



***Migration Amendment (Complementary Protection and Other Measures) Bill
2015***

Senate Legal and Constitutional Affairs Legislation Committee

**Submission by the
Office of the United Nations High Commissioner for Refugees**

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees ('UNHCR') welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee ('Committee') in respect of its inquiry into the *Migration Amendment (Complementary Protection and Other Measures) Bill 2014* ('Bill').
2. UNHCR acknowledges the difficulties and challenges inherent in the assessment of claims for refugee status and complementary protection. In this regard, UNHCR recognizes and supports the need for fair and efficient procedures for determining eligibility for international protection ('asylum procedures'), which are in the interests both of applicants and of States.
3. UNHCR's submission focuses on the following amendments proposed by the Bill to the *Migration Act 1958* (Cth) ('Migration Act') which (among other things) seek to:
 - a) Disregard consideration of the 'reasonableness' of the proposed area of internal flight or relocation (see Part IV (A) below).
 - b) Require that an applicant must establish that he or she will suffer significant harm and if the real risk is faced by the population of the country generally, the person must be at a 'particular risk' for the risk to be faced by the person personally (see Part IV (B) below).
 - c) Conclude that an applicant for complementary protection does not have a real risk of significant harm if:
 - (i) the receiving country has an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant State; or
 - (ii) "adequate and effective protection measures" are provided by a source other than the relevant State (see Part IV(C) below).
 - d) Conclude that a person does not have a real risk of significant harm if the person could take reasonable steps to modify his or her behaviour relating to certain characteristics, yet with some exceptions (see Part IV(D) below).

- e) Exclude an applicant from merits review if he or she has been deemed an 'excluded person' by the Minister (see Part IV(E) below).
- f) Exclude an applicant from protection in Australia if he or she can find 'effective protection' elsewhere (see Part IV(F) below).

II. UNHCR'S AUTHORITY

- 4. UNHCR offers these comments as the organization entrusted by the United Nations General Assembly ('UNGA') with the mandate to provide protection to refugees, and, together with governments, for seeking permanent solutions to the problem of refugees.¹
- 5. As set forth in its Statute, UNHCR fulfils its mandate by, *inter alia*, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.'²
- 6. UNHCR's supervisory responsibility under its Statute is reiterated in the preamble of the *1951 Convention relating to the Status of Refugees* ('1951 Refugee Convention'),³ whereas Article 35 of the 1951 Refugee Convention requires State parties to 'co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention'. The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).⁴
- 7. The UNGA, UN Economic and Social Council and the Executive Committee of the High Commissioner's Programme (ExCom), of which Australia is a member, have extended UNHCR's competence *ratione personae*⁵, by empowering UNHCR to protect and assist particular groups of people whose

¹ See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775,[1] ("Statute").

² *Ibid.*,[8(a)].

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

⁵ See UNHCR, *Note on International Protection*, submitted to the 45th session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/830, 7 September 1994, at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f0a935f2>, paras. 31-32 and note 8: With respect to the mandate of UNHCR, successive GA and ECOSOC resolutions have had the effect of extending the High Commissioner's competence to refugees fleeing armed conflict and generalized violence. Using a variety of formulations, the GA has regularly called upon the High Commissioner 'to continue his assistance and protection activities in favour of refugees within his mandate as well as for those to whom he extends his good offices or is called upon to assist in accordance with relevant resolutions of the General Assembly,' see, e.g., GA res. 3143 (XXVIII), 14 Dec. 1973. Other resolutions refer, e.g., to 'refugees for whom [the High Commissioner] lends his good offices', GA Res. 1673 (XVI), 18 Dec. 1961; 'refugees who are of [the High Commissioner's] concern', GA res. 2294 (XXII), 11 Dec. 1967; 'refugees and displaced persons, victims of man-made disasters', ECOSOC Res. 2011(LXI), 2 Aug. 1976, endorsed by GA res. 31/55 of 30 Nov. 1976; 'refugees and displaced persons of concern to the Office of the High Commissioner', GA res. 36/125, 14 Dec. 1981; 'refugees and externally displaced persons', GA res. 44/150, 15 Dec. 1989; 'refugees and other persons to whom the High Commissioner's Office is called upon to provide assistance and protection', GA res. 48/116, 20 Dec. 1993).

