugee protection,⁸⁸ consistent with the guidance of UNHCR.⁸⁹

1.7.2. Inconsistency with international law

101. The proposed provision is inconsistent with international best practice. As UNHCR has observed:
- It is well established that the challenges inherent in the process of fact-finding are particularly acute in the examination of applications for international protection. The reality facing decision-makers ... is that there is often a paucity of documentary or other evidence to support an applicant's statements. Moreover, the applicant's statements and other evidence as exist may be fragmentary and uncertain. Further, the potential consequences of an error in the determination of international protection may be extremely grave. *As a result, there is no requirement that relevant facts asserted by the applicant have affirmatively to be 'proven'.*⁹⁰
102. UNHCR emphasises that the decision-maker continues to 'share the duty' to ascertain and evaluate facts, an approach that is consistent with the practice and jurisprudence of several EU nations, including Italy, Ireland, Spain and Ireland.⁹¹ (As already noted above, the UK courts have rejected the importation of burdens and standards of proof as inappropriate in this context.)
103. In the EU, the Qualification Directive provides that Member States may consider it the duty of the applicant to submit as soon as possible all the elements 'needed to substantiate the application',⁹² which 'simply means to provide statements and submit

⁸⁶ *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR

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⁸⁷ *Ibid* [135].

⁸⁸ *FTZK*, above n 71.

⁸⁹ United Nations High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims* (16 December 1998), <www.unhcr.org/refworld/docid/3ae6b3338.html>, [6].

⁹⁰ UNHCR and European Refugee Fund of the European Commission, above n 26, 85 (emphasis added).

⁹¹ *Ibid* 86–87.

⁹² *Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise Need International Protection and the Content of the Protection Granted (recast)* (Council Directive 2011/95/EU, 13 December 2011), art 4(1).

documentary or other evidence in support of an application'.⁹³ The provision also states that 'in cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application'.

1.7.3. Misunderstanding of refugee status determination

104. As discussed above, the proposed change misunderstands the nature of refugee status determination. It fails to recognise the inquisitorial nature of the system, the fact the inquiry relates to future risk rather than past events, the uniquely difficult evidentiary context, and the special vulnerability of asylum seekers.

1.7.4. Practical effect

105. We draw particular attention to the fact that the vulnerability of asylum seekers makes it difficult for them to discharge the so-called burden of proof in the timeframe required. The sensitivity of claims, poor mental health (common among asylum seekers), and difficulty in accessing support services and legal advice and representation are all significant practical barriers for asylum seekers making their claims.
106. The practical effect of these factors is magnified for especially vulnerable groups, such as victims of sexual violence, victims of torture, or people claiming on the basis of sexual orientation or identity, who generally (and understandably) take longer to disclose the details of their claims.
107. We also draw attention to asylum seekers' very limited access to legal advice and representation, particularly in light of the removal of government funding for those who arrive without visas. We do not agree with the suggestion in the Statement of Compatibility that the (largely theoretical) possibility of private migration assistance and unspecified administrative 'support' and 'policies' are sufficient to ensure that vulnerable people are not removed in violation of Australia's international legal obligations.
108. These factors create a significant practical risk that Australia's *non-refoulement* obligations will be violated.⁹⁴
109. Further, this is arguably inconsistent with the principles of equality before the law and non-discrimination, including the specific guarantees in this regard in relation to children and those with disabilities.⁹⁵ Under human rights law, the practical effect of burdens on access to justice must be considered in determining whether people are treated equally before the law, and in ensuring that groups are not discriminated against in their access to the law. For example, children and people with disabilities are likely to be practically disadvantaged in their ability to meet the burden of proof.
110. Finally, we note that if the Government's proposal to 'fast track' refugee status determination proceeds, this will give applicants a very short timeframe in which to discharge any legal burden of proof. In practice, it is difficult to see how an applicant could obtain any documents from a major refugee-producing country within the foreshadowed timelines of the 'fast track' proposal.

⁹³ UNHCR and European Refugee Fund of the European Commission, above n 26, 85.

