



***Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014***  
**Senate Legal and Constitutional Affairs Legislation Committee**

**Submission by the Office of the United Nations High Commissioner for Refugees**  
**12 August 2014**

**SUMMARY OF UNHCR’S RECOMMENDATIONS**

**Recommendation 1:**

Delete or amend proposed subsection 5AAA(4) to make clear that while the burden of proof in principle rests on the applicant, there is a shared duty to ascertain and evaluate all the relevant facts between the Minister and the applicant.

**Recommendation 2:**

Amend proposed subsection 423A(2) to specify that the Tribunal may draw an inference unfavourable to the credibility of the claim or evidence if the Tribunal is satisfied that the applicant does not have a reasonable explanation for why the claim was not raised, or the evidence was not presented, before the primary decision was made.

**Recommendation 3:**

Amend proposed section 91WA to clarify that a failure to provide documents will be a matter to be determined in each case, bearing in mind that an applicant should only be required to make an effort to support his or her statements by any available evidence and only needs to adduce evidence to the extent practically possible. Recognition of the particular situation of stateless persons and an exception accommodating their circumstances should be included.

**Recommendation 4:**

UNHCR recommends against the adoption of proposed section 6A, which defines the standard of proof required in respect of assessing Australia’s *non-refoulement* protection obligations under the ICCPR and the CAT as ‘more likely than not’.

## 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 (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 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 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 intend to:
  - a) make clear that it is an asylum-seeker's responsibility to specify the particulars of their claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish their claim by inserting a new s 5AAA (see section II below);
  - b) provide for the Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to the credibility of claims or evidence that are raised or presented by a protection visa applicant at the review stage for the first time by inserting a new s 423A, if the applicant has no reasonable explanation to justify why those claims and evidence were not raised before a primary decision was made (see section III below);
  - c) insert a new s 91WA which provides that the Minister must refuse to grant a protection visa if: (a) the applicant provides a bogus document as evidence of his/her identity, nationality or citizenship; or (b) the Minister is satisfied that the applicant: (i) destroyed or disposed of documentary evidence of the applicant's identity, nationality, or citizenship; or (ii) has caused such documentary evidence to be destroyed or disposed of. However, the Minister must not refuse to grant the protection visa on those grounds if the Minister is satisfied that: (a) the applicant has a reasonable explanation for providing the bogus document or the destruction or disposal of the documentary evidence; and (b) either: (i) provides documentary evidence of his/her identity, nationality or citizenship; or (ii) has taken reasonable steps to provide such evidence (see section IV below); and
  - d) define the risk threshold for assessing Australia's protection obligations under the *1966 International Covenant on Civil and Political Rights* (ICCPR)<sup>1</sup> and the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)<sup>2</sup> by inserting a new section 6A (see section V below).<sup>3</sup>

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<sup>1</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>2</sup> UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : resolution / adopted by the General Assembly*, 10 December 1984, United Nations, Treaty Series, vol. 1465 UNTS p. 112.

<sup>3</sup> Migration Amendment (Protection and Other Measures) Bill 2014, *Explanatory Memorandum*, page 1.

## II. UNHCR'S AUTHORITY

4. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly (UNGA) with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.<sup>4</sup>
5. As set forth in its 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."<sup>5</sup>
6. UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees* (the 1951 Refugee Convention)<sup>6</sup> according to which State parties undertake 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).<sup>7</sup>
7. UNHCR also has stipulated responsibilities for refugees who are stateless, pursuant to paragraphs 6(A)(II) of the Statute and Article 1(A)(2) of the 1951 Refugee Convention, both of which specifically refer to stateless persons who meet the refugee criteria. Moreover, in accordance with UNGA resolutions 3274 XXIX<sup>8</sup> and 31/36<sup>9</sup>, UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness*<sup>10</sup>, as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UNGA further entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.<sup>11</sup>
8. The UNGA, UN Economic and Social Council and UNHCR's Executive Committee (ExCom), of which Australia is a member, have extended UNHCR's competence by empowering UNHCR to protect and assist particular groups of people whose circumstances do not necessarily meet the definition of the 1951 Convention.