circumstances may not necessarily meet the definition of the 1951 Refugee Convention.⁶ In addition, UNHCR has adopted the usage of a wider refugee definition, based on the definitions in regional instruments such as the *1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*⁷ and the *1984 Cartagena Declaration on Refugees*.⁸ In practical terms, this has extended UNHCR's mandate to a variety of situations of forced displacement resulting from conflict, indiscriminate violence or public disorder. In light of this evolution, UNHCR considers that serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order are valid reasons for international protection under its mandate.⁹

8. In respect of complementary forms of protection, ExCom has also noted that:

*'States may choose to consult with UNHCR, if appropriate, in view of its particular expertise and mandate, when they are considering granting or ending a form of complementary protection to persons falling within the competence of the Office.'*¹⁰

9. ExCom Conclusions on International Protection are developed through a consensual process. Although not formally binding, ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. The specialist knowledge of ExCom and the fact that its Conclusions are taken by consensus add further weight. Australia takes an active role in the work of ExCom.

10. Australia is a Contracting Party to the 1951 Refugee Convention and its 1967 Protocol, the *1966 International Covenant on Civil and Political Rights* ('ICCPR'),¹¹ and the *1984 Convention against Torture and Other Cruel, Inhuman*

⁶ In such cases, the institutional competence of UNHCR is based on[9] of its Statute: *'The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.'*

⁷ Convention Governing the Specific Aspects of Refugee Problems in Africa (of the Organisation of African Unity (now African Union)), 10 September 1969, 1001 UNTS 45, at <http://www.unhcr.org/refworld/docid/3ae6b36018.html> -

⁸ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984 at <http://www.unhcr.org/refworld/docid/3ae6b36ec.html> .

⁹ UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, Executive Committee of the High Commissioner's Programme, Standing Committee, UN Doc. EC/55/SC/CRP.16, 2 June 2005, [26], at <http://www.unhcr.org/refworld/docid/47fd49d.html>.

¹⁰ 2005 ExCom Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection (no103 (LVI)), para. (p).

¹¹ 1966 ICCPR, opened for signature 26 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Obligations under the ICCPR, as interpreted by the Human Rights Committee, also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. With regard to the scope of the obligations under Article 7 of the ICCPR, see Human Rights Committee in its General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, [9] ("*States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement*"); and General

or Degrading Treatment or Punishment ('CAT')¹², and a founding member of ExCom.

III. UNHCR'S DEFINITION OF COMPLEMENTARY PROTECTION

11. The 1951 Refugee Convention forms the cornerstone of the international refugee protection regime. The criteria for refugee status in the 1951 Refugee Convention needs to be interpreted in such a manner that individuals or groups of persons who meet the criteria are duly recognized and protected under that instrument. Only when an asylum-seeker is found not to meet the refugee criteria in the 1951 Refugee Convention should broader international protection criteria as contained in UNHCR's mandate and regional instruments be examined.¹³
12. UNHCR defines 'complementary' forms of protection as referring to legal mechanisms for protecting and according a status to a person in need of international protection who does not fulfil the refugee definition of the 1951 Refugee Convention or regional refugee law instruments because they are at risk of serious harm. In this regard, UNHCR's competence *ratione personae* (see paragraph 7 above) extends to:

*'Persons who are outside their country of origin or habitual residence and who are unable or unwilling to return there owing to serious threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.'*¹⁴

13. UNHCR considers complementary protection mechanisms to be a positive and pragmatic response to certain international protection needs not covered by the 1951 Refugee Convention, or other international refugee law instruments, so long as they complement, and do not undermine, refugee status under the 1951 Refugee Convention. Indeed, complementary protection mechanisms are necessary to avoid protection gaps and enable all those in need of international protection to find and enjoy it in accordance with States' international obligations.¹⁵
14. Complementary protection should also be distinguished from temporary protection; a specific provisional response to humanitarian crises and complex

Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, [12].

¹² 1984 CAT, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987). An explicit *non-refoulement* provision is contained in Article 3 of the CAT which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

¹³ UNHCR Executive Committee, *Conclusion on the Provision on International Protection Including through Complementary Forms of Protection*, No. 103 (LVI) – 2005, 7 October 2005, <http://www.refworld.org/docid/43576e292.html>.

