UNHCR
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UNHCR Submission

Administrative Review Reform: Issues Paper

Designing a new federal administrative review body that is user-focused, efficient, accessible, independent and fair

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I. What are the most important principles that should guide the approach to a new federal administrative review body?

The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide input into to the government of Australia's reform of Australia's system of administrative review. UNHCR welcomes the Reform and offers relevant guidance, limited to its particular expertise and mandate. UNHCR acknowledges the difficulties inherent in the assessment of claims for refugee status and recognizes and supports the need for fair and efficient asylum procedures, which are in the interests of both applicants and States. UNHCR considers that there are important core principles in establishing and maintaining fair and effective national asylum systems that uphold protection principles and are able to respond effectively to operational challenges. These principles and observations are based on international standards, relevant UNHCR doctrine, global good State practice, previous advocacy, and current UNHCR operational engagement in Australia and in other parts of the world.

The concept of the rule of law is central to a fair and efficient asylum system. Protection systems grounded in the rule of law offer legal certainty in the application of rules, as well as accountability, equity and transparency. They are built on legal and policy frameworks that meet international standards and are administered by impartial and properly trained officials, supported by a functioning judiciary and other accountability structures. Such a system should demonstrate fairness, efficiency, adaptability and integrity. Moreover, such a system should establish mechanisms to allow access for all persons seeking protection, and for the fair and efficient assessment of their claims, without discrimination (including with respect to mode or manner of arrival). The 1951 Refugee Convention defines those to whom international protection is to be conferred and establishes key principles such as non-penalisation of irregular entry and non-refoulement. Whilst it does not set out procedures for the determination of refugee status as such, as a general rule, processes and procedures should aim to demonstrate fairness, efficiency, adaptability and integrity.[1]

Procedures that incorporate core principles and key procedural standards promote

[1] UNHCR, RSD Procedural Standards Unit 4: Adjudication of Refugee Status Claims, p. 11, available at: https://www.refworld.org/docid/5e87075d0.html.

consistency in decision-making are essential for the integrity of national asylum systems based on the rule of law.[2] While not an exhaustive list, the core due process standards listed below are essential for an asylum system so that it is in line with international standards that are fundamental to maintaining the fairness, efficiency, and integrity of the process.[3]

The right to be heard with due process guarantees and within a reasonable time is a core procedural standard. As a general rule, the right to be heard requires that an applicant should have the opportunity to present their claim in person. Common exceptions to this rule include refugee claims where there is a high presumption of inclusion, and the applicant may be recognized based on information from registration or other available sources.

The right of an applicant to receive information regarding the asylum process, including in a language they understand, is another core due process standard. Effective access to information, including a right to notification and a motivated decision for negative decisions, enables applicants to make informed decisions throughout the process and raises awareness of what consequences each decision may entail. It may further prevent the lodging of unfounded and/or subsequent applications, thus promoting the efficiency of the system.

Providing accessible, reliable, and high-quality government funded legal aid and legal representation is instrumental in establishing fair and transparent asylum procedures. Provision of legal aid and legal representation can go a long way in strengthening the quality of decision-making and can contribute to the efficiency of the refugee status determination (RSD) process, as it can strengthen an applicant's understanding of the process, lower the number of appeals and subsequent applications, and shorten adjudication timelines. High-quality legal representation can also discourage the submission of false claims by dispelling misguided or exploitative information, and thus also contributes to the efficiency and expediency of the asylum process.

For example, Argentina's Commission for Global Assistance and Protection of Refugees and Asylum Seekers not only assists applicants for asylum and stateless status within the framework of the determination procedure, both in the first instance and in the administrative and judicial appeal instances which has shown that comprehensive free legal assistance (especially early in the procedure) is critical in ensuring access to justice for asylum-seekers and contributes to improving the

[2] UNHCR, A guide to international refugee protection and building state asylum systems, 2017, Handbook for Parliamentarians N° 27, available at: www.refworld.org/docid/5a9d57554.html.
[3] UNHCR, Effective processing of asylum applications: Practical considerations and practices, March 2022, available at: https://www.refworld.org/docid/6241b39b4.html. See also UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, available at: https://www.refworld.org/docid/5cb474b27.html.