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<sup>4</sup> See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 ("Statute").

<sup>5</sup> *Ibid.*, para. 8(a).

<sup>6</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>7</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

<sup>8</sup> UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).

<sup>9</sup> UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.

<sup>10</sup> UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

<sup>11</sup> 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.

9. 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.'*<sup>12</sup>

10. 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.
11. Australia is a Contracting Party to the 1951 Refugee Convention and its 1967 Protocol, the ICCPR and the CAT, and a founding member of ExCom.

### **III. ASYLUM-SEEKERS' RESPONSIBILITY IN RELATION TO PRESENTING THEIR CLAIMS**

12. The 1951 Refugee 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 administrative structure, and in accordance with procedural safeguards established in line with international human rights law. In examining claims to refugee status, the particular situation of asylum-seekers needs to be kept in mind and consideration given to the ultimate objective of refugee status determination as being humanitarian and non-political.<sup>13</sup>
13. In relation to where the burden of proof lies in respect of refugee claims, 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* (UNHCR Handbook)<sup>14</sup> explicitly states at [196] that 'while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.'<sup>15</sup>
14. This shared duty applies due to the fact that an applicant for refugee status is normally in a particularly vulnerable situation. Given the particular reasons motivating refugee movements, a person fleeing from persecution is often compelled to leave with only the barest necessities and very frequently without personal documents.<sup>16</sup>

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<sup>12</sup> 2005 ExCom Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection (no103 (LVI)), para. (p).

<sup>13</sup> See [5] of the Preamble to the 1951 Refugee Convention and Article 2 of the Statute.

<sup>14</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, HCR/IP/4/Eng/REV.1 (UNHCR Handbook).

<sup>15</sup> UNHCR notes with concern the misinterpretation in the *Statement of Compatibility with Human Rights* prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011: Migration Amendment (Protection and Other Measures) Bill 2014*, 3 (Statement) of UNHCR's position on the shared burden of proof. The Statement incorrectly asserts that the proposed amendment is 'Consistent with requirements in other resettlement countries, and guidelines from the United Nations High Commissioner for Refugees.'

<sup>16</sup> UNHCR Handbook [196]; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, 17.

15. At present, the Migration Act does not explicitly assign the burden of proof to either the asylum-seeker or the Minister. The Bill proposes to insert a new s 5AAA which provides at subsection (2) that it is the responsibility of an applicant for a protection visa to specify all particulars of the claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish the claim. UNHCR considers an asylum-seeker has an obligation to give a truthful account of facts relevant to his/her claim so far as these are within his/her own knowledge, and insofar as there is information that is available to him/her and which he/she can reasonably be expected to provide to the decision-maker. As far as the amendment supports this position, it is acceptable to UNHCR.
16. However, UNHCR is concerned that subsection 5AAA(4) provides that ‘To remove doubt, the Minister does not have any responsibility or obligation to specify, or assist in specifying, any particulars of an [applicant’s] claim or establish, or assist in establishing, the claim.’
17. As noted, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the decision-maker. The proposed insertion of subsection 5AAA(4) raises concerns regarding the fairness of the assessment of claims to refugee status, given the particular situation that asylum-seekers find themselves in, which is an alien environment, often without relevant documents, where they may experience serious difficulties, technical and psychological, in submitting their case to the authorities of a foreign country, often in a language that is not their own.<sup>17</sup> He or she may also have experienced traumatic events, particularly with authorities, and may feel apprehensive about interacting with authority figures.<sup>18</sup> Likewise he or she may be vulnerable in others ways, including as a result of being a child, elderly, female or disabled. In the current Australian asylum system, such difficulties may be exacerbated further where asylum-seekers are unable to access legal and/or migration assistance, due to the removal of Immigration Advice and Application Assistance Scheme support for those who arrived in and entered Australia without a valid visa, other than those deemed to be the most vulnerable.<sup>19</sup>
18. Due to these factors, it is UNHCR’s long-held view, supported widely by state practice, that it is incumbent upon the decision-maker to use the means at his/her disposal to produce the necessary evidence in relation to the application. This may not, however, always be successful and there may also be elements that are not susceptible of proof. In such circumstances, if the applicant has made a genuine effort to substantiate his/her claim, all available evidence has been obtained and checked and the examiner is satisfied as to the applicant's general credibility, the applicant should, unless there are good reasons to the contrary, be given the benefit of the doubt. The requirement of evidence should thus not be too strictly applied in view of the difficulty inherent in the special situation in which an applicant for refugee status finds herself/himself.<sup>20</sup> For these reasons UNHCR recommends that subsection 5AAA(4) is either deleted or

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<sup>17</sup> UNHCR Handbook [190].