¹⁴ See for example, UNHCR, *MM (Iran) v. Secretary of State for the Home Department - Written Submission on Behalf of the United Nations High Commissioner for Refugees*, 3 August 2010, C5/2009/2479, <http://www.refworld.org/docid/4c6aa7db2.html>, [10]; and UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 6 August 2013, HCR/EG/AFG/13/01, <http://www.refworld.org/docid/51ffdca34.html>.

¹⁵ *ExCom Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection (no103 (LVI))*.

or mixed population movements, particularly in situations where existing responses are not suited or adequate.¹⁶

15. Contracting States' obligations under the 1951 Refugee Convention and international human rights instruments are binding obligations which should be considered as the framework for any efforts to set complementary standards.
16. UNHCR welcomes the Government's announcement that it is no longer going to repeal the statutory complementary protection framework, as was proposed in the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*. Indeed, UNHCR made written submission on that Bill noting its serious concerns regarding the proposal to repeal the complementary protection framework.
17. In relation to the Bill, UNHCR welcomes the proposed amendments that seek to capture circumstances of chain *refoulement*, as noted at paragraph 99 of the Explanatory Memorandum to the Bill.
18. UNHCR does, however, have serious concerns regarding a number of amendments proposed by the Bill in so far as it expands the basis upon which applicants will be excluded from complementary protection, which in turn further widens existing protection gaps in Australia.

IV. AMENDMENTS PROPOSED BY THE BILL THAT GIVE RISE TO CONCERN

19. The Explanatory Memorandum to the Bill states that an objective is to align the complementary protection framework with equivalent standards established in the new statutory refugee framework, as inserted by Part 2 of Schedule 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* ('Legacy Caseload Act').
20. UNHCR made a submission to the Committee that set out a number of its concerns in relation to the Legacy Caseload Bill, some of which apply in relation to the amendments proposed by the Bill to the statutory complementary protection framework. Those concerns, together with separate protection issues that UNHCR has identified, are set out below.

A. The reasonable analysis of the internal flight or relocation alternative

21. Proposed subsection 5LLAA(1)(a) seeks to specify that a person has a real risk of significant harm only if the real risk relates to all areas of a receiving country. The Explanatory Memorandum further describes that it is 'the Government's intention that the 'reasonableness' of relocation no longer be a part of the test'.¹⁷ UNHCR has serious concerns regarding these proposed amendments that are being made to align the complementary protection framework with the new refugee framework. Indeed, UNHCR's concerns as set out in its written submissions in relation to the Legacy Caseload Bill remain in so far as the amendments apply to the complementary protection framework.

¹⁶ UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, <http://www.refworld.org/docid/52fba2404.html>.

¹⁷ Explanatory Memorandum to the Bill[60].

22. International refugee protection, as set out in the 1951 Refugee Convention, does not support an approach which would place an individual who has a well-founded fear of persecution in one area of the country, in another area of that country where his or her fundamental human rights would be violated.¹⁸
23. Similarly, UNHCR's view is that these fundamental principles of international protection equally apply in the context of complementary protection claims, a view that is supported by State practice. International human rights law does not support an approach which would place an individual who has a real risk of significant harm in one area of the country, in another area of that country where his or her fundamental human rights would be violated.¹⁹
24. The concept of the internal flight or relocation alternative refers to a specific area of a country where there is no risk of a well-founded fear of persecution or of significant harm and where, given the particular circumstances of the case, an asylum-seeker could reasonably be expected to establish him/herself and live a normal life.²⁰
25. In developing the concept of the internal flight or relocation alternative, Contracting States have drawn on paragraph 91 of UNHCR's Handbook, which reads:

*'The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality [or habitual residence]. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.'*²¹
26. Notably, international law does not require threatened individuals to exhaust all options within their own country first before seeking asylum; that is, it does not consider asylum to be the last resort.²² The 1951 Refugee Convention also does not require or suggest that the fear of being persecuted need always extend to the whole territory of the refugee's country of origin.²³

¹⁸ UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, [20], <http://www.refworld.org/docid/3f2791a44.html>.

¹⁹ UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Norway*, 25 April 2006, CCPR/C/NOR/CO/5, [11], <http://www.refworld.org/docid/453777a611.html>.

²⁰ UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, [6], <http://www.refworld.org/docid/3f2791a44.html>

²¹ With regard to the Handbook it is worth noting that this was drafted at the request of the Member States of the Executive Committee of the High Commissioner's Programme, the Office's governing body comprising States. See ExCom Conclusion No.8 (XXVII), 1977, *Determining Refugee Status*, [(g)].

²² UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04 [4], available at: <http://www.unhcr.org/refworld/docid/3f2791a44.html>

²³ *Ibid.* [6]; Handbook, op.cit. [91].

27. It is UNHCR's view that decision makers are required to assess whether the internal flight or relocation alternative is, firstly, a relevant consideration, and secondly, whether it is a reasonable consideration, both subjectively and objectively, given the circumstances of the asylum-seeker and the conditions in the proposed internal flight or relocation alternative. Relevant considerations include personal circumstances, past persecution, safety and security, respect for human rights and economic survival. This applies when assessing a claim under the 1951 Refugee Convention or in accordance with international human rights law which gives rise to a complementary protection claim.
28. When applying the internal flight or relocation concept to the facts of a case, the UNHCR *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* ('UNHCR's IFA Guidelines') provide the following guidance:
- 'II. The Reasonableness Analysis
- a) *Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.'*²⁴
29. UNHCR considers the 'reasonableness' assessment of respect for basic human rights undertaken in the context of an evaluation of the availability of an alternative area of relocation where a well-founded fear of persecution or risk of significant harm arises has already been shown in another part of the country is just one element of the reasonable test and does not mean that the deprivation of any civil, political or socio-economic human rights in the proposed area will rule out internal flight or relocation. As UNHCR's IFA Guidelines note:
- 'Rather, it requires, from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative.'*
30. This test of 'reasonableness' has been adopted by many jurisdictions and the proposed amendments which disregard this analysis is a concerning development which places Australia at variance with existing State practice.
31. The 'reasonableness test' is a useful legal tool which has proved sufficiently flexible to address the issue of whether or not, in all the circumstances, the

²⁴ UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, [7]. See, further, [24-30] which identify a number of issues which need to be assessed when determining whether relocation would be 'reasonable', including the asylum-seeker's personal circumstances, whether the asylum-seeker has suffered psychological trauma arising out of past persecution, whether the asylum-seeker is able to find safety and security and be free from danger or risk of injury, whether respect for basic human rights standards including in particular non-derogable rights is problematic (including whether, from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative), whether the individual concerned will be able to earn a living or access accommodation or whether medical care can be provided or is clearly adequate or whether a relatively normal life can be led in the context of the country concerned.

particular applicant could reasonably be expected to move to the proposed area to overcome his or her well-founded fear of being persecuted or significant harm. It is not an analysis based on what a hypothetical 'reasonable person' should be expected to do.

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

B. Risk of significant harm must be personal

33. Subsection 5LAA(1)(b) of the Bill provides that there is a real risk that an applicant will suffer significant harm in a country if the real risk is faced by the person personally. Further, subsection 5LAA(2) provides that, for the purposes of subsection 5LAA(1)(b), if the real risk is faced by the population of the country generally, the person must be at a particular risk for the risk to be faced by the person personally.
34. UNHCR's view is that a person's risk of being persecuted or subjected to significant harm must be assessed in the context of the overall situation in the country of origin, taking into account general as well as individual circumstances. To adopt a different approach, as proposed by these amendments, significantly increases the likelihood that an applicant will be subjected 'gross, flagrant or mass violation of human rights' upon his/her return, which greatly undermines the complementary protection framework in the Migration Act.
35. Indeed, during armed conflict and other situations of violence, whole communities may suffer and be subjected to significant harm and/or be at risk of persecution. The fact that many or all members of particular communities may be equally at risk does not undermine the validity of any particular claim. Indeed, to contemplate doing so, as is proposed by these amendments, increases the likelihood that Australia will be in direct breach of its *non-refoulement* obligation under international law.²⁵
36. UNHCR notes that when assessing an asylum claim, the test applied by decision makers in accordance with international law is whether an individual's fear of being persecuted is well-founded and if not, the decision maker then considers whether the individual has a real risk of significant harm if returned. In fact, at times, the impact of a conflict on an entire community strengthens, rather than weakens, the risk to any particular individual and in such circumstances Australia must provide protection. To exclude decision makers from taking into account such circumstances is of grave concern.

²⁵ UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, [8], <http://www.refworld.org/docid/50d32e5e2.html>.