holistic quality of the asylum procedure.[4] For example, in Switzerland, the provision of timely access to information, counselling, and legal representation by a lawyer of a non-governmental organization has improved applicants' trust in the system as well as led to an improved understanding of the process and their rights, and obligations from an early stage, allowing for a better understanding of the process and what is expected. The provision of information also gives a more realistic view to applicants of their chances in the asylum process. Additionally, the fact that such information is provided by non-governmental actors has proven to increase the acceptance of the information provided.[5]

The right of an asylum applicant to an effective remedy or to be able to appeal a decision, is a core due process standard in promoting the fairness and integrity of an asylum system and central to protecting the right to seek and enjoy asylum from persecution and the principle of non-refoulement. The remedy needs to be available in practice as well as in law, meaning, for instance, that the applicant must have sufficient time to lodge an appeal and prepare the appeal, even if in detention. Access to an appeal should not be restricted for reasons related to procedural irregularities or because of the perceived merits of the claim.

II. Should all members be required to be legally qualified to be eligible for appointment?

While States have the primary responsibility for determining refugee status, UNHCR conducts refugee status determination (RSD) in countries and territories that are not party to the 1951 Convention, or which have not yet established the legal and institutional framework to support an RSD process. The Procedural Standards for RSD under UNHCR's Mandate establishes core principles and standards to ensure that all asylum-seekers benefit from accurate, timely and consistent decision-making.

These UNHCR procedural standards are capable of being equally applicable to the functions and responsibilities of States, albeit as minimum procedural standards. Thus, under these standards, decision-makers should hold a degree in a relevant field, preferably in law, international relations or political sciences. It is also recommended that they have had legal training and/or other relevant professional experience. Training and/or experience in the field of human rights, psychology or social work is an advantage. Moreover, they should at a minimum possess the following aptitudes, skills and qualifications:

- Legal knowledge and the ability to apply legal principles[6]
- Good research and analytical skills

[4] UNHCR, Asylum Capacity Support Group (ACSG), Argentina: Advice and legal representation for asylum-seekers, refugees, and stateless persons, Good practice in legal aid, available at: https://acsg-portal.org/tools/argentina-advice-and-legal-representation-for-asylum-seekers-refugees-and-stateless-persons/.
[5] UNHCR, Effective processing of asylum applications: Practical considerations and practices, March 2022, available at: https://www.refworld.org/docid/6241b39b4.html.
[6] This requirement should not be equated to the possession of a law degree or a professional legal qualification.

- Good oral and written communication skills
- Strong interpersonal skills, including the ability to work as part of a team
- Age, gender, cultural and diversity awareness and sensitivity
- The ability to work effectively under stress.[7]

Before carrying out RSD responsibilities each decision-maker should receive a comprehensive RSD induction training, which should cover both theoretical and practical aspects of conducting RSD. In addition, the review body should establish a program for continuing training and professional development for decision-makers. Decision-makers should understand and be alert to signs of compassion fatigue, vicarious trauma and burnout that may negatively affect the quality of interviews or assessments as well as the well-being of the staff concerned.[8]

For example, under its Quality Assurance Framework for Decision-Making, the Immigration and Refugee Board of Canada (IRB) has developed staffing strategies and tools to enable merit-based recruitment. During the hiring process, applicants must successfully complete a written exam and an interview that are tailored to measure decision-making ability, alongside other necessary qualities, such as judgment and reasoning, information-seeking and self-control. A reference check and background check or security clearance are also administered to verify the Candidate's suitability for the member position. Values and ethics are assessed as part of the hiring process, and any isolated or specific conflict-of-interest considerations are addressed throughout the hiring process and on an ongoing basis. The staffing strategy is responsive to data trends, such as determining the predicted number of applications needed to fill a set number of positions. Moreover, the IRB has established a 'New Member Training' project, which runs an approximately seven-weeks training to ensure all new members have standardized approach to conducting hearings and rendering decisions.[9]

III. What is the value of members holding specific expertise relevant to the matters they determine? Should the new body set particular criteria for subject-matter expertise (alongside more general qualifications)?