<sup>18</sup> UNHCR Handbook [196], [198].

<sup>19</sup> DIBP, *Fact Sheet 63 – Immigration Advice and Application Assistance Scheme*, available at <https://www.immi.gov.au/media/fact-sheets/63advice.htm>

<sup>20</sup> See UNHCR Handbook [195] and UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998.

amended to make clear that, while the burden of proof in principle rests on the applicant, there is a shared duty to ascertain and evaluate all the relevant facts between the Minister and the applicant.

**Recommendation 1:**

Delete or amend proposed subsection 5AAA(4) to make clear that while the burden of proof in principle rests on the applicant, there is a shared duty to ascertain and evaluate all the relevant facts between the Minister and the applicant.

**IV. RRT TO DRAW UNFAVOURABLE CREDIBILITY INFERENCE WHERE APPLICANT HAS NO REASONABLE EXPLANATION TO JUSTIFY WHY NEW CLAIMS OR EVIDENCE NOT PREVIOUSLY RAISED AT FIRST INSTANCE**

19. UNHCR recognizes and supports the need for efficient asylum procedures, which are in the interests both of applicants and of states. To this end, UNHCR notes the value of procedures that address clearly abusive or fraudulent claims, where those procedures respect minimum procedural safeguards, both in law and in practice.<sup>21</sup>
20. The proposed s 423A provides that the RRT decision-maker ‘is to’ draw an unfavourable inference in respect of an asylum-seeker’s credibility if the decision-maker is satisfied that the applicant does not have a reasonable explanation why either a claim was not raised, or evidence was not presented, before the application was refused at first instance.
21. The second reading speech notes that proposed s 423A:

“...will not prevent asylum seekers raising late claims where there were good reasons why they could not do so earlier. What this amendment seeks to prevent are those non-genuine asylum seekers who attempt to exploit the independent merits review process by presenting new claims or evidence to bolster their original unsuccessful claims only after they learn why they were not found to be refugees by the department.”
22. In principle, UNHCR supports the stated intention of this proposed amendment in so far as it is designed to act as a procedural mechanism to prevent claims that may be clearly abusive or fraudulent, thereby promoting the fairness and efficiency of Australia’s asylum system.
23. UNHCR considers that, upon assessing the circumstances of the case as a whole, including whether there is or is not a reasonable explanation, the decision-maker should have discretion to determine whether it would be fair and appropriate to draw an unfavourable inference as to an applicant’s credibility, rather than being compelled to do so. In this regard, UNHCR considers it desirable that the provision be amended so that

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<sup>21</sup> Excom, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983.

the decision-maker ‘may’ draw an unfavourable inference, rather than the current drafting which provides a decision-maker ‘is to’ draw such an inference.