⁹⁴ See also Parliamentary Joint Committee on Human Rights, above n 8, [1174].

⁹⁵ Ibid [1238]–[1247].

1.8. Temporary protection

111. Schedule 3 of the Bill proposes changes that would enable the Immigration Department to transfer people on temporary safe haven visas on to other forms of temporary protection visas, and to increase Ministerial powers in respect of whether asylum seekers are allowed to apply for visas.
112. In our view, these provisions rely on Ministerial discretion, which is insufficient to ensure that Australia meets its international legal obligations. Further, the provisions would have the effect of inappropriately undermining the intention of Parliament both in establishing the temporary safe haven visa class, and in disallowing regulations for temporary protection visas.

1.8.1. Proposed changes

113. The Temporary Safe Haven visa class was enacted in 1999 to deal with Kosovars brought to Australia. Soon after, it was also used for East Timorese.⁹⁶ An asylum seeker cannot apply for the visa, but must be invited by the Minister to accept its grant. The Minister determines the length of the visa. Holders of Temporary Safe Haven visas cannot apply for any other kind of visa, but may be granted a Temporary Humanitarian Concern visa if the Minister believes there are humanitarian reasons compelling a longer stay. The Temporary Humanitarian Concern visa includes a number of rights, such as access to Medicare and Centrelink benefits and the right to work.⁹⁷
114. Earlier this year, after the Senate disallowed temporary protection visas, the Immigration Department began offering Temporary Safe Haven visas and Temporary Humanitarian Concern visas to asylum seekers. Accepting these visas had the legal effect of preventing the asylum seeker from applying for any other kind of visa, including a permanent protection visa.
115. Currently, asylum seekers arriving by boat and those in an offshore processing country are prevented from making a valid visa application if they did not hold a valid visa on arrival, unless the Minister exercises a personal, non-compellable power to allow them to do so (known as 'lifting the bar'). The Bill would extend this bar to irregular arrivals who hold bridging visas or other temporary visas of a prescribed class, including Temporary Safe Haven and Temporary Humanitarian Concern visas, replacing the existing bar.
116. The effect of the changes, then, would be to allow the Minister to exercise the personal, non-compellable power to 'lift the bar' under section 46B to allow those currently on Temporary Safe Haven and Temporary Humanitarian Concern to apply for temporary protection visas, if and when these are allowed by the Senate. This would enable the Minister to transfer people from a system of temporary visas—which does include benefits such as access to Medicare and Centrelink benefits and work rights—to a future system with fewer benefits.

⁹⁶ Savitri Taylor, 'Protection or Prevention? A Close Look at the New Temporary Safe Haven Visa Class' (2000) 23 *University of New South Wales Law Journal* 75.

⁹⁷ *Temporary Humanitarian Concern Visas* (Factsheet), 25 July 2014

<http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/temporary_humanitarian_concern_visa.pdf>.

117. This would be facilitated by further changes allowing the Minister to ‘lift the bar’ for specified classes of arrivals, allowing the Minister to limit the time for ‘lifting the bar’, and also allowing the Minister to revoke any lifting of the bar. Practically, this would allow the Minister to ‘lift the bar’ for all those on Temporary Safe Haven or THC visas for a set period of time, increasing the pressure for those on these visas to apply for what are likely to be less generous temporary protection visas.

1.8.2. Ministerial discretion

118. The purpose of the major reforms of the *Migration Act* between 1992 and 1994 was to convert the system from a highly discretionary regime to one based on statutory rights and protections. We now seem to be in a reverse process, and the proposed provision is an example of this.

119. The discretionary nature of the Temporary Safe Haven Visa was arguably justified in its original application to people from Kosovo and East Timor. The visa was created as a humanitarian gesture to assist people whom Australia was not formally obliged to protect. However, the effect of the current proposals would mean that all asylum seekers who arrive by sea without a visa, even those with valid bridging visas or temporary visas, would no longer be able to apply for protection without the intervention of the Minister, who would not even have a duty to consider such an intervention.