While not specifically a position on the value of members holding specific expertise relevant to the matters they determine, UNHCR would underline the need for application of appropriate evidence specific to asylum decision-making, particularly as it relates to Country of origin (COI) information.

To this end, the new body should consider how COI information supports decision making. COI that is relied on by decision-makers on review should provide accurate,

[7] UNHCR, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, 26 August 2020, p. 140, available at: https://www.refworld.org/docid/5e870b254.html.
[8] Ibid.
[9] For more information see Quality Assurance Framework for Decision-Making, Part 3, available at: https://irb.gc.ca/en/transparency/qa-aq/Pages/qaf-caq.aspx. See also current eligibility criteria for IRB Refugee Protection Division Member vacancies at: https://emploisfp-psjobs.cfp-psc.gc.ca/psrs-srfp/applicant/page1800?poster=1905922.

impartial and up-to-date knowledge of the asylum-seeker's country of origin or habitual residence, of its laws and their application in practice and enable the decision-maker to make an informed, independent, and accurate assessment of each case.[10] COI and, where available, UNHCR country guidance including UNHCR's Eligibility Guidelines, International Protection Considerations and Positions on Return should be used to inform decisions. In all cases, timely, relevant, and reliable COI needs to be considered.[11]

The ACCORD Researching Country of Origin Information: Training Manual notes that COI quality standards have been developed to ensure that COI can contribute to fair and efficient procedures.[12] Together, these standards and principles help those who research and rely on COI to reach the maximum possible objectivity.[13] Relevantly, a COI product is only transparent if every piece of information is referenced, enabling readers to independently verify and assess the information provided.[14] It is also important to emphasise that no general hierarchy of sources exists.[15]

Of concern to UNHCR currently is the 'Ministerial Direction No.56 – Consideration of Protection Visa applications', issued by former Minister O'Connor on 21 June 2013, which requires decision-makers, including at administrative review, to take account of certain country information assessments prepared by the Australian Department of Foreign Affairs and Trade (DFAT), where relevant for protection status determination purposes. While a decision maker is not precluded from considering other relevant information about the country, DFAT country information reports have been the subject of significant criticism. For example, ARC, an internationally recognised source of expertise on COI methodologies has been critical of the DFAT Country Information Report on Sri Lanka as it considers it diverges from some of the accepted principles and standards of COI such as relevance, reliability, balance, neutrality, accuracy, currency, traceability and transparency.[16] In

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[10] UNHCR, A guide to international refugee protection and building state asylum systems, 2017, Handbook for Parliamentarians N° 27, available at: https://www.refworld.org/docid/5a9d57554.html.
[11] The COI database endorsed by UNHCR is ecoi.net, which is managed by Austria Centre for Country of Origin & Asylum Research and Documentation (ACCORD). It contains COI from primary sources, as well as COI compilations commissioned by UNHCR to its partner organizations ACCORD and Asylum Research Centre (ARC), as well as COI compilations prepared by other organizations such as European Union Agency for Asylum (EUAA) and the COI units of individual countries of asylum.
[12] Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), Researching Country of Origin Information: Training Manual, October 2013, available at: https://www.refworld.org/docid/5273a56b4.html. The quality standards "relevance", "reliability and balance", "accuracy and currency" and "transparency and traceability" rest on the basic principles of "impartiality and neutrality", "equality of arms as regards access to information", "using public information" and "data protection".
[13] Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), Researching Country of Origin Information: Training Manual, October 2013, p.30, available at: https://www.refworld.org/docid/5273a56b4.html.
[14] Ibid. p.35.
[15] European Asylum Support Office, Judicial practical guide on country of origin information, 2018, https://www.easo.europa.eu/sites/default/files/judicial-practical-guide-coi_en.pdf
[16] ARC, Comments on the Australian Government Department of Foreign Affairs and Trade's (DFAT) Country Information Report on Sri Lanka of 4 November 2019, July 2020, available at: https://www.ecoi.net/en/file/local/2036164/ARC-Comments-on-DFAT-SL-report_July-2020.pdf.

its July 2020 report it noted several and significant deviations from the internationally accepted standards and principles.[17] UNHCR echoes these concerns and strongly urges the Government to repeal this Ministerial instruction for all levels of decision-making.

