



Submission to the Senate Legal and Constitutional Affairs Legislation Committee

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

31 October 2014

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 (“the Committee”) in respect of its inquiry into the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (“the Bill”).
2. UNHCR acknowledges the difficulties inherent in the assessment of claims for refugee status and welcomes efforts intended to streamline procedures and bring clarity to such processes. In this regard, UNHCR recognizes and supports the need for fair and efficient asylum procedures, which are in the interests of both applicants and States.
3. UNHCR also shares the Government of Australia’s commitment to reduce the loss of life at sea, as well as the risks of exploitation, abuse and violence facing individuals in the context of mixed maritime movements. However, efforts to address mixed migration movements and limit loss of life at sea must not jeopardize access to international protection for refugees, asylum-seekers and stateless people.

II. KEY CONCERNS

4. UNHCR is concerned by the proposed amendments to the *Migration Act 1958* (Cth) (“the Migration Act”) and the *Maritime Powers Act 2012* (Cth) (“the MPA”) because:
 - (i) Certain amendments are not consistent with existing State practice and a proper interpretation of Australia’s obligations under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (“the 1951 Convention”);¹
 - (ii) Certain amendments fundamentally alter the obligations to refugees assumed by Australia upon its accession to the 1951 Convention, in particular relating to Article 1D;² and,
 - (iii) Certain amendments codify Australia’s interpretation of the 1951 Convention by establishing a ‘new statutory definition of refugee’ which removes most references to the 1951 Convention,³ which, it is noted, does not alter Australia’s international obligations to refugees.

¹ UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

² Explanatory Memorandum, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, p. 10 (“Explanatory Memorandum”)

³ *Ibid.*

5. Part 1 of UNHCR’s submission addresses the proposed amendments to the Migration Act which:
 - a) Codify Australia’s interpretation of the refugee definition and narrow the personal scope of the refugee definition as established by Article 1A(2) of the 1951 Convention, by:
 - 1) disregarding consideration of the “reasonableness” of the proposed area of internal flight or relocation;
 - 2) concluding that a person does not have a well-founded fear of persecution if the receiving country has an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant State, without an assessment of the effectiveness, accessibility and adequacy of State protection in the individual case;
 - 3) concluding that a person does not have a well-founded fear of persecution if “adequate and effective protection measures” are provided by a source other than the relevant State;
 - 4) concluding that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour relating to certain characteristics;
 - 5) concluding that a particular social group requires a cumulative, rather than alternative, application of the “protected characteristics” and the “social perception” approaches; and,
 - 6) disregarding the special protection regime established by Article 1D of the 1951 Convention and thereby requiring “Palestinian refugees” to establish their need for international refugee protection by reference to Article 1A(2).
 - b) Introduce temporary protection visas which require Convention refugees to re-establish their continuing need for international refugee protection and afford only limited Convention rights for reasons of their irregular arrival to Australia.
 - c) Introduce a new ‘fast track’ procedure by establishing the Immigration Assessment Authority to deal with/to examine claims of asylum-seekers who have arrived by sea in Australia without visas on or after 13 August 2012, other than certain categories of asylum-seekers who arrived by sea who will not be able to access review procedures (because they have been previously been refused protection, already have protection available elsewhere, or have unmeritorious claims).
 - d) Introduce the power to limit, suspend and cease the grant of protection visas to Convention refugees and, thereby, impede access to their rights specified by Articles 2–34 of the 1951 Convention.
6. Part 2 of UNHCR’s submission addresses the proposed amendments to the MPA which:
 - a) Restrict the application of the rules of natural justice to a range of powers in the MPA, including the powers to authorize the exercise of maritime powers, the new Ministerial powers and the exercise of powers to hold and move vessels and persons.
 - b) Ensure that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to consider, properly consider, or

comply with Australia's international obligations, or the international obligations or domestic law of any other country; and,

- c) Clarify for the purposes of certain provisions under the MPA that a vessel or a person may be taken to a place outside Australia whether or not Australia has an agreement or arrangements with any country concerning the reception of the vessel or the persons.

III. UNHCR'S AUTHORITY

7. UNHCR provides these comments in light of its supervisory responsibility in respect of the 1951 Convention, to which Australia is a Contracting State. Under the 1950 Statute of the Office of the UNHCR (annexed to UN General Assembly Resolution 428(V) of 14 December 1950), UNHCR has been entrusted with the mandate to provide protection to refugees and, together with governments, for seeking permanent solutions to their problems.⁴
8. As set forth in the Statute, UNHCR fulfils its international protection 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.'⁵
9. UNHCR's supervisory responsibility is also reflected in Article 35 of the 1951 Convention and Article II of the 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions, including, in particular, to facilitate UNHCR's duty of supervising the application of these instruments. The supervisory responsibility is exercised in part by the issuance of interpretative guidelines, including: (a) UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued January 1992 and December 2011) ("Handbook"); (b) UNHCR's subsequent Guidelines on International Protection (issued in the context of refugee status determination); and, (c) other position papers and guidance on the international refugee protection framework.
10. UNHCR has been formally mandated by the UN General Assembly to prevent and reduce statelessness around the world, as well as to protect the rights of stateless people. UN General Assembly resolutions 3274 (XXIV) and 31/36 designated UNHCR as the body mandated to examine the cases of persons who claim the benefit of the 1961 Convention on the Reduction of Statelessness and to assist such persons in presenting their claims to the appropriate national authorities. In 1994, the UN General Assembly conferred upon UNHCR a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons. This mandate has continued to evolve as the General Assembly has endorsed the conclusions of UNHCR's Executive Committee. Over time, UNHCR has developed a recognized expertise on statelessness issues.⁶

IV. PART 1 – PROPOSED AMENDMENTS TO THE MIGRATION ACT

11. When interpreting any provision of the 1951 Convention, Article 31 of the *Vienna Convention on the Law of Treaties* ('Vienna Convention') provides that a treaty such

⁴ 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").

⁵ *Ibid.*, [8(a)].

⁶ UNGA resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995.

as the 1951 Convention is to be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.’⁷ The Vienna Convention specifies that the context includes, *inter alia*, the preamble, as a source of the object and purpose of the instrument.

12. The 1951 Convention affirms in its preamble that the refugee protection regime is about the ‘widest possible exercise’ of refugees’ ‘fundamental rights and freedoms’.⁸ Indeed, refugees are owed international protection precisely because their human rights are under threat.

13. The *non-refoulement* obligation is the cornerstone of international refugee law. To safeguard against the *refoulement* of a refugee, Contracting States are required, *inter alia*, to apply the 1951 Convention in *good faith* and to implement asylum procedures to safeguard against the wrongful denial of refugee status.

A. Codification of Australia’s interpretation of the refugee definition established by Article 1A(2) of the 1951 Convention

14. UNHCR is concerned that the proposed amendments to the Migration Act would narrow the personal scope of the refugee definition, and lead to a restrictive application of rights to Convention refugees.