24. To assist RRT decision-makers, UNHCR recommends that, if the provision is enacted, RRT decision-makers be provided with clear available guidance as to what is considered a ‘reasonable explanation’. The decision-maker should be directed to ask for an explanation as to why the claim was not raised, or the evidence was not presented, before the primary decision was made, and to then formally assess whether that explanation is considered ‘reasonable’, and record the reasons for such an assessment. Such a requirement is a necessary safeguard to ensure that asylum-seekers are given the opportunity to provide an explanation to the decision-maker. This is particularly pertinent due to the fact that, other than the most vulnerable, asylum-seekers are no longer eligible to receive funded legal and/or migration assistance in respect of applying for asylum, if they arrived in and entered Australia without a valid visa and may not put forward such an explanation, unless prompted by the decision-maker.<sup>22</sup>
25. Such guidance will assist with promoting the fairness, consistency and transparency of RRT decision-making in the circumstances raised by s 423A.
26. In terms of assessing whether an explanation is reasonable, RRT decision-makers would need to take into account any individual and contextual circumstances of an asylum-seeker, along with relevant country of origin information, which may explain why a claim was not raised or evidence was not presented at first instance.<sup>23</sup> Indeed, UNHCR recommends that ‘reasonable explanation’ be interpreted to mean not only the oral explanation provided by the applicant, but also whether the RRT decision-maker has, through his or her own inquiries, found any circumstances or information which may give rise to a reasonable explanation.
27. For example, those who have suffered traumatic events may seek to avoid thinking and talking about an event and/or situations that might trigger a recall.<sup>24</sup> Therefore, it may be reasonable that the claims related to those events were not raised and/or evidence presented at first instance. Similarly, people who have fled persecution for reasons of sexual orientation and/or gender identity may not initially disclose the real grounds for their application due to feelings of shame and fear of stigma.<sup>25</sup>
28. Other reasonable explanations as to why claims may not have been raised or evidence presented at first instance include where there are changed circumstances or conditions in

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<sup>22</sup> DIBP, *Fact Sheet 63 – Immigration Advice and Application Assistance Scheme*, <https://www.immi.gov.au/media/fact-sheets/63advice.htm>

<sup>23</sup> UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems : Full Report*, May 2013, 56.

<sup>24</sup> J Herlihy, L Jobson, S Turner, ‘Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum’, *Applied Cognitive Psychology*, vol. 26, no. 5, 2012, pp 661-76; American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (4<sup>th</sup> edn.), Washington DC: American Psychiatric Association, 1994.

<sup>25</sup> Research shows that stigma, a sense and/or a fear of rejection by one’s family and community, can inhibit disclosure of relevant information. D Bogner, J Herily, C Brewin, ‘Impact of Sexual Violence on Disclosure during Home Office Interviews’, *British Journal of Psychiatry*, vol. 191, no. 1, 2007, p 75. In particular, asylum-seekers applying for international protection based on gender, sexual and gender-based violence, or their sexual orientation and/or their gender identity may feel ashamed and/or fearful of rejection by family and community. See further UNHCR, *Guidelines No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its Protocol relating to the Status of Refugees*; UNHCR (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.

the country of origin, or in relation to the applicant's circumstances, or where new country of origin information has become available that is pertinent to the case at hand.

**Recommendation 2:**

Amend proposed subsection 423A(2) to specify that the Tribunal may draw an inference unfavourable to the credibility of the claim or evidence if the Tribunal is satisfied that the applicant does not have a reasonable explanation for why the claim was not raised, or the evidence was not presented, before the primary decision was made.

**V. PROTECTION VISA REFUSAL WHEN APPLICANTS REFUSE TO ESTABLISH OR PROVIDE DOCUMENTATION IN RESPECT OF THEIR IDENTITY, NATIONALITY, CITIZENSHIP WITHOUT PROVIDING A REASONABLE EXPLANATION AND HAS NOT TAKEN REASONABLE STEPS**

29. UNHCR's view is that an asylum-seeker has a duty to 'tell the truth and assist the examiner to the full in establishing the facts of his case'.<sup>26</sup> An asylum-seeker thus has a duty to co-operate with authorities to establish his/her identity and/or to provide sufficient information concerning the claims that have been raised.
30. However, this obligation must be considered in light of the fact that a person fleeing from persecution will often have arrived with the barest necessities and very frequently without personal documents, including identity documents, or with fraudulent, false or expired documents in order to be able to travel. This is situation that was indeed anticipated by the drafters of the 1951 Refugee Convention (see paragraph 35 below). In some instances, asylum-seekers may also destroy their identity documentation, though this may be at the compulsion of smugglers.
31. The Bill proposes to amend the Migration Act by inserting s 91WA which provides that the Minister must refuse to grant a protection visa if: (a) the applicant provides a bogus document as evidence of his/her identity, nationality or citizenship; or (b) the Minister is satisfied that the applicant: (i) destroyed or disposed of documentary evidence of the applicant's identity, nationality, or citizenship; or (ii) has caused such documentary evidence to be destroyed or disposed of. However, the Minister must not refuse to grant the protection visa on those grounds if the Minister is satisfied that: (a) the applicant has a reasonable explanation for providing the bogus document or the destruction or disposal of the documentary evidence; and (b) either: (i) provides documentary evidence of his/her identity, nationality or citizenship; or (ii) has taken reasonable steps to provide such evidence.
32. In so far as this proposed amendment attempts to address challenges that arise when an applicant refuses to co-operate with a decision-maker (without reasonable explanation) and fails to discharge his/her duty to supply all relevant information, including information about his or her identity, nationality or citizenship at his/her disposal the amendment is not problematic. Non-cooperation can undermine the applicant's overall