120. In our view, this raises a real risk that Australia’s *non-refoulement* obligations could be violated. As the Parliamentary Joint Committee on Human Rights has repeatedly stated, a personal, non-compellable Ministerial power is an insufficient safeguard to ensure the fulfilment of Australia’s international legal obligations. It also breaches article 31 of the Refugee Convention by penalising asylum seekers who arrive in an irregular manner.

1.8.3. Parliamentary intent

121. As noted above, the existing provisions relating to temporary safe haven visas were drafted when the visa was created for Kosovar refugees brought temporarily to Australia. They prevent temporary safe haven visa-holders from applying for other kinds of visas. The rationale behind this was that such visas were ‘humanitarian’ in nature and offered as a matter of goodwill by the Minister, rather than in accordance with a legal obligation. In our view, in the current context, offering temporary safe haven and THC visas is not consistent with the purpose for which this Ministerial discretion was conferred.

122. Moreover, it seeks to frustrate Parliament’s clear intention, as evidenced by the disallowance in the Senate of regulations to allow temporary protection visas. In our view, it would be inappropriate to allow the Minister to convert temporary safe haven and THC visas into a new form of temporary protection visa.

1.9. Family reunion

123. Proposed section 91WB of the Bill would deny protection to a refugee’s family members who apply for protection after the refugee has already been granted a protection visa. In other words, a family member who seeks to join a recognised refugee in Australia must now be able to demonstrate they are a refugee (or in need of complementary protection) in their own right, rather than obtaining a derivative status.

124. In our view, this provision contravenes the principle of family reunification in international refugee and human rights law, which reflects the importance of family life, especially for children. Again, this provision lacks adequate justification, and will cause considerable hardship to refugees in Australia. It is likely to make their adjustment into the community all the more difficult, contribute to psychological problems, and lead to on-going anxiety.

125. Many countries, including Australia, have traditionally granted protection to recognised refugees' immediate family members without requiring them to individually establish a protection need in their own right. This reflects the fundamental importance of the principle of family unity in international law, and the fact that in order to preserve family life, family members should be permitted to live with the recognised refugee in the country where he or she has been granted protection. It also reflects that fact that if one family member is at risk, there is a high degree of likelihood that other family members will be as well. It is therefore also more efficient to grant the family protection rather than requiring individual status determination.

1.9.1. The principle of family unity

126. International law recognises that the family is a fundamental unit of society and is entitled to protection by society and the State.⁹⁸ The importance of family, and the principle of family unity, is expressly reflected in the Refugee Convention, which in its preamble recommends that governments:

take the necessary measures for the protection of the refugee's family, especially with a view to:

- (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,
- (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

127. This has been reiterated by UNHCR's Executive Committee, comprised of States (including Australia), including in Conclusion No 24 (1981), where it recommended that:

- 'every effort should be made to ensure the reunification of separated refugee families';
- 'countries of asylum [should] apply liberal criteria in identifying those family members who can be admitted with a view to promoting the comprehensive reunification of the family'; and
- States 'promote the rapid integration of refugee families in the country of settlement, joining close family members should in principle be granted the same legal status and facilities as the head of the family who has been formally recognized as a refugee.'⁹⁹

128. The UN Committee on the Rights of the Child has stated that:

In order to pay full respect to the obligation of States under article 9 of the Convention [on the Rights of the Child] to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views (art. 12) ...

⁹⁸ *Universal Declaration of Human Rights* (GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, A/810, 10 December 1948), art 16(3); ICCPR, art 23; CRC, art 10.

⁹⁹ Executive Committee of the United Nations High Commissioner for Refugees, *Conclusion on Family Reunification* (ExCom Conclusion No 24 (XXXII), 21 October 1981).

Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein. In this context, *States parties are particularly reminded that 'applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner' and 'shall entail no adverse consequences for the applicants and for the members of their family' (art 10(1)).*¹⁰⁰

1.10. Inadequate justification

129. We agree with the Parliamentary Joint Committee on Human Rights that there is inadequate justification provided for these measures.¹⁰¹ The Statement of Compatibility says:

The Government has a legitimate aim of encouraging people to enter and reside in Australia using regular means, thereby preserving the integrity of the migration system and the national interest. ... The Australian Government will not provide a separate pathway (outside of the Humanitarian Programme) for family reunification that will exploit children and encourage them to risk their lives on dangerous boat journeys. As such, to the extent that the rights under Article 10 are limited in existing law, these limitations are considered necessary, reasonable and proportionate to achieve a legitimate aim.

130. This statement is misleading in that it suggests the provision only applies to irregular arrivals by boat, and to prevent children being used as an avenue for family reunification. In fact, the provision extends to all asylum seekers.

131. It is also misleading because it suggests there are other accessible means of family reunion. This fails to take into account the increasingly complex barriers to family reunion. These include:

- the abolition of the allocation of 4,000 places within the family stream for irregular arrivals in Budget 2014–15;
- the removal of non-contributory family and parent visas in the migration stream under Budget 2014–15 (which increasing numbers of refugees were using);¹⁰²
- the bar on family reunion under the Humanitarian Program for irregular maritime arrivals who came on or after 13 August 2012, and lowest processing priority for family reunion for irregular maritime arrivals before that date; and
- very lengthy processing times for family reunion under the Humanitarian Program.¹⁰³

132. In addition, the statement is wholly inadequate in justifying the considerable interference with human rights. No evidence is provided that the current law encourages irregular entry. No evidence is given of the numbers of people who apply

¹⁰⁰ UN Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (CRC/GC/2005/6, 1 September 2005), [81], [83].

¹⁰¹ Parliamentary Joint Committee on Human Rights, above n 8, [1232].

¹⁰² Refugee Council of Australia, *Family Reunion and Australia's Refugee and Humanitarian Program: A Discussion Paper* (November 2009), <<http://www.refugeecouncil.org.au/r/rpt/2009-Reunion.pdf>>.

¹⁰³ RAILS, *Refugee Family Reunion: Guide for Applicants, Migration agents and Volunteers* (March 2013), <<http://www.rails.org.au/wp-content/uploads/2013/01/RAILS-Refugee-Family-Reunion-Guide.pdf>>.

on the basis of family membership.¹⁰⁴ There is no good faith attempt to balance the grave impact of the interference on family life for these vulnerable people (especially children) against the interest of the State in 'orderly migration'. In human rights law, such interferences can only be justified if they achieve a legitimate objective and are reasonable, necessary and proportionate in the circumstances. Furthermore, in the present context, they must be consistent with the best interests of the child. None of these elements has been justified.

1.11. Failure to appear

133. The Bill confers powers on the RRT to dismiss an application if an asylum seeker fails to appear, without considering the application or information before it.¹⁰⁵ If the asylum seeker applies within seven days, the RRT can reinstate the application 'if it considers it appropriate to do so', but otherwise it must dismiss it.

134. The key change here is that the Bill enables the RRT to ignore evidence before it.

135. If applied literally, this provision would allow the RRT to reject a valid claim for protection. This would create a real risk of *refoulement* for the asylum seeker concerned.

1.11.1. Current practice

136. As noted above, the RRT is inquisitorial not adversarial. Although it has the power to make a decision without hearing an applicant, in practice there is usually a hearing.

137. The hearing is intended to clarify and probe the evidence already given to the RRT, and to give the applicant a chance to explain and respond to adverse evidence. Prior to a hearing, the RRT would already have significant documentary evidence, including relevant statutory declarations, information before the Immigration Department, and submissions.