(i) Well-founded fear of persecution

(a) The reasonable analysis of the internal flight or relocation alternative

15. The proposed amendments specify that a person has a well-founded fear of persecution only if there is a real chance of persecution in all areas of a receiving country.⁹ The Explanatory Memorandum further describes that ‘[i]t is the Government’s intention that this statutory implementation of the ‘internal relocation’ principle not encompass a ‘reasonableness’ test... Australian case law has broadened the scope of the ‘reasonableness’ test to take into account the practical realities of relocation. Decision makers are currently required to consider information that is additional to protection considerations under Article 1A(2) of the Refugees Convention’.¹⁰

16. The framework of international refugee protection set out in the 1951 Convention does not support an approach which would place an individual who had a 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.

⁷ This requires the application of Articles 31 to 33 of the *Vienna Convention on the Law of Treaties 1969* which requires, in essence, that the interpreter look primarily to the ordinary meaning to be given in terms of the treaty in their context and in light of the treaty’s object and purpose (see Art 31(1)). The context is to be widely understood (Art 31(2)), and the interpreter will also take into account various other elements, notably any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, or any subsequent practice in the application of the treaty which establishes such agreement (Art 31(3)).

⁸ This finds expression, *inter alia*, in the first two recitals of the Preamble to the 1951 Convention and Recommendation E of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which adopted the 1951 Convention. It is clear from the terms of the Preamble that the 1951 Convention was envisaged as a human rights instrument directed at a specific and identifiable group of victims of human rights violations and designed to ensure that they obtain the fullest possible enjoyment of their human rights and, most specifically, their right to seek and enjoy asylum (as envisaged by Article 14 of the Universal Declaration of Human Rights) and their right to non-discrimination (as inherent in Arts 1 and 2 of the Universal Declaration of Human Rights)

⁹ Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, s5J(1)(c).

¹⁰ Explanatory Memorandum, *op.cit.* pp. 10-11 and [1183].

17. 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 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.
18. 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.*¹¹

19. 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.¹² The 1951 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.¹³
20. 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. Such a test is forward-looking, which must take into account the asylum-seeker's current personal circumstances as well as those in the country of origin.
21. 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 authoritative guidance.
22. UNHCR considers the 'reasonableness' assessment to assess whether the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship.¹⁴ Part of this assessment is the extent of respect for basic human rights in the proposed area of relocation, however, it does not mean that the deprivation of any

¹¹ 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)].

¹² 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/3f2791a4.html> ("Guidelines on International Protection No. 4").

¹³ *Ibid.* [6]; Handbook, op.cit. [91].

¹⁴ *Guidelines on International Protection No. 4*, op.cit. [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.

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.

23. 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. Indeed, by necessity the assessment of reasonableness includes considerations of respect for the individuals’ human rights – just as the Bill and indeed Migration Act require that to determine whether an asylum-seeker will be subjected to ‘serious harm’ requires a decision maker to consider possible serious human rights abuses, including ‘significant economic hardship that threatens the persons’ capacity to subsist, denial of basic services, where the denial threatens the person’s capacity to subsist; denial of capacity to earn a livelihood of any kind, where the denial threatens the persons capacity to subsist’.¹⁵

Recommendation 1: UNHCR recommends the revision of this proposed amendment to ensure that the refugee definition, 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 proper interpretation of Australia’s obligations under the 1951 Convention.

(b) Adequate and effective protection provided by the State or non-State actors

24. The Explanatory Memorandum indicates that subsection 5J(2) ‘codifies the principle of “effective State protection” which provides the standard of effective State or non-State protection within the receiving country that is required in order to make a determination of whether a person has a *well-founded fear of persecution* in that country.’¹⁶
25. The proposed amendments specify that a person does not have a well-founded fear of persecution 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.¹⁷ The Explanatory Memorandum further notes that these amendments are codifications of the jurisprudence of the High Court of Australia (*Minister for Immigration and Multicultural Affairs v S152/2003* (2004) 222 CLR) and Federal Court of Australia (*Siaw v Minister for Immigration and Multicultural Affairs* [2001] FCA 953), respectively.¹⁸

¹⁵ See Explanatory Memorandum, op.cit [1200] in respect of new subsection 5J(5) which provides that without limiting what is serious harm for the purposes of para 5J(4)(b), the following are instances of serious harms for the purposes of that para: ‘a threat to the person’s life or liberty; significant physical harassment of the person; significant physical ill-treatment of the person; significant economic hardship that threatens the person’s capacity to subsist; denial of access to basic services, where the denial threatens the person’s capacity to subsist; denial of access to basic services, where the denial threatens the person’s capacity to subsist; denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.’

¹⁶ Explanatory Memorandum, op.cit., [1186].

¹⁷ Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, s5J(2).

¹⁸ Explanatory Memorandum, op.cit., [1188]-[1189].

26. It is understood that this proposed amendment relates only to situations where the feared harm is from a non-State entity or group because ‘[i]n cases where the State inflicts the harm or is complicit in the sense that it encourages, condones or tolerates the harm, a conclusion may readily be drawn that the fear is well-founded.’¹⁹
27. UNHCR notes that the phrase “protection of that country” in Article 1A(2) of the 1951 Convention refers to protection of the country of nationality or habitual residence and refers to protection by the State inside the country of origin.²⁰
28. According to the UNHCR Handbook, being unable to avail oneself of protection of the country of origin ‘implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbances, which prevents the country of nationality from extending protection or makes such protection ineffective’.²¹
29. The issue of State protection in the country of origin has also been considered in relation to the potential availability of an internal flight or relocation alternative for persons who have a well-founded fear of persecution from a non-State actor. According to the UNHCR IFA Guidelines, the assessment of available State protection ‘involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State’s willingness, but, unless they are given effect in practice, are not of themselves indicative of the availability of protection’.²²
30. 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 applying Article 1A(2) of the 1951 Convention, to have regard to all the relevant circumstances of the case. The assessment to be made is whether the applicant’s fear of persecution continues to be well-founded, regardless of the steps taken by the State to prevent persecution or serious harm.²³ 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.
31. 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.²⁴
32. The proposed amendment also provides that adequate and effective protection measures may be provided by a source other than the relevant State, and is, according to the Explanatory Memorandum, designed not to differentiate between cases where adequate and effective protection is provided:

¹⁹ MRT-RRT, *Guide to Refugee Law, Chapter 3: Well-founded fear* (June 2014), pp. 3-12.

²⁰ UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, [35-37], available at: <http://www.unhcr.org/refworld/doc/3b20a3914/html> (“*Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*”).

²¹ Handbook, op.cit., [98].

²² *Guidelines on International Protection No. 4*, op.cit., [15].

²³ 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”).

²⁴ UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, [15].

- a) entirely by government forces;
 - b) by a combination of government forces and friendly forces;
 - c) by forces from a neighbouring country or ally;
 - d) by mercenaries (alone or paid to assist government forces); or,
 - e) by United Nations forces invited to assist government forces.²⁵
33. 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. UNHCR notes also that the sources listed relate to cases of ‘military forces’, rather than other parts of the civil apparatus. These will only be relevant in situations of armed conflict or other situations of violence (and even then they cannot be exhaustive), and that this assessment is better undertaken as part of the ‘relevance’ test.²⁶
34. 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 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.²⁷
35. Similarly, it is inappropriate for a decision-maker to find that the asylum-seeker will be protected by forces from a neighbouring country or ally, mercenaries, local clan or militia in an area, where they are not the recognized authority in that territory and/or where their control over the area may only be temporary. For protection to be found by a decision maker to be appropriate it must be effective and of a durable nature; it must be provided by an organized and stable authority exercising full control over the territory and population in question.²⁸ Control being exercised by military forces should in and of itself raise questions regarding the protection available in that country. It is noted in this regard that the judgment of the Federal Court of Australia is a very particular case involving persecution by non-State actors during a situation of conflict, and the same assessment of State protection would not likely apply to a political opponent who, for example, is persecuted by a non-State actor during peacetime.