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<sup>26</sup> UNHCR Handbook [205].



credibility and/or cause serious difficulties in substantiating the claim, potentially giving rise to legitimate reasons to reject an application for a protection visa.<sup>27</sup>

33. However, while recognising 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).
34. Research conducted by UNHCR has found in some instances that decision-makers often wrongly assume that those in need of international protection will:
  - a) know in advance of flight from the country of origin, or place of habitual residence, that documentary or other evidence will be relevant if he or she applies for international protection in another country;
  - b) not place trust in the advice of agents or others (including smugglers or traffickers) – but will place trust in national authorities; and/or
  - c) not willingly dispose of or surrender any documentary or other evidence unless subject to coercion or force.<sup>28</sup>
35. Such assumptions raise empirical questions about how people actually behave when fleeing in fear and how they decide whom to trust.<sup>29</sup> 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 authorisation, 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.
36. UNHCR is further concerned that the application of s 91WA(2) will be particularly problematic in practice as it is unclear what would be considered a 'reasonable explanation' for providing the bogus document or the destruction or disposal of the documentary evidence and also when it would be considered that an applicant has taken 'reasonable steps' to provide such evidence, so that the Minister is not mandatorily required to refuse a protection visa. The interpretation of 'reasonable explanation' and 'reasonable steps' has very serious implications for applicants, and should therefore be approached with care.
37. To illustrate some of the challenges, it would be unreasonable to expect a female

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<sup>27</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 36, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

<sup>28</sup> UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems : Full Report*, May 2013, available at: <http://www.refworld.org/docid/519b1fb54.html>, 94.

<sup>29</sup> Especially after extreme experiences such as torture, which is designed to break down a person's ability to trust another. S Turner, 'Torture, refuge and trust', in D E Valentine and J C Knudsen (eds), *Mistrusting Refugees*, Berkley: University of California Press, 1995.

applicant to submit certain identification documentation if, for instance, she has no access to identity documents and other relevant documentary evidence because the country of origin, or place of habitual residence, does not afford women access to such documentation. Likewise, stateless refugees, by the very fact of their statelessness, are frequently not in a position to establish their identity through documentation, and in fact their lack of any nationality recognized by any State, may be the basis for their claim to international protection.

38. Refugee determination authorities need to take into account that asylum-seekers are often unable to substantiate their claim with much, if any, documentary evidence and, where appropriate, give sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence.<sup>30</sup> Further, they are usually not in a position to contact their consulate or embassy to obtain such documents.
39. In such circumstances, the individual's own testimony is the primary and often the only source of evidence. There may be circumstances in which the applicant may not be able to give a 'reasonable explanation' because they are unable to articulate such an explanation, for the same reasons as are outlined above (paragraph 17 above), and which include specific vulnerabilities of the applicant.
40. In general, if the overall credibility of the claim is established,<sup>31</sup> the asylum-seeker should, unless there are good reasons to the contrary, as indicated above, be given the benefit of the doubt with regard to those statements which are not susceptible to proof.<sup>32</sup>
41. Although an individual is under a duty to cooperate with the authorities by providing documentary evidence, particularly in relation to identity, the question of whether the failure to provide such information reflects an absence of good faith will be a matter to be determined in each case. In this regard, an applicant is only required to make a reasonable effort to support his or her statements by any available evidence and only needs to adduce evidence to the extent practically possible.<sup>33</sup>

### **Recommendation 3:**

Amend proposed section 91WA to clarify that a failure to provide documents will be a matter to be determined in each case, bearing in mind that an applicant should only be required to make an effort to support his or her statements by any available evidence and only needs to adduce evidence to the extent practically possible. Recognition of the particular situation of stateless persons and an exception accommodating their circumstances should be included.