IV. How should the legislation empower the new body to manage and respond to issues relating to member performance and conduct?

In terms of assessing human resources and staffing needs, many national asylum systems have established benchmarks and targets to measure productivity. While this can be a useful way of assessing productivity, it is imperative to also consider operational factors and requirements that influence the processing capacity of decisionmakers. It is important to acknowledge that unreasonable case processing targets can lead to stress and burn-out among personnel, which can result in increased sick leave, absenteeism, and personnel turnover. These factors will have a detrimental impact on staff well-being, but they will also have a negative impact on the quality of decisions and overall efficiency in terms of system output over time.[18]

V. How can the new body ensure that application methods and processes are accessible to all those seeking review? What should be the time limits for making an application? Should these be consistent across all matters? In what circumstances should the new body be able to grant an extension of time or set the date of effect of a decision?

The right of an asylum applicant to an effective remedy or to be able to appeal a decision, is a core due process standard in promoting the fairness and integrity of an asylum system and central to protecting the right to seek and enjoy asylum from persecution and the principle of non-refoulement. The remedy needs to be available in practice as well as in law, meaning, for instance, that the applicant must have sufficient time to lodge an appeal and prepare the appeal, even if in detention. The UNHCR Canberra Office conducts regular detention monitoring and has observed first-hand the impediments for people in detention in accessing processes and meeting inflexible timeframes. UNHCR supports flexibility regarding timing for

[17] These principles are laid down by the European Union Common EU Guidelines for Processing Country of Origin Information, the Austrian Red Cross/Austrian Centre for Country-of-Origin Information and ACCORD Researching COI Training Manual (2013 Edition), and the International Association for Refugee Law Judges Judicial Criteria for Assessing Country of Origin Information.

[18] In the last years, an increasing number of academic researchers have presented findings related to stress on cognitive functioning in high intensity situations, including among health staff and humanitarian and aid works and personnel involved in individual case processing, such as RSD. See available information: University of York, The protection of human rights defenders at risk, available at: www.york.ac.uk/research/impact/protection-of-hrds/: Thesis submitted to the University of Nottingham for the degree of Doctor of Philosophy, by Liza Jachsen (B.Soc.SC,M.a.); Job stress among humanitarian aid workers, from February 2018, available at: https://bit.ly/3Acxc7y; War trauma foundation, Building resilience and preventing burnout among aid workers in Palestine: a personal account of mindfulness based staff care, https://bit.ly/34i0ZX1; Journal of Pain and Symptom Management: Article on Building Resilience for Palliative Care Clinicians: An Approach to Burnout Prevention Based on Individual Skills and Workplace Factor (by Anthony L. Black, Karen E. Steinhauser, Arif H. Kamal Vicki A. Jackson), 2016, available at: https://bit.ly/3g6mxbS.

seeking review and supports processes, including legal representation, that ensure vulnerable applicants, including those in detention, are able to access effective remedy.

VI. What powers or procedures should be available to expedite the resolution of matters? Are there specific types of matter which could benefit from expedited review processes?

Protracted processing will result in asylum-seekers waiting several years for a final determination of their claim without meaningful access to rights. For some, it will also likely lead to a deterioration of physical and mental health over time, for which concessions and accommodations will need to be made.[19] Protracted backlogs and prolonged delays in the determination of asylum claims can erode public confidence in the asylum system and impede efforts to return those determined not to be in need of international protection. UNHCR emphasises the importance of States maintaining quality asylum systems that are efficient and adaptable, while also upholding fairness and integrity of processing. Sacrificing key procedural safeguards and/or setting short time limits or numerical targets may result in flawed decisions which will defeat the objective of a fair and efficient asylum procedure.