²⁵ Explanatory Memorandum, op.cit. [1189]; *Siaw v Minister for Immigration and Multicultural Affairs* [2001] FCA 953, [7].

²⁶ Para. 10-12, considering an internal flight or relocation alternative is not a relevant consideration if the place of relocation is not safely accessible.

²⁷ 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.

²⁸ UNHCR, *Guidelines on International Protection No. 4*, op.cit. [17].

Recommendation 2: UNHCR advises that the availability of State protection in situations when the agents of persecution are non-State actors requires a judicious assessment of the effectiveness, accessibility and adequacy of State protection in the individual case.

Recommendation 3: UNHCR advises that it is not appropriate to equate national protection provided by States with the exercise of a certain administrative authority and control over territory by an international organization, neighbouring country or ally, mercenaries, local clan or militia on a transitional or temporary basis.

(c) *Behaviour modification to avoid a well-founded fear of persecution*

36. The proposed amendments specify that a person does not have a well-founded fear of persecution if reasonable steps could be taken to modify his or her behaviour so as to avoid a well-founded fear of persecution, unless a modification would conflict with a characteristic that is fundamental to the person's identity or conscience; or conceal an innate or immutable characteristic of the person.²⁹
37. The statuses protected by Article 1A(2) of the 1951 Convention - "race, religion, nationality, membership of a particular social group or political opinion" - reflect the protection of fundamental human rights law and the principle of non-discrimination at the heart of the 1951 Convention. While there is a distinction between innate and therefore unchangeable characteristics, such as race, and voluntarily assumed characteristics such as religion and political opinion, it is noted that the 1951 Convention extends protection to both sets of characteristics because the first cannot be changed and the second, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights.³⁰ To require individuals to hide, conceal, be discreet or alter their character or behaviour in order to avoid persecution is fundamentally at odds with the protection the 1951 Convention seeks to provide; this principle being widely accepted in international jurisprudence.³¹
38. 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.³²

²⁹ Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, s5J(3).

³⁰ UNHCR, *UNHCR intervention before the Supreme Court of the United Kingdom in the case of HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, 19 April 2010, [17]. See, also, UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, [12] ("UNHCR Guidelines on International Protection No. 9")

³¹ See *HJ(Iran) v Secretary of State for the Home Department* [2010] UKSC 31; *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2012] UKSC 38; CJEU judgment in *C-199/12, C200/12 and C201/12, X, Y and Z*, 7 November 2013; CJEU – *C-71/11 and C-99/11 Germany v Y and Z*, 5 September 2012.

³² *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].

Recommendation 4: UNHCR recommends the deletion of this proposed amendment as they are fundamentally at odds with the purpose of refugee protection, because a person cannot be denied refugee status based on a requirement that he or she can change or conceal his or her identity, opinions or characteristics in order to avoid persecution.

(ii) Convention Ground Analysis: Membership of a particular social group

39. The proposed amendments specify that a person is a member of a particular social group if, inter alia, the characteristic is an innate or immutable characteristic or the characteristic is so fundamental to a member's identity or conscience the member should not be forced to renounce it; and the person shares, or is perceived as sharing, the characteristic; and the characteristic distinguishes the group from society.³³ UNHCR finds that these criteria are more onerous on a cumulative basis than that which is required at international law.³⁴

40. The 1951 Convention includes no specific list of particular social groups. UNHCR defines a particular social group for the purposes of the 1951 Convention as

*a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.*³⁵

41. UNHCR's definition reconciles the "protected characteristics" and the "social perception" approaches which have been recognized by most jurisdictions. The "protected characteristics approach" is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. The "social perception approach" is based on a common characteristic which creates a recognizable group that sets it apart from the society at large. While the results under the two approaches may frequently converge, this is not always the case.

42. To avoid any protection gaps, UNHCR has long recommended to Contracting States that they permit alternative, rather than cumulative, application of the two approaches.³⁶

43. Further, it is not clear what is meant by the requirement of the "characteristic distinguishes the group from society". It is not clear how this differs from the group being perceived as such by society. UNHCR is concerned that this "distinguishing"

³³ Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, s5L.

³⁴ See, also, UNHCR, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, August 2012, PPLA/2012/02.

³⁵ UNHCR, *Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, [11] (emphasis added).

³⁶ See, further, UNHCR, *Annotated Comments on EC Council Directive 2004/83/EC of 29 April 2004*, 28 January 2005, 23; *UNHCR Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, 21 October 2009, 23; UNHCR, *UNHCR intervention before the United States Board of Immigration Appeals in the matter of Valdiviezo-Galdamez* (10 August 2012), 12-17; UNHCR, *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, [3.1.3]-[3.1.4].

element may impose an even higher burden of proof on individuals and could be used to raise the bar even higher than the merging the two approaches. UNHCR believes that this element either adds nothing to the preceding criteria, or if it is intended to add an additional element, it adds a layer not consistent with international refugee law.

Recommendation 5: UNHCR recommends a revision of this proposed amendment so that only one of the two approaches needs to be met in order to satisfy the particular social group definition, and that the “distinguishing” element be deleted.

(iii) Article 1D of the 1951 Convention

44. The Explanatory Memorandum states that “[i]t is not intended to incorporate Article 1D of the Refugees Convention into the Migration Act. Following the Full Federal Court’s finding in *Minister for Immigration and Multicultural Affairs v WABQ* [2002] FC 329 Palestinian refugees as a class of persons do not fall within the scope of Article 1D due to protection from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees, having ceased for this group. Consistent with this finding, any Palestinian refugees making claims for protection in Australia are to be considered against the definition of **refugee** under the new section 5H in the Migration Act.”³⁷
45. Article 1D was inserted into the 1951 Convention with the specific purpose to provide protection to Palestinian refugees who were already recognized by the international community as refugees. It is for reason of this recognition that Palestinian refugees are not required to re-establish their refugee status pursuant to Article 1A(2); rather they are required to show that they fall within the personal scope of the first paragraph of Article 1D and that the protection or assistance of United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) has ceased, per the second paragraph.
46. It is UNHCR’s position that the phrase “ceased for any reason” in the second paragraph of Article 1D of the 1951 Convention would include the following: (i) the termination of UNRWA as an agency; (ii) the discontinuation of UNRWA’s activities; or (iii) any objective reason outside the control of the person concerned such that the person is unable to (re-)avail themselves of the protection or assistance of UNRWA. Both protection-related as well as practical, legal or safety barriers to return are relevant to this assessment.³⁸
47. Furthermore, it is UNHCR’s position (which is broadly similar to the Court of Justice of the European Union (CJEU) Judgment of *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*) that where the protection or assistance of UNRWA has ceased “for one of the aforementioned reasons” within the meaning of Article 1D, a Palestinian refugee (who falls within the personal scope of Article 1D and is eligible for UNRWA assistance), is *ipso facto* entitled to the benefits of the 1951 Convention and does not need to fulfil the criteria of Article 1A(2) of the 1951 Convention.³⁹

³⁷ Explanatory Memorandum, op.cit., p. 10.