138. Presently, if an applicant does not appear, the RRT may make a decision without allowing the applicant to appear before it, but can choose to reschedule the hearing or delay its decision.¹⁰⁶ Similar provisions exist in other countries.¹⁰⁷

1.11.2. Inconsistent with international law

139. The practical effect of this provision is that an asylum seeker could establish a valid claim with considerable documentary evidence and submissions in anticipation of a hearing. However, if the asylum seeker then missed both the hearing and the 7-day reinstatement period through (for example) ill health, he or she could be denied

¹⁰⁴ The statistics include the number of dependents granted protection visas (710 in 2013), but these would mostly relate to dependents who arrive with primary applicants: Department of Immigration and Border Protection, *Asylum Trends - Australia 2012-13* (November 2013), <<http://www.immi.gov.au/media/publications/statistics/immigration-update/asylum-trends-aus-2012-13.pdf>>.

¹⁰⁵ There are parallel provisions for the Migration Review Tribunal, but our submission addresses those pertaining to the RRT specifically.

¹⁰⁶ *Migration Act 1958* (Cth), s 426A.

¹⁰⁷ *The Asylum and Immigration Tribunal (Procedure) Rules* (2005), rule 19; *Immigration Act 2009* (UK), s 234.

protection. If he or she were then removed, this would violate Australia's *non-refoulement* obligations.

140. This is clearly a real practical risk. In 2012–13, the RRT reported that 1,621 of 5,296 hearings did not go ahead as planned, because they were either postponed, rescheduled, or because applicants failed to appear.¹⁰⁸

1.11.3. Ignoring evidence

141. More fundamentally, it is unfair to allow the RRT to ignore all the evidence before it. This is particularly so since, as already noted, evidence adduced at the hearing is only part of the overall evidence that must be considered. Invariably, the decision-maker has already considered all the documentary evidence prior to the hearing, so there is no real reduction in administrative burden.
142. If an asylum seeker fails to turn up for the hearing, this already results in prejudice to the case, since he or she is not able to clarify questions or provide supplementary evidence. It is unclear why any additional power is needed, and it is difficult to see how the provision can be justified.

1.11.4. Reinstatement application

143. We also consider that the seven-day limit on a reinstatement application is manifestly unfair and clearly could lead to *refoulement*. There is no provision for extending this time limit, even where there may be good reason (for example, hospitalisation).
144. This is particularly unfair as the RRT's decision is deemed to be made not when the asylum seeker is informed of it, but rather when the decision is written.¹⁰⁹ The RRT is only required to notify the asylum seeker of that decision within 14 days. Therefore, it is very likely the asylum seeker will remain unaware that a decision has been made within those seven days.
145. The practical consequence of this provision is that asylum seekers could be denied protection simply because, for instance, they failed to notify the RRT of a change of address or their address was wrongly recorded, they therefore did not receive notice of the hearing, and they did not become aware of this until the seven-day reinstatement period had passed.
146. In a similar context in the UK, the House of Lords considered that a situation in which an uncommunicated decision could bind an individual offended the rule of law:

This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. ... Until the decision in *Salem* it had never been suggested that an uncommunicated administrative decision can bind an individual. It is an astonishingly unjust proposition. In our system of law surprise is regarded as the enemy of justice. Fairness is the guiding principle of our public law. ... Where decisions are published or notified to those concerned accountability of public authorities is achieved.

¹⁰⁸ Migration Review Tribunal-Refugee Review Tribunal, *Annual Report 2012-2013*, <<http://www.mrt-rrt.gov.au/AnnualReports/ar1213/part-3.html#p8>>.

¹⁰⁹ See also *Migration Act 1958* (Cth), ss 430(2), 430D.

*Elementary fairness therefore supports a principle that a decision takes effect only upon communication.*¹¹⁰

1.12. 'Late' claims and evidence

147. Proposed section 432A of the Bill would require the RRT to draw an adverse inference if an asylum seeker raised a claim or presented evidence that was not in his or her original application to the Immigration Department, without a reasonable explanation.
148. This provision is likely to have a significant adverse impact on asylum seekers. There are many practical reasons why claims and evidence are not submitted until the RRT stage. This provision creates a risk of *refoulement*.
149. We are also concerned about undue interference with the RRT's function, the breadth of this provision, and the need for guidance concerning what might constitute a 'reasonable explanation'.