Against this backdrop, it is important to make reference to Australia's fast track review mechanism, in the form of the Immigration Assessment Authority (IAA). In UNHCR's view, the swiftness with which the IAA can finalize cases has come at a cost; for key procedural safeguards are absent from the review process. For instance, its accelerated review process denies asylum-seekers the opportunity to attend a review hearing and the review authority can only consider new information that was not before the first instance decision-maker in exceptional circumstances. This has resulted in consistently high rejection rates, especially for particular nationalities, since commencement.[20] Moreover, the fast-track merits review process is not available to all those who receive a negative outcome at the primary stage. As at 31 December 2022, 89 persons had been found to be excluded from any form of merits review, many on the basis that their protection claims had been refused by a country other than Australia, despite the passage of time and any new protection claims that may have emerged in the interim.[21] Others have been excluded because they have used a bogus document without reasonable explanation in support of their application.[22] Some have subsequently been involuntarily returned to their country of origin of former residence, including Afghanistan and Sri Lanka.[23]

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[19] UNHCR, Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process, November 2017, available at: https://www.refworld.org/docid/5ae2d74d4.html.l– 2018, available at: www.refworld.org/docid/5b589eef4.html.
[20] Immigration Assessment Authority, Statistics, available at: https://www.iaa.gov.au/about/statistics.
[21] Department of Home Affairs, Supplementary Budget Estimates, 13-14 February 2023, Response to question taken on notice, Question SE23-524, available at: https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2022-23_Supplementary_budget_estimates.
[22] "Excluded fast track review applicant" is defined in s 5 Migration Act 1958.
[23] Ibid.

There are a variety of strategies or mechanisms that States can utilise to make improvements to the efficiency and adaptability of their asylum systems, without compromising fairness or integrity. For instance, triaging is an important caseload management tool that can strengthen the response and reduce strains on systems. Triaging entails a mapping of the asylum-seeking population and an analysis of caseloads by country of origin and specific profiles, taking overall protection rates (granting of protection) and timely, reliable and relevant COI for such profiles into careful consideration. For both caseloads and profiles with high or low protection rates, triaging and differentiated case processing modalities, including simplified and accelerated refugee status determination (RSD) processes, can be applied. Procedural case management approaches can be used or developed to help streamline and speed up the determination of an asylum-seeker's international protection needs whether at the primary or review stage.[24] Accelerated and simplified procedures might be well suited to caseloads or profiles with high or low protection rates, such as where claims are likely to be 'manifestly well-founded'[25], 'manifestly unfounded'[26] and/or cases with a 'presumption of inclusion'.[27] Such procedures might also be appropriate when claims are made by applicants with specific needs or by those manifestly in need of a protection intervention. These approaches must still afford applicants all the procedural safeguards required to have a fair determination of their claim, and to be heard, in accordance with international standards.

An additional or alternative approach would be to conduct simplified interviews or hearings that focus only on the core elements of the claim such as nationality, area of origin, ethnicity or religion or other protected characteristics. The personal interview/hearing remains nonetheless crucial as it provides the applicant with an opportunity to explain comprehensively and directly to the authorities the reasons

[24] See also; UNHCR, Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under U'HCR's Mandate (The Glossary), 2020, available at: https://www.refworld.org/docid/5a2657e44.html

[25] Manifestly well-founded refers to an asylum claim, which, on its face, clearly indicates that the individual meets the criteria for refugee status or a complementary form of international protection. This may be because the individual falls into the category of people for which a presumption of inclusion applies or because of particular facts arising in the individual's application for international protection. Such cases will normally have very high protection rates and can be streamed through simplified and/or accelerated procedures.

[26] Manifestly unfounded claims are defined as covering applications for refugee status or complementary forms of international protection "clearly not related to the criteria for refugee status" or another international protection status, or which are "clearly fraudulent or abusive." It should be noted that only if the applicant makes what appears to be false allegations of a material or substantive nature relevant for the determination of his or her status and the claim clearly does not contain other elements which warrant further examination, could the claim be considered "clearly fraudulent". Such cases will have very low protection rates and can be streamed through accelerated procedures, and if there are homogenous claims, through simplified procedures.