³⁸ UNHCR, *Note on UNHCR’s Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection*, May 2013, p.4.

³⁹ *Ibid*, p.5.

48. UNHCR acknowledges that Article 1D can be applied on an individual basis, assessed through individual procedures. While Article 1D does apply to Palestinian refugees as belonging to a specific class or category of refugees (i.e. Palestine refugees from 1948 whose position has not been finally settled in accordance with General Assembly resolutions, as well as 1967 displaced persons, and their descendants), and who may fall within the second paragraph of Article 1D, their refugee claims are to be assessed individually.
49. UNHCR is not aware of any other Contracting State to the 1951 Convention which has removed Article 1D from being a basis for determining the refugee status of Palestinian refugees.

Recommendation 6: UNHCR recommends that Australia gives effect to its international obligations to Palestinian refugees by codifying, in full, Article 1D of the 1951 Convention in the Migration Act 1958.

B. Temporary Protection Visas

50. The proposed amendments intend to create a new Class XD Temporary Protection (Subclass 785 (Temporary Protection)) visa, and any additional temporary visas (including a new safe haven enterprise visa),⁴⁰ which would be granted, inter alia, to refugees who arrived in Australia as an unauthorized maritime arrival, without a visa or immigration clearance.⁴¹
51. The effect of the proposed amendment is that if the Subclass 785 (Temporary Protection) visa holder does not apply for another Subclass 785 (Temporary Protection) visa before the cessation of their temporary visa, then the temporary visa will cease at the earlier of: (i) the end of three years from the date of grant of the first visa; and (ii) the end of any shorter period, specified by the Minister, from the date of grant of the first visa.⁴²
52. It is noted that a such a refugee will be required to make a valid application for another Subclass 785 (Temporary Protection) visa prior to the cessation of their temporary visa (which, it is understood, will require another assessment of refugee status in accordance with the new subclause 785.211(2)),⁴³ and if the person's visa ceases would be required to apply for, and be granted, a bridging visa in order to become a lawful non-citizen, which may not have the same benefits as a Subclass 785 (Temporary Protection) visa.⁴⁴

⁴⁰ It is noted that the new visa to be known as Safe Haven Enterprise Visas (SHEV) has not yet been created, and the relevant amendments for this visa will follow in 2015. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 7.

⁴¹ Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, ss 35A(3) and 35A(3A), and proposed amendments to the Migration Regulations 1994 (Cth); Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, [393], [414], [477-478].

⁴² Migration Regulations 1994 (Cth), Part 2, Clause 785.5.

⁴³ Explanatory Memorandum, op.cit.[432]:

785.21 – Criteria to be satisfied at time of application

...

New subclause 785.211(2) provides that the applicant:

- claims that a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act is satisfied in relation to the applicant; and
- makes specific claims as to why that criterion is satisfied.

⁴⁴ Ibid, [483].

53. In principle, recognition of refugee status should offer certainty and stability for a refugee (as well as their families). Although the length of visa/stay is left to the discretion of each State and is not regulated by the 1951 Convention, the Convention does provide that States parties shall facilitate as far as possible the integration and naturalization of refugees.⁴⁵ It is within UNHCR's broader mandate to seek, together with governments, permanent solutions for refugees, notably integration within countries of asylum.⁴⁶
54. Further, the 1951 Convention provides that refugee status which has been correctly recognized continues until a cessation clause under Article 1C is applicable. It does not envisage a potential loss of status triggered by the expiration of domestic visa arrangements, nor to impose on refugees the requirement to re-establish their refugee status every three or five years (or shorter period if specified by the Minister). UNHCR, therefore, advocates for the granting of some form of long term legal status equivalent to permanent residence and to citizenship within a prescribed period, and that refugee status not be subject to periodic re-assessment. Not only are such re-assessments disruptive to the lives of refugees and their ability to integrate successfully into local communities – they impose significant financial and administrative burdens on States, as well as on refugees. UNHCR is not aware of any other industrialized country which has instituted such re-assessments.
55. UNHCR is concerned by the introduction of temporary protection visas which provide differential rights to Convention refugees on the basis of their mode of arrival to Australia. The Minister has explained that 'TPVs will be granted for a maximum of three years and will provide access to Medicare, social security benefits and work rights... [but] will not include family reunion or a right to re-enter Australia.'⁴⁷ UNHCR advises that as a Contracting State to the 1951 Convention and the 1967 Protocol, Australia has undertaken to apply the Convention rights specified by Articles 2–34 of the 1951 Convention to all persons covered by the refugee definition provided by Article 1.
56. UNHCR is concerned that Convention refugees who are granted temporary protection visas will be unable to re-enter Australia, if they wish to temporarily depart Australia. Refugees are entitled to be issued with travel documents for the purpose of travel outside the country of asylum under Article 28(1) of the 1951 Convention, a right which anticipates a concomitant entitlement to re-enter to country:

The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such

⁴⁵ Art. 34 of the 1951 Convention provides: "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

⁴⁶ UNHCR's Statute, para. 1 provides: "The United Nations High Commissioner, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."

⁴⁷ Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Second Reading (Morrison, Scott, MP), 25 September 2014

<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansard%2Fa526371b-b2dd-4037-ba7a-649c0c3fb696%2F0021;query=Id%3A%22chamber%2Fhansard%2Fa526371b-b2dd-4037-ba7a-649c0c3fb696%2F0000%22>>.

*a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.*⁴⁸

57. Any limitation on the entitlement of refugees who are lawfully staying in the country of asylum from re-entering that country will impinge upon the ability of refugees to travel outside of the country of asylum, and having no rights to re-enter under the amendments, would raise the question of leaving refugees in legal limbo outside Australia.⁴⁹ Refugees remain the responsibility of the country granting asylum, and that responsibility cannot be shifted to other Contracting States by refusing to allow their re-entry.
58. UNHCR is also concerned that the proposed conditions attached to temporary protection visas will not provide for family reunification. The right to family unity is a fundamental human right which is also applicable to refugees.⁵⁰ ExCom has supported the issue of refugee family reunification on a number of occasions,⁵¹ and it is a right supported by international human rights law obligations.⁵² UNHCR notes that the being reunited with family members is also an essential element of sustainable settlement and full integration.

Recommendation 7: UNHCR recommends the deletion of the parts of the proposed amendments on temporary protection visas which require Convention refugees to re-establish their continuing need for international refugee protection. No distinction should be made on the basis of mode of arrival in respect of rights. All refugees are entitled to 1951 Convention rights.