1.12.1. The proposed change

150. The RRT, as a merits review tribunal, 're-makes' the original decision as to whether or not a person is owed international protection. It is therefore required to determine whether a person is a refugee or beneficiary of complementary protection at the time it makes the decision. This Bill proposes to limit the extent to which new evidence and claims can be provided to the RRT by requiring it to draw an adverse inference if it is satisfied that there is no reasonable explanation for why the evidence or claims were not presented earlier.

1.12.2. Practical effect of change

151. In practice, asylum seekers often submit new claims and evidence to the RRT because:
- they feel pressured to submit an application for a protection visa quickly, perhaps because an existing visa is due to expire or because they fear removal;
 - they lack awareness about the evidence required, especially given the limited availability of free legal advice and representation;
 - even if represented, the limited resourcing of specialist services makes it impracticable to provide comprehensive submissions and evidence; or
 - there was insufficient time to obtain (and/or translate) testimony, evidence from overseas, or medical (including psychological) reports for the original application.
152. Further, in many cases new evidence or claims will need to be submitted as a result of the Immigration Department's initial decision, which commonly raises specific points that an asylum seeker cannot be expected to anticipate.
153. The proposed change would therefore impose an additional and unnecessary procedural hurdle on many asylum seekers (and the RRT itself) by requiring the RRT to be satisfied that there was a 'reasonable explanation' for any new claims or evidence provided.

¹¹⁰ *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, [28]–[30].

1.12.3. Inconsistency with international law

154. A decision about whether or not a person has an international protection need must be made in light of all relevant facts available at the time when the decision is made (including any appeal). This logically flows from the fact that the inquiry concerns future risk, rather than past facts. It goes to the very heart of the protection claim and respect for the principle of *non-refoulement*.
155. The proposed provision creates a real risk of undermining this approach, since it requires the RRT to discount evidence or claims solely on the basis that they were provided after the original application was made.
156. Ultimately, the provision creates a real risk of *refoulement*. For example, an asylum seeker could provide a new claim based on torture, which the RRT considers should have been raised earlier. The RRT then discounts the credibility of this claim, and a protection visa is therefore denied.
157. We also agree with the Parliamentary Joint Committee on Human Rights that there has been inadequate consideration of the effect on this on particularly vulnerable groups, including children.¹¹¹

1.12.4. Breadth of the provision

158. The proposed provision has similarities with the recently enacted section 15 of the *Immigration Act 2014* (UK). This section prevents the UK's First Tier Tribunal from considering 'new matters' that have not previously been considered by the Secretary of State in the context of a refugee or complementary protection claim, without the Secretary of State's consent. We note that the UK Parliament's Joint Committee on Human Rights expressed concern about the compatibility of this provision with the right of access to court, the principle of equality of arms and the rule of law, and the discriminatory nature of the provision.¹¹²
159. Notably, the UK provision does *not* extend to new evidence or 'claims' broadly defined, but rather to specified grounds of appeal. The UK Government expressly agreed that 'there are circumstances where new evidence that supports grounds of appeal or reasons for wanting to enter or remain in the UK which have not previously been considered by the Secretary of State should be capable of being raised for the first time at the appeal, to ensure that the tribunal is able to make a decision having regard to all relevant facts and evidence before it at the time the appeal is determined.'¹¹³
160. We are concerned that the term 'claims' in the current Bill is too broad, because it could include different characterisations of the same matters. For example, it is common for people claiming gender-based persecution under the Refugee Convention to submit that the persecution is for reasons of their membership of a 'particular social group', but there are many ways to express what that 'particular social group' may be (for example,

¹¹¹ Parliamentary Joint Committee on Human Rights, above n 8, [1216]–[1217].

¹¹² Joint Committee on Human Rights (UK), *Legislative Scrutiny: Immigration Bill* (HL Paper 102/HC 935, 18 December 2013),

<<http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/102/10202.htm>>, [42]; Joint Committee on Human Rights (UK), *12th Report – Legislative Scrutiny: Immigration Bill (Second Report)* (HL Paper 142/HC 1120, 3 March 2014), [94].