37. Indeed, there is no basis under international refugee or human rights law for holding that in armed conflict or other situations of violence, an applicant needs to establish a risk of harm over and above that of others caught up in such situations. Further, there is nothing in the text of the 1951 Refugee Convention or relevant international human rights instruments, namely the CAT or the ICCPR, to suggest that an applicant for international protection has to be singled out for persecution or significant harm, either generally or over and above other persons at risk of being persecuted. A person may have a well-founded fear of persecution or significant harm that is shared by many others.²⁶
38. As for individualised harm, where there are widespread human rights violations, such as murder and assault of civilians, there will potentially be many persons at risk of persecution or significant harm. Indeed, the 1951 Refugee Convention was negotiated with the victims of the Second World War firmly in mind, where entire communities were the subject of appalling abuse and violence. Thus, a person clearly need not be at any greater risk or 'particular risk' than others in his neighbourhood or community to satisfy the 1951 Refugee Convention's or complementary protection criteria. Therefore, a well-founded fear of persecution may arise where it is evident that a particular ethnic, religious or political group is at risk of attack because of the sectarian or communal nature of the surrounding conflict and/or if an applicant can establish that he or she will be at a real risk of significant harm.
39. UNHCR is concerned by these proposed amendments as they significantly undermines the complementary protection framework; a framework that is designed to protect individuals from serious human rights abuses in accordance with Australia's international human rights law obligations. UNHCR strongly recommends that Australia does not implement these proposed amendments, as they greatly increase the risk that an applicant will be returned to significant harm.

C. Adequate and effective protection provided by the State or non-State actors

40. The Explanatory Memorandum provides that new subsection 5LAA(4) 'is intended to have the effect that when determining whether a person engages one of Australia's complementary protection obligations, consideration must be given to the level of effective protection available in the receiving country to ascertain if such protection will mitigate the risk of harm towards the person.'²⁷ The Explanatory Memorandum further states: '[t]he purpose of this amendment is to align the complementary protection framework, relating to State protection measures, with the equivalent provisions in the new refugee framework'. UNHCR has concerns regarding these proposed amendments that are being made to align the complementary protection framework with the new refugee framework.

²⁶ UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, [9], <http://www.refworld.org/docid/50d32e5e2.html>

²⁷ Explanatory Memorandum to the Bill [75].

41. If new subsection 5LAA(4) is inserted, the effect will be that the effective protection measures set out in s5LA (introduced by the Legacy Caseload Act) will apply to complementary protection claims, such that an applicant will be found not to have a real risk of significant harm if the receiving country has an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant State; and/or adequate and effective protection measures provided by a source other than the relevant State. Although UNHCR acknowledges that s 5LA(2) provides that effective protection is offered if (a) the person can access the protection; and (b) the protection is durable, in UNHCR's view the availability of State protection in situations where the feared harm is from a non-State agent of persecution requires an assessment of the effectiveness, accessibility and adequacy of State protection in the individual case. This requires decision-makers, when assessing a claim for complementary protection, to have regard to all the relevant circumstances of the case, not just whether the receiving country has an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant State. The assessment to be made is whether the risk of the applicant being subjected to significant harm remains, regardless of the steps taken by the State to prevent persecution or significant harm.²⁸ The effectiveness of protection available depends on the *de jure* and *de facto* capability and willingness of the State authorities to provide protection. The mere existence of a law prohibiting certain persecutory acts will not of itself be sufficient.
42. Where such an assessment is necessary, it requires a judicious balancing of a number of factors both general and specific, including the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents.²⁹
43. The Explanatory Memorandum further provides that protection need not be provided exclusively by the State, but may be effected by non-State actors, for example, the United Nations or friendly forces.³⁰
44. UNHCR considers that not all sources of possible protection are tantamount to State protection, and that there can be no hard-and-fast rules to this assessment, as this requires a factual assessment of circumstances on the ground. Therefore listing of what constitutes effective State protection can only be illustrative.
45. In UNHCR's view, refugee status should not be denied on the basis of an assumption that the threatened individual could be protected by parties or organizations, including international organizations, if that assumption cannot be challenged or assailed. It would, in UNHCR's view, be inappropriate to

²⁸ UNHCR, *UNHCR Annotated Comments on EC Council Directive 2004/83/EC of 29 April 2004 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 (OJ L 30412 of 30.9.2004)*, 28 January 2005, available at: <http://www.unhcr.org/refworld/docid/4200d8354.html> ("UNHCR Annotated Comments on EC Council Directive, 28 January 2005").