C. Implementation of a fast track assessment process

59. The 1951 Convention defines who is a refugee, but does not indicate what types of procedures are to be adopted by Contracting States for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and

⁴⁸ See also the *Final act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* at IV(A), the Conference adopted unanimously the recommendation, *inter alia*, that: 'The Conference, **considering** that the issue and recognition of travel documents is necessary to facilitate the movement of refugees, and in particular their resettlement, **urges** Governments which are parties to the Inter-Governmental Agreement on Refugee Travel Documents signed in London on 15 October 1946, or which recognize travel documents issued in accordance with the Agreement, to continue to issue or to recognize such travel documents, and to extend the issue of such documents to refugees as defined in Article 1 of the Convention relating to the Status of Refugees or to recognize the travel documents so issued to such persons, until they shall have undertaken obligations under Article 28 of the said Convention.' (Emphasis added.)

⁴⁹ ExCom Conclusion No. 12 (XXIX) – 1978, *Travel documents for refugees*.

⁵⁰ The right to family unity is entrenched in universal and regional human rights instruments and international humanitarian law, and it applies to all human beings, regardless of their status. Although there is not a specific provision in the 1951 Convention the strongly worded Recommendation in the Final Act of the Conference of Plenipotentiaries reaffirms the 'essential right' of family unity for refugees. Respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take positive measures to maintain the family unity and reunite family members who have been separated. Family reunification in the country of asylum is often the only way to ensure respect for a refugee's right to family unity as the family has no realistic possibilities for enjoying that right elsewhere. Article 10 of the CRC contains useful wording regarding the handling of family reunification applications concerning children.

⁵¹ Executive Committee Conclusions Nos. 1, 9, 24, 84, 85, 88, and 107 each reaffirm States' obligations to take measures which respect to family unity and family reunion. See also, Handbook, [186].

⁵² For example, Article 10 of the Convention on the Rights of the Child contains useful wording regarding the handling of family reunification applications concerning children while Article 22 provides the special protection or assistance to refugee children including family tracing of family members and information for the reunification with family members.

administrative structure, and in accordance with procedural safeguards established in line with international human rights law.⁵³

60. UNHCR supports and recognizes the need for efficient asylum procedures, but such mechanisms must also be fair. Enhancing the fairness and efficiency of asylum procedures is in the interests both of asylum-seekers and Contracting States.⁵⁴ ExCom has reiterated:

*the importance of establishing and ensuring access consistent with the 1951 Convention for all asylum-seekers to **fair and efficient procedures** for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection⁵⁵*

61. In their Declaration of December 2001, Contracting States to the 1951 Convention called upon all States “consistent with applicable international standards, to take or continue to take measures to strengthen asylum and render protection more effective including through the adoption and implementation of national refugee legislation and procedures for the determination of refugee status and for the treatment of asylum-seekers and refugees, giving special attention to vulnerable groups and individuals with special needs, including women, children and the elderly”.⁵⁶

62. When implementing mechanisms to enhance efficiency, Contracting States must not dispense with key procedural fairness safeguards or the quality of examination procedures under any circumstances. Sacrificing key procedural process increases the likelihood of flawed or erroneous decisions and the likelihood of refugees being *refouled*.

i) Proposed cohort is inappropriate and the effect is punitive in nature

63. In UNHCR’s view, accelerated or ‘fast track’ national procedures for the determination of refugee status or complementary protection may be appropriate for dealing with the following applications:

- a) Claims that are clearly abusive (i.e. clearly fraudulent) or manifestly unfounded (i.e. not related to the grounds for granting international protection), as stated in ExCom Conclusion No. 30 (XXXIV) of 1983;⁵⁷

⁵³ See Handbook [189].

⁵⁴ UNHCR *Statement on the right to an effective remedy in relation to accelerated procedures*, 21 May 2010, at para.6, available at <http://www.refworld.org/docid/4bf67fa12.html>.

⁵⁵ See ExCom Conclusions adopted by the Executive Committee on International Protection of Refugee. No. 71 (XLIV) (1993), [(i)] (emphasis added), available at: <http://www.refworld.org/docid/4afd25c32.html>. See, also, No. 74 (XLV), 1994, which reiterates the importance of ensuring access for all persons seeking international protection to fair and efficient procedures for the determination of refugee status or other mechanisms, as appropriate, to ensure that persons in need of international protection are identified and granted such protection; No. 82 (XLVIII), 1997, which reiterates, in light of these challenges, the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects; access, consistent with the 1951 Convention and the 1967 Protocol, of asylum-seekers to fair and effective procedures for determining status and protection needs; and, UNHCR intervention before the European Court of Human Rights in the case of *Sharifi and others v. Italy and Greece*, October 2009, Application No. 16643/09.

⁵⁶ UNHCR, Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, available at <http://www.refworld.org/docid/3d60f5557.html>

⁵⁷ See [5] of the UNHCR statement on the right to an effective remedy; and UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, p.28. See, also, UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12.

- b) Claims that give rise to compelling protection reasons, for example, are clearly well-founded, which can lead to expeditious grants of status of either refugee status or other complementary forms of protection.⁵⁸
64. Rather than implementing accelerated procedures in the circumstances listed above (ie abusive/manifestly unfounded claims or compelling protection grounds), the proposed fast track assessment process applies to asylum-seekers who arrive by sea in Australia without valid visas on or after 13 August 2012 (albeit this may be expanded to include, for example, asylum-seekers who arrive by air).
65. It is further proposed that these so-called ‘Fast Track Applicants’ may be excluded from the fast track review process and review by the Refugee Review Tribunal if:
- a) In the opinion of the Minister the Fast Track Applicant:
- i. holds a nationality or a right to enter and reside in a safe third country and therefore can access protection elsewhere; or
 - ii. has previously made a valid protection visa application in Australia which was refused or withdrawn and have subsequently re-entered and been refused protection as a Fast Track Applicant; or
 - iii. has made a claim for protection in a country other than Australia, that was refused by that country; or
 - iv. has made a claim for protection in a country other than Australia that was refused by UNHCR in that country; or
 - v. makes a manifestly unfounded claim for protection; or
 - vi. without reasonable explanation provides, gives or presents a bogus document to DIBP in support of his or her claims; or
- b) The Fast Track Applicant is included individually in a class of persons who are specified in a legislative instrument made by the Minister.
66. These asylum-seekers are denied access to even an accelerated procedure of review (with very limited opportunity to seek review from the Administrative Appeals Tribunal or the judiciary), denying them access to due process and procedural fairness. Furthermore, the Minister is given discretion to decide who should not have access to any form of review and thereby be deemed an Excluded Fast Track Applicant.
67. In UNHCR’s view, access to the fast track procedure should not be on the basis that an asylum-seeker’s protection claim was refused by another country or by UNHCR. This fails to take account of changed circumstances that may have arisen or the varying quality of decision making in different jurisdictions. In particular, some countries with very limited resources and appropriately trained decision makers may be ill-equipped to conduct refugee status determinations and may incorrectly deny refugee status, which may also be the case with the Australian first instance decision maker.
68. Also, to exclude asylum-seekers on the basis that they have provided bogus documents is not appropriate. UNHCR acknowledges that an asylum-seeker has a duty to ‘tell the

⁵⁸ See para 7 of the UNHCR statement on the right to an effective remedy; UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, pp.57-58.

truth and assist the examiner to the full in establishing the facts of his case⁵⁹ and a duty to co-operate with authorities to establish his/her identity. However, while recognizing the importance of establishing the identity of applicants and the need (and indeed the obligation) for applicants to co-operate in establishing their identity, the proposed amendments may otherwise raise serious concerns. In UNHCR's experience, asylum-seekers are often compelled to have recourse to false or fraudulent documentation when leaving a country (if they fear for their safety and/or freedom or do not have the ability to obtain their identity documents), or to dispose of their identity documentation (in fear of being returned and particularly if instructed to do so by smugglers).⁶⁰ To then deny them review or appeal procedures would amount to a failure to provide due process and would be interpreted as a penalty contrary to Article 31 of the 1951 Convention.