¹¹³ Joint Committee on Human Rights (UK), above n 112, [43].

women in Afghanistan, Hazara women in Afghanistan, divorced women in Afghanistan). These may be considered new 'claims' in legal terms, although the facts and evidence have clearly been raised before the Immigration Department.

161. We also draw attention to the lack of guidance as to what might constitute a 'reasonable explanation' in this context. It is unclear which of the practical reasons given above might be considered 'reasonable'. For example, it is possible that the RRT could consider that failure by a legal representative to identify a particular claim is not a 'reasonable explanation'. Again, there appears to be no procedure to counter an RRT decision in this respect.

1.13. Guidance decisions

162. The Bill would empower the Principal Member of the RRT to direct decision-makers to follow particular decisions (known as 'guidance decisions') unless the decision-maker was satisfied that the facts or circumstances of the case were clearly distinguishable.¹¹⁴
163. In principle, there is value in a system which produces greater consistency and guidance in refugee status determination. However, we note that there are also challenges and some significant contextual differences between the RRT and other jurisdictions in which country guidance decisions are used.

1.13.1. Benefits and concerns

164. There are potential benefits in issuing guidance decisions. They may help to improve the consistency and efficiency of decision-making, and the quality of country assessments generally (particularly if such assessments assist the decision-making of the Immigration Department).
165. To achieve those benefits, however, it is crucial that the decisions are of sufficiently high quality, are based on objective and credible evidence and sources, and weigh different sources of information appropriately and independently.¹¹⁵ Decision-makers must also be made aware of the limits of guidance decisions, since they may be overly general in particular cases.
166. Our principal concern is that the Bill does not sufficiently guarantee these safeguards. It simply allows the Principal Member to designate a particular decision to be a guidance decision, with no safeguards to ensure the quality or appropriateness of such a decision.
167. We believe that much can be learned from the experience of the UK over the past decade in terms of what safeguards are necessary. The UK has developed 'country guidance decisions' which are treated as precedents—authoritative factual findings about a particular country that should be followed insofar as the case before the tribunal depends upon the same or similar evidence.¹¹⁶ There are currently 349 country guidance decisions.¹¹⁷

¹¹⁴ Proposed section 420B.

¹¹⁵ We note here that Ministerial Direction No. 56 requires tribunal members to take account of country information provided by the Department of Foreign Affairs and Trade, where it is provided for the purposes of protection status determination and is relevant.

¹¹⁶ *Practice Directions: Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal* (10 February 2010), <<http://www.judiciary.gov.uk/wp->

168. UK country guidance decisions are selected by a Reporting Committee of the Upper Tribunal, involving a senior group of immigration judges. They are decisions that are considered to have ‘general significance and utility’, ‘sufficiently well reasoned’ and ‘consistent with binding statutory provisions or precedent of the senior courts’.¹¹⁸
169. In practice, a potential suitable case (or group of cases) is usually identified at a case management hearing. Parties are notified that the appeal may be treated as a country guidance case.¹¹⁹ The tribunal’s practice is only to select cases where the appellant has publicly-funded legal representation.¹²⁰ The case is heard by a panel of usually three senior immigration judges, or two immigration judges and one non-legal member.¹²¹
170. After the decision is made, it is submitted for final selection as a country guidance case to the Reporting Committee and an expert country convenor. It is expected that country guidance cases ‘will normally involve an intense examination of country of origin information including expert reports and the any advice given by UNHCR’.¹²² A case will not be reported as a country guidance decision unless all relevant country material has been considered.¹²³ Guidance is also given that:
- If there is credible fresh evidence relevant to the issue that has not been considered in the Country Guidance case or, if a subsequent case includes further issues that have not been considered in the CG case, the judge will reach the appropriate conclusion on the evidence, taking into account the conclusion in the CG case so far as it remains relevant.¹²⁴
171. Courts in the UK have also laid down certain procedural safeguards. It is expected that, in country guidance cases, the tribunal will set out its reasons ‘with particular rigour’, take ‘special care to ensure that its decision is effectively comprehensive by considering all the relevant country information, if necessary by adopting a more inquisitorial approach than would normally be the case, and by explaining what it makes of such information’, and should usually consider evidence by ‘country experts’, being individuals such as academics, journalists and independent researchers who have expert knowledge of the relevant country.¹²⁵
172. Although in the UK these practices have developed without the need for legislation, we believe the present Bill should be amended to insert similar safeguards. This is because there are a number of factors that are less conducive to quality guidance decisions in Australia. For example, in Australia:
- the RRT does not have multi-member panels;