²⁹ UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, [15].

³⁰ Explanatory Memorandum to the Bill [77].

equate national protection provided by States with the exercise of a certain administrative authority and control over territory by international organizations on a transitional or temporary basis. Under international law, international organizations do not have the attributes of a State. In practice, this generally has meant that their ability to enforce the rule of law is limited and in turn, protection from a real risk of significant harm is not effective.³¹ UNHCR recommends that these amendments not be passed.

D. Behaviour modification to avoid a well-founded fear of persecution

46. Proposed subsection 5LAA(5) specifies that an applicant does not have a real risk of significant harm if reasonable steps could be taken to modify his or her behaviour so as to avoid a real risk of harm, yet excluding specified modifications.³²
47. In accordance with international refugee law, a person cannot be denied refugee status based on a requirement that she or he can change or conceal his or her identity, opinions or characteristics in order to avoid persecution. Individuals who hold certain political views, religious beliefs or sexual orientation/gender identity are entitled to freedom of expression and association in the same way as others. Persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.³³
48. Although UNHCR acknowledges that the legal issue is different in that it concerns the risk of harm irrespective of any connection to a real or imputed Convention ground, the question is not whether the applicant, by being discreet, could live in that country without attracting adverse consequences, as is proposed by this amendment to the Migration Act. In UNHCR's view, an objective and fact-specific examination of the nature of the applicant's predicament upon return and whether this amounts to persecution or significant harm is required. The role of the decision maker is to assess risk (whether the fear of persecution or significant harm is well-founded or gives rise to a real risk (as relevant)) and not to demand conduct (pronounce upon what that the applicant should or should not do).

E. Denial of merits review if applicant has received a negative assessment

49. UNHCR notes its concern that the Bill proposes to amend subsection 502(1)(a)(ii) of the Migration Act, to expand the scope of s 502 to deny an applicant for complementary protection the ability to seek merits review before the Administrative Appeals Tribunal if he or she has been declared an 'excluded person' on character grounds by the Minister of Border Protection and Immigration.

³¹ UNHCR, *UNHCR Annotated Comments on EC Council Directive*, 28 January 2005, p.18; *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011.

³² See Explanatory Memorandum to the Bill [80] which specifies the following

³³ R, *UNHCR intervention before the Court of Justice of the European Union in the cases of Minister voor Immigratie en Asiel v. X, Y and Z*, 28 September 2012, C-199/12, C-200/12, C-201/12, [5.2.2].

50. UNHCR's view is that a vital element of any procedural safeguard is a right of appeal to an independent body in relation to the first instance decision. UNHCR recommends that this amendment not be passed, as procedural fairness is integral to ensure a fair and efficient asylum process.

F. Effective protection elsewhere

51. The Bill seeks to align statutory provisions relating to protection in another country (third country protection) with the definition of 'well-founded fear of persecution in s 5J of the Migration Act, such that Australia does not owe protection obligations to an applicant for refugee protection who has not taken all possible steps to avail himself or herself of a right to enter and reside in any country (beyond the applicant's country of origin or place of habitual residence) apart from Australia (where he or she is not at risk of persecution, significant harm or chain *refoulement*). This is sometimes referred to as 'effective protection elsewhere'.
52. UNHCR avails itself of this opportunity to express its ongoing concern with the use of this concept of effective protection elsewhere with regard to applicants seeking asylum. The concept does not constitute a principle of international refugee law and, at best, can be seen as a device used by States to determine which of them has the primary responsibility to facilitate the refugee status determination and durable solution for a recognized refugee. In UNHCR's view, the concept introduces a procedural bar which cannot be a substitute for a substantive assessment of an applicant's need for refugee or complementary protection and, therefore, should not form part of the determination process.
53. UNHCR's firm view is that return to a country that is deemed to provide 'effective protection' should only occur if the applicant will be readmitted to the country, will be able to access fair asylum procedures and, if recognized, will be able to enjoy 'effective protection' there and the statutory framework should be amended to reflect these requirements.³⁴

UNHCR Regional Representation in Canberra
3 December 2015

³⁴ See UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.refworld.org/docid/3b36f2fca.html> [15].