69. It is unclear what would be considered a 'reasonable explanation' for providing the bogus document or the destruction documentary evidence. In general, if the overall credibility of the claim is established,⁶¹ the asylum-seeker should, unless there are good reasons to the contrary, be given the benefit of the doubt with regard to those statements which are not susceptible to proof.⁶²
70. Finally, UNHCR is of the view that it is entirely inappropriate to subject children and individuals with complex claims to the fast track procedures.
71. In relation to child asylum-seekers, ExCom has called on States to:

*utilize, within the framework of the respective child protection systems, appropriate procedures for the determination of the child's best interests, which facilitate adequate child participation without discrimination, where the views of the child are given due weight in accordance with age and maturity, where decision makers with relevant areas of expertise are involved, and where there is a balancing of all relevant factors in order to assess the best option.*⁶³

(ii) Failure to implement key procedural fairness safeguards

72. In relation to a key procedural safeguard, this includes the right to appeal a negative decision and an effective remedy that is an internationally accepted standard of due

⁵⁹ Handbook [205].

⁶⁰ Indeed, the drafters of the 1951 Refugee Convention were aware of these challenges: Articles 27 and 31(1) explicitly acknowledge that persons may be forced to flee or to enter and stay in a territory without the requisite authorization, which would include the use of fraudulent, false or expired documentation. Article 27 requires Contracting States to issue identity papers to any refugee in their territory who does not possess a valid identity document; while Article 31(1) prohibits the penalization of refugees for their illegal entry or stay, which would include the use of fraudulent, false or expired documents.

⁶¹ This will be the case when all available evidence on the material elements of the claim has been obtained and checked, or if needed produced by the examiner, and the examiner is satisfied as to the applicant's general credibility. The applicant must have made a general effort to substantiate the claim and his/her statements must be coherent and plausible, must not run counter to generally known facts, and are therefore, on balance, capable of being believed. See UNHCR Handbook, [196], [203] and [204]. See also UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998.

⁶² Handbook [196], [203].

⁶³ ExCom Conclusion on *Children at Risk*, 5 October 2007, No. 107 (LVIII) – 2007 [(e)], [(g) (viii)] which recommended States, UNHCR and other relevant agencies and parties to:

'develop child and gender-sensitive national asylum procedures, where feasible, and UNHCR status determination procedures with adapted procedures including relevant evidentiary requirements, prioritized processing of unaccompanied and separated child asylum-seekers, qualified free legal or other representation for unaccompanied and separated children, and consider an age and gender-sensitive application of the 1951 Convention...'

process or procedural fairness.⁶⁴ In this regard, the right of an asylum-seeker to appeal against a negative first instance decision is a fundamental safeguard to guard against *non-refoulement* under the 1951 Convention.

73. The Bill proposes that establishment of the Immigration Assessment Authority (IAA) to carry out the fast track procedures if the Minister refers the decision to the IAA (an asylum-seeker is prevented from applying directly). UNHCR has a number of concerns in respect of the procedures to be carried out by this body.
74. First, the IAA is not required to accept or request any new information from the asylum-seeker and must not consider any new information unless it is satisfied that there are exceptional circumstances and such information was not and could not be put before the Minister at first instance.⁶⁵
75. UNHCR considers that for a remedy to be effective, it must allow access to a tribunal or court (independent from the first instance decision making body) as reflected in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and those appeal procedures must allow consideration of issues of law and fact.
76. The Explanatory Memorandum explains that '[a] fast track review applicant has had ample opportunities to present their claims and supporting evidence to justify their request to international protection throughout the decision making process and before a primary decision is made on their application' (see [893] and [920]). However, the requirement for an appeal body to consider both law and fact is a key procedural safeguard for a number of reasons including:
- a) Facts or evidence may not be raised in the course of the first instance decision due to, for example, a failure of the asylum-seeker to understand the significance of certain facts to his/her claim or the need to provide them (an increased likelihood as the vast majority of asylum-seekers are no longer entitled to access IAAAS scheme);
 - b) the first instance decision maker during the personal interview may not have addressed the issue or elicited the particular information;
 - c) trauma, shame or other inhibitions may have prevented full oral testimony by the asylum-seeker in the previous examination procedure, particularly in the case of survivors of torture, sexual violence and persecution on the grounds of sexuality;⁶⁶
 - d) the lack of a gender-appropriate interview and/or interpreter may have inhibited the asylum-seeker⁶⁷
 - e) the situation in the country of origin may have changed and a well-founded fear of persecution or a real risk of suffering serious harm may be based on events which have taken place in the country of origin since the first instance examination of the application.⁶⁸

⁶⁴ UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* op.cit. [41].

⁶⁵ New information is defined as any document or information that was not before the Minister when the Minister made the decision under section 64 and the Authority considers may be relevant (see proposed subsection 473DC(1) and [850] of the Explanatory Memorandum).

⁶⁶ Improving asylum procedures: Comparative analysis of recommendations for law and practice at p. 466.

⁶⁷ Improving asylum procedures: Comparative analysis of recommendations for law and practice at p. 466.

⁶⁸ Improving asylum procedures: Comparative analysis of recommendations for law and practice at p. 467.

77. It is therefore critical that where the facts are in dispute, the appeal authority is able to establish all the relevant facts and assess all the relevant evidence at the time it takes the decision.
78. Secondly, the IAA does not hold a hearing. In the view of UNHCR, a fundamental right and key procedural safeguard to an effective remedy includes the entitlement to a fair hearing. Any accelerated asylum procedure, must respect minimum procedural safeguards both in law and in practice including, *inter alia*, to be given the opportunity of a personal interview.⁶⁹
79. As a general rule, asylum-seekers should be given the opportunity to present their claims in person during an appeal. Removing the possibility of an appeal authority to decide to conduct an oral hearing would be to remove an important safeguard. Where the personal credibility of the applicant is at issue, the opportunity for the appeal authority to hear from and gain a personal impression of the asylum-seeker is particularly important.⁷⁰ The decision of the appeal authority as to whether to allow an oral hearing should be guided by a number of factors, including but not limited to whether adequate standards of due process or procedural fairness were applied at first instance, a fully reasoned decision was issued, and/or the applicant was given the opportunity to counter any negative credibility issues or variations in facts presented during the first instance hearing or interview. Conversely, factors that may guide decision not to allow an oral hearing would include where the applicant's credibility is not at issues and s/he is not seeking to present new information or evidence relevant to the case; all relevant evidence has been presented and considered; the determination of the facts, including decisions to accept or reject particular evidence, is supported by the first instance interview and decision; and the first instance decision is based on a clearly correct application of the refugee criteria to the accepted facts. These would need to be assessed on a case-by-case basis.
80. Thirdly, the Bill proposes to introduce a provision that limits natural justice requirements, to put beyond doubt that the IAA is not required to give a Fast Track Applicant any material that was before the Minister for comment.
81. Fourthly, if the IAA reaffirms a negative first instance decision, the Minister may issue a conclusive certificate so that the decision may not be reviewed by the IAA if the Minister believes that:
- a) it would be contrary to the national interest to change the decision; or
 - b) it would be contrary to the national interest for the decision to be reviewed.
82. The need to process asylum applications in a rapid and efficient manner cannot and should not prevail over the effective exercise of the prohibition of *refoulement*.⁷¹
- D. Capping number of protection visas**
83. The proposed amendments allow the Minister to place a limit on the maximum number of protection visas that may be granted in a specified financial year, determine that

⁶⁹ UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures [12].