<sup>30</sup> Further flexibility is also warranted where it is difficult for individuals to obtain documents originating from a foreign authority properly notarized or fixed with official seals.

<sup>31</sup> 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.

<sup>32</sup> UNHCR Handbook [196], [203].

<sup>33</sup> UNHCR Handbook [205(a)(ii)]

## VI. DEFINE THE RISK THRESHOLD IN RELATION TO AUSTRALIA'S *NON-REFOULEMENT* OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

42. In relation to refugee status claims, the standard of proof applied by many Convention States,<sup>34</sup> and also UNHCR, is whether the applicant's fear of persecution should be considered well-founded if he or she 'can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable' or, in other words, there is a 'reasonable possibility' of persecution upon return.<sup>35</sup> There is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is 'more probable than not'.<sup>36</sup>
43. The Bill proposes to define the standard of proof in respect of assessing Australia's *non-refoulement* protection obligations under the ICCPR and the CAT. The proposed standard of proof is that the Minister can only be satisfied that Australia has protection obligations under the CAT and ICCPR if the Minister considers that it is 'more likely than not' that the non-citizen will suffer significant harm if removed from Australia to a receiving country. The Explanatory Memorandum of the Bill states that this new test would require that there would be greater than a 50 per cent chance that an applicant would suffer significant harm in the country of origin; a threshold similar to the civil law standard of proof of 'on the balance of possibilities'.<sup>37</sup>
44. Article 3 of the CAT prohibits the return to 'another State where there are substantial grounds for believing that [they] would be in danger of being subjected to torture'. No exceptional circumstances (such as war, political instability or any other public emergency) can be used as justification for torture.<sup>38</sup> Torture is defined under article 1 of the CAT as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for a specific purpose.
45. Under the ICCPR, Article 6 protects the inherent right to life and Article 7 provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. The UN Human Rights Committee has commented that States Parties to the ICCPR must not remove people in such circumstances 'where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed...'.<sup>39</sup>
46. The standard of proof applied by the UN Human Rights Committee is 'real risk' which is very similar as the standard of proof applied in respect of refugee claims which is 'reasonable possibility'. Conversely, the Bill proposes a higher threshold than 'real risk' or 'reasonable possibility' which is 'more probable than not'; greater than a 50 per cent chance that an applicant would suffer significant harm if returned.

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<sup>34</sup> See the Annex to the UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998.

<sup>35</sup> UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998 [8]; UNHCR Handbook [42]

<sup>36</sup> UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998 [17]

<sup>37</sup> 2013-2014, The Parliament of the Commonwealth of Australia, House of Representatives, *Migration Amendment (Protection and other Measures) Bill 2014, Explanatory Memorandum*, [18].

<sup>38</sup> UN Committee against Torture (CAT), *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 21 November 1997, A/53/44.

<sup>39</sup> United Nations Human Rights Committee, '*General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*', adopted 29 March 2004.

47. In view of the absolute prohibition on torture or cruel, inhuman and degrading treatment and punishment, and on the arbitrary deprivation of life, and the very serious repercussions if an applicant is returned to such serious human rights violations, as well as the similarity of difficulties facing applicants in obtaining evidence and recounting their experiences to refugees, UNHCR is of the view that there is no basis for adopting a stricter approach to assess the risk of harm in cases of complementary protection than there is for refugee protection, and that the standard of proof 'more likely than not' is inappropriate.

**Recommendation 4:**

UNHCR recommends against the adoption of proposed section 6A, which defines the standard of proof required in respect of assessing Australia's *non-refoulement* protection obligations under the ICCPR and the CAT as 'more likely than not'.

*UNHCR Regional Representation in Canberra*  
*12 August 2014*