content/uploads/JCO/Documents/Practice+Directions/Tribunals/IAC_UT_FtT_PracticeDirection.pdf> [12.2].

¹¹⁷ See the decision database at <<https://tribunalsdecisions.service.gov.uk/utiac>>.

¹¹⁸ Nicholas Blake, ‘Luxembourg, Strasbourg and the National Court: The Emergence of a Country Guidance System for Refugee and Human Rights Protection’ (2013) 25 *International Journal of Refugee Law* 349, 354.

¹¹⁹ Robert Thomas, ‘Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom’ (2008) 20 *International Journal of Refugee Law* 489, 494.

¹²⁰ Thomas, above n 119, 502.

¹²¹ Thomas, above n 119, 501.

¹²² Blake, above n 118, 354.

¹²³ Thomas, above n 119, 504.

¹²⁴ Blake, above n 118, 355.

¹²⁵ Thomas, above n 119, 505.

- RRT members are not required to possess the legal training and expertise of the senior immigration judges in the UK;
- RRT members are equivalent to the UK's First Tier Tribunal members, and there is no equivalent to the Upper Tribunal;
- RRT members have limited (three-year) terms in office;
- there is no entitlement to legal representation before the RRT and, given recent changes, access to legal representation has been further reduced; and
- it is much rarer for applicants to have access to 'country experts'.

173. At a minimum, we believe it is necessary for the Bill to provide that a case can only be designated as a guidance decision if:

- there is sufficient notice given to the asylum seeker that it may be treated as such, and he or she consents to this being treated as such a case;
- the asylum seeker is legally represented, as this otherwise imposes an unfair burden on an asylum seeker; and
- the decision comprehensively considers country information, including UNHCR reports, and provides adequate justification for rejecting any country information.

174. We believe it should also be necessary for the Principal Member to set out published criteria (for example, in the form of a Practice Direction) as to when a case should be considered country guidance.

175. We also believe that, as in the UK, guidance and training should be given to RRT members to enable them to identify when a country guidance decision should *not* be followed – such as where there is credible fresh evidence, where there are matters in the instance case that were not considered in the country guidance decision, or where there has been a change of circumstances in the country.¹²⁶

176. Finally, we note that a fair country guidance system rests fundamentally on the quality of country information that is produced. While previously the RRT had its own researchers to obtain such information, its country of information unit has been transferred to the Immigration Department. We are concerned that unless the RRT has the resources to independently source and evaluate information, confidence in the impartiality of the country guidance decisions may be reduced.

Conclusion

177. We thank the Committee for the opportunity to raise our concerns about this Bill. We emphasise that our primary recommendation is that this Bill should not be passed, primarily because it creates a number of risks that Australia's international legal obligations will be breached. However, in the event that the Committee recommends passage of some or all of these provisions, we have provided some alternative recommendations (see table in the Executive Summary).

178. We also emphasise the importance of the Committee seeking to obtain proper justification for these proposed changes. Our view is that they do not improve the refugee status determination process, but rather add unnecessary complexity to an

¹²⁶ Blake, above n 118, 355.

already difficult task. This increases the burden not only on asylum seekers and their legal representatives, but also on the Immigration Department and the RRT.

179. Although the changes proposed by this Bill are technical, they are likely to have a profound impact on a highly vulnerable group of people. We would therefore welcome the opportunity to assist the Committee further in clarifying any of the matters raised in this submission.