⁷⁰ UNHCR Asylum Processes - UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* [43].

⁷¹ See also Parliamentary Assembly of the Council of Europe Resolution on accelerated asylum procedures, which states that Member States should ensure a balance between the need to process asylum applications in a rapid and efficient manner and the need to ensure there is no compromise over international obligations including under the Refugee Convention and the ECHR. Council of Europe: Parliamentary Assembly, Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States, [8.1], 17 October 2005, 1471 (2005), at: <http://www.unhcr.org/refworld/docid/43f349e04.html>.

dealing with applications for visas of a specified class is to stop until a day specified in the notice, or suspend the processing of visa applications.⁷²

84. The Explanatory Memorandum indicates that it is necessary ‘to place a statutory cap on the number of protection visas granted in a programme year in order to ensure that the onshore component of the Humanitarian programme is appropriately managed.’ It is further suggested that despite any cap on the grant of protection visas, the processing of applications would continue and, where relevant, ‘the Minister can consider alternative ways to release someone from detention if they are found to engage Australia’s protection obligations but cannot be granted a protection visa because of a cap’, for example, by the grant of a bridging visa.⁷³

85. UNHCR recalls the Explanatory Memorandum to the Bill for the *Migration Reform Act 1992* (Cth), which introduced protection visas into the Migration Act, stated that:

*A protection visa is intended to be the mechanism by which Australia offers protection to persons who fall under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.*⁷⁴

86. As a Contracting State to the 1951 Convention and the 1967 Protocol, Australia has undertaken to apply the Convention rights specified by Articles 2–34 of the 1951 Convention to all persons covered by the refugee definition provided by Article 1.

87. It is UNHCR’s view that as soon as an individual is recognized as a refugee he or she should be entitled to a visa regularizing his or her stay, which allows the individual to access their rights under the 1951 Convention. Any measures to impede access to such rights or a visa which guarantees access to such rights, including by the grant of an interim (bridging) visa which does not provide a refugee with a full entitlement to Convention rights, is inconsistent with the 1951 Convention.

Recommendation 8: UNHCR recommends the deletion of the proposed amendments which operate to limit the entitlement of a Convention refugee to the rights and obligations specified in Articles 2-34 of the 1951 Convention.

V. PART 2 – PROPOSED AMENDMENTS TO THE *MARITIME POWERS ACT 2007*

88. The MPA governs the powers of the Commonwealth concerning enforcement of maritime law within and beyond Australian waters (‘maritime powers’).

A. International law and *non-refoulement*

89. UNHCR welcomes the statement in the Explanatory Memorandum that the executive government remains accountable to the international community for its compliance with its international obligations.⁷⁵ The Bill nevertheless seeks to limit the role of

⁷² Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, ss 84-85.

⁷³ Explanatory Memorandum, op.cit. [1477]-[1479]. See, also, Attachment A: Statement of Compatibility with Human Rights, 31-32.

⁷⁴ Ibid. [26].

⁷⁵ Item 1 on p 17 states that the amendment to s7 does not change the need to give effect to international obligations and that the executive government remains accountable internationally. However, the interpretation and application of those obligations is to be a matter for the executive. Para [17] also reiterates that the

international law in maritime enforcement operations by removing reference to limitations on maritime powers imposed by international law and to provide that an authorization to exercise maritime powers shall not be considered invalid because the international obligations of Australia (or the international obligations and domestic laws of foreign States) were breached, were not considered, or were considered defectively.

90. While States have the sovereign right to manage their borders, such measures must conform with international obligations to refugees, asylum-seekers and stateless persons.⁷⁶
91. In particular, a State must ensure compliance with the fundamental principle of *non-refoulement*, enshrined in Article 33(1) of the 1951 Convention and crystallized into a customary norm of international law, which prohibits States from expelling or returning (*refouling*) a refugee in any manner whatsoever to a territory where he or she would be at risk of persecution. The prohibition on *refoulement* applies to all refugees, including those who have not been formally recognized as such, and to asylum-seekers whose status has not yet been determined.⁷⁷
92. This *non-refoulement* obligation operates wherever a State exercises jurisdiction, including through exercising ‘effective control’ over a person. In the case of maritime interceptions of asylum-seeker vessels, a State’s exercise of jurisdiction will engage the *non-refoulement* obligation, irrespective of whether the vessel is within or outside that State’s territorial waters.⁷⁸ This extra-territorial application of Article 33(1) of the 1951 Convention is also consistent with Australia’s extraterritorial obligations of *non-refoulement* in Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Articles 7 and 9 of the ICCPR.⁷⁹
93. The proposed amendments noted above allow maritime powers to be exercised and considered valid even if they are in breach of Australia’s international obligations. The Vienna Convention requires that a State implement its treaty obligations in good faith.⁸⁰
94. The Bill also proposes that the Minister may give directions as to the exercise of maritime powers, with the only condition being that the Minister thinks the direction to be in the national interest, which is undefined. In accordance with the principles

government takes its international obligations seriously and that appropriate measures are always put in place to make sure that they are respected. This point is repeated at [86] on p 27.

⁷⁶ UNHCR, *Global Initiative on Protection at Sea* (2014) p 3; UNHCR, *Intervention before the European Court of Human Rights in the case of Hirsi & Ors v Italy* (2011) para [4.3.4]; ExCom, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach* (2000) paras [19], [34(a)-(b)]; ExCom, *Conclusion No. 97* (LIV), ‘Conclusion on Protection Safeguards in Interception Measures’ (2003) para [a].

⁷⁷ UNHCR, *Note on the Principle of Non-refoulement* (1997); UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing* (2010) para [13]; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention* (2007) para [6] (‘Advisory Opinion’); UNHCR, *Intervention before the European Court of Human Rights in the case of Hirsi & Ors v Italy* (2011) paras [4.1.2], [4.3.1]; ExCom, *Conclusion No 6* (XXVIII) (1977) para [c].

⁷⁸ See UNHCR, *Advisory Opinion* (2007); ExCom, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach* (2000) para [23]; UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing* (2010) paras [9]-[12].

⁷⁹ For the extraterritorial obligations under these provisions, see: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 180 [111]; *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168, 242-243 [216]; Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2 (2008) para [16]; UN Human Rights Committee (HRC), *General comment no. 31* [80], *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13.

⁸⁰ *Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331 Art 26.

above and Australia's duty to fulfil its international obligations in good faith, UNHCR notes that in any exercise of maritime powers, international obligations should also be an explicit consideration.

95. Finally, the Bill provides that certain maritime powers are not subject to, or limited by, the *Migration Act 1958* (Cth). UNHCR considers that in the context of maritime interceptions, there is a significant likelihood of protection issues arising. The consideration of these issues (necessarily under the *Migration Act*) should not be considered distinct from the exercise of maritime powers under the MPA.⁸¹

Recommendation 9: UNHCR recommends the deletion of the proposed amendments which allow maritime powers to be considered valid under Australian legislation even if in breach of Australia's international obligations.

B. Transfer of persons to third countries

96. Section 72(4) of the MPA currently allows a person to be taken to a place inside or outside Australia's migration zone. The Bill provides that this power may be exercised to take a person to another country, whether or not Australia has an agreement or arrangement with that country relating to the vessel (and persons on board the vessel) and irrespective of the international obligations or domestic laws of that country.
97. It is UNHCR's position that asylum-seekers and refugees should be ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them.⁸² Maritime powers, such as that contained in s 72(4), should not be used by a State to avoid this responsibility. Given the practical difficulties of identifying and processing asylum-seekers' claims on board a vessel, this process is most appropriately carried out on land.⁸³
98. If a State proposes to take or send a person to a third country prior to a determination of that person's need for protection, the State must ensure that the persons transferred: (i) will be admitted to the third country; (ii) will enjoy protection against refoulement there; (iii) will have the ability to seek and enjoy asylum; and (iv) will be treated in accordance with accepted international standards. This process should ordinarily be regulated by a legal agreement or arrangement.⁸⁴

⁸¹ Para [116] of the Explanatory Memorandum states that this section is introduced to refute a (potential) argument that the MPA is limited in its ability to transfer persons, because the Migration Act has regional processing provisions which have similar outcomes (and, presumably, should be used in preference to the MPA where protection obligations are engaged).

⁸² UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (2013) para [1]; UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing* (2010) [2].

⁸³ UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (2002) para [23]; ExCom, *Conclusion No. 23 (XXXII)* (1981) para [3]; UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing* (2010), [55]-[59].

⁸⁴ UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing* (2010) paras [18], [35]; UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (2013); UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (2002) [20]; UNHCR, *Global Initiative on Protection at Sea* (2014) p. 2; UNHCR, *Submissions in the High Court of Australia in the case of CPCF v Minister for Immigration & Anor* (2014) para [44].

99. The insertion of section 75C into the MPA allows transfers of asylum-seekers to be effected without safeguards in relation to these conditions being in place (whether in the form of guarantees or legal obligations).
100. It is not enough to merely assume that an asylum-seeker would be treated in conformity with these standards; review of the actual practice of a State in complying with international standards is required.⁸⁵ The obligation to ensure that conditions in the receiving State meet these requirements rests with the transferring State and is not extinguished upon the transfer being effected. At a minimum, the transferring State remains bound by the *non-refoulement* obligation even after the conclusion of the transfer.⁸⁶

Recommendation 10: UNHCR recommends the deletion of the proposed amendments to the MPA to allow transfers of asylum-seekers to take place without appropriate safeguards being in place under Australian legislation.

C. Natural justice

101. The Bill proposes to insert two new provisions which expressly render the rules of natural justice inapplicable to the exercise of certain maritime powers (including powers to detain persons and take them to a third country).
102. The *non-refoulement* obligation includes a duty on the part of a State to inquire into whether a person may face a risk of persecution in the territory to which return is contemplated. State authorities should allow potential asylum-seekers an effective opportunity to express their wish to seek international protection.⁸⁷ UNHCR is concerned that without the right to such natural justice procedures, asylum-seekers and refugees are at greater risk of *refoulement*, contrary to Article 33(1).

Recommendation 11: UNHCR recommends the deletion of the proposed amendments which render the rules of natural justice inapplicable to the exercise of certain maritime powers under Australian legislation.

D. Detention at sea

103. Currently, sections 69 and 72 of the MPA allow a person to be detained on a vessel, until it is taken to a port or other place. The Bill amends the operation of these provisions by the insertion of new sections 69A and 72A. These clauses allow detention under sections 69 and 72 to continue for so long as is reasonably required

⁸⁵ UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (2013) [3]. This is accepted in Europe (*MSS v Belgium and Greece*, European Court of Human Rights, Application No 30696/09) and Hong Kong (*Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013).

⁸⁶ UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (2013) [4]; UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing* (2010) [23].

⁸⁷ UNHCR, *Intervention before the European Court of Human Rights in the case of Hirsi & Ors v Italy* (2011) para [4.3.4]; UNHCR, *Advisory Opinion* (2007) para [8].

- for certain logistical matters to be arranged (such as deciding the vessel's destination, allowing for travel time and arranging disembarkation). Proposed section 69A(3) provides that the time taken to organize logistical matters will not be considered in determining the 28-day limit to which detention under section 69 is limited (by s 87).
104. Furthermore, proposed section 75C will provide that the place to which a person or vessel is taken need not be a country and may be 'just outside' a country.
 105. Detention of asylum-seekers should ordinarily be avoided and used only as a last resort. As seeking asylum is not an unlawful act, any restrictions on liberty should be provided for by law, carefully circumscribed and subject to prompt review. Detention should only be used where it pursues a legitimate purpose and has been determined to be both necessary and proportionate to the circumstances of each individual case.
 106. These requirements are set out in UNHCR's *Detention Guidelines* (2012). They are also obligations binding on Australia as a State party to the ICCPR, Article 9 of which prohibits arbitrary detention. Furthermore, Article 37 of the *Convention on the Rights of the Child* (1989) requires that detention of children be used only as a measure of last resort and for the shortest appropriate period of time.
 107. Detention which is open-ended may be considered arbitrary.
 108. Furthermore, detention should be subject to periodic and independent judicial review to determine its legality and continued propriety.⁸⁸ Absent such procedural safeguards, detention may become arbitrary, even if initially acceptable. UNHCR recommends that the Bill include provision for those detained under the MPA to have prompt access to judicial review concerning the legality of their detention.
 109. The Bill proposes to make the new powers under sections 75D, 75F and 75H immune from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). UNHCR considers that the gravity of decisions made under these provisions, including powers to detain and remove to a third country, indicate that they should be subject to judicial review in line with the ancient writ of habeas corpus.
 110. The Bill also allows a person to be detained in a 'particular place' on a vessel. UNHCR notes that Australia is bound under Article 10 of the ICCPR to ensure that conditions of detention are humane. This requirement has also been reinforced by ExCom, which has recommended that all persons intercepted by State authorities be treated, at all times, in a humane manner respectful of human rights.⁸⁹ Any such 'place' of detention must meet this minimum standard and allow access to medical treatment and legal representation.⁹⁰

Recommendation 12: UNHCR recommends the deletion of the proposed amendments to make the new powers to detain and remove immune from judicial review.

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31 October 2014

⁸⁸ UNHCR, *Detention Guidelines* (2012) para [47(iii)].

⁸⁹ ExCom, *Conclusion No. 97* (LIV), 'Conclusion on Protection Safeguards in Interception Measures' (2003) para [a].

⁹⁰ UNHCR, *Detention Guidelines* (2012) paras [47(ii) and 48].