[27] Presumption of inclusion (or presumption of eligibility) may be said to exist where the objective evidence on the situation in the country of origin indicates that applicants with a particular profile will likely meet the eligibility criteria in Article 1A (2) of the 1951 Refugee Convention and/or broader refugee criteria and/or criteria for complementary forms of international protection. A presumption of inclusion is rebuttable, so it does not mean that every applicant within the profile or belonging to a specified group will automatically be recognized as a refugee or otherwise be in need of international protection. However, caseloads or profiles with a presumption of inclusion will usually have very high protection rates and are often processed through prima facie, simplified and/or accelerated procedures.

for seeking asylum and gives the determining authority the opportunity to establish, as far as possible, all the relevant facts and to assess the credibility of the oral evidence.[28]
For example, Immigration and Refugee board of Canada (IRB) contributes to high quality administrative justice by allocating the appropriate level of resources to the matter being decided. This allows the RPD to use its resources as efficiently and effectively as possible while the parties who appear before it benefit from a more efficient resolution of their cases. The IRB's Refugee Protection Division (RPD), the first-instance refugee status determination (RSD) body in Canada has two separate processes for finalizing less complex claims: the short-hearing process and the file-review process. These processes, described in the Instructions Governing the Streaming of Less Complex Claims at the Refugee Protection Division, aim to allocate an amount of preparation and hearing room time that is proportionate to the complexity of each unique claim. [29] The RPD can, in specific circumstances, accept a claim for refugee protection without a hearing. Accepting a claim without a hearing is called the file-review process, and it allows RPD decision-makers to accept the claim after a review of the evidence in the file, which includes confirmation of security screening, the Basis of Claim Form, identity documents and other relevant evidence and submissions. This process focuses on those claims that appear to be manifestly founded on initial review and that can be fairly determined without allocating the necessary resources for a hearing.

Under certain circumstances, the RPD may decide a claim for refugee protection after a short, focused hearing. A refugee protection claim that is suitable for the short-hearing process has only one or two issues which appear to be determinative of the claim. The hearing of such a claim can usually be concluded within two hours. Country and claim types that are considered appropriate for processing under the file-review process may also be processed under the short-hearing process.[30] Further examples of global good practice are provided in UNHCR's Effective processing of asylum applications: Practical considerations and practices.[31]

VII. What should be the requirements and timeframes for issuing oral and written reasons for decision in the new body?

As noted at Question 1 of this survey, the right of an applicant to receive information regarding the asylum process, including in a language they understand, is core due process standard. Effective access to information, including a right to notification

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[28] Ibid., p. 10. See also: UNHCR, Effective processing of asylum applications: Practical considerations and practices, March 2022, available at: https://www.refworld.org/docid/6241b39b4.html; UNHCR, UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union, 25 July 2018, available at: https://www.refworld.org/docid/5b589eef4.html.
[29] Immigration and Refugee Board of Canada, Instructions governing the streaming of less complex claims at the Refugee Protection Division, available at: https://irb.gc.ca/en/legal-policy/policies/Pages/instructions-less-complex-claims.aspx.
[30] Asylum Capacity Support Group(ACSG), Canada: The short-hearing and file-review processes, Good practice: Procedures Design, available at: https://acsg-portal.org/tools/canada-less-complex-claims-the-short-hearing-and-file-review-processes/.
[31] (UNHCR), Effective processing of asylum applications: Practical considerations and practices, March 2022, available at: https://www.refworld.org/docid/6241b39b4.html.

and a motivated decision for negative decisions, enables applicants to make informed decisions throughout the process and raises awareness of what consequences each decision may entail. It may further prevent the lodging of unfounded and/or subsequent applications, thus promoting the efficiency of the system.

VIII. What services would assist parties to fully participate in processes under the new body and improve the user experience? Which of these services should be provided by departments and agencies, by the new body and by other organisations?

Interpreters play a crucial, yet often underestimated role in asylum interviews/hearings. An asylum applicant who does not speak the language of the country of asylum will be reliant on an interpreter to present their claim accurately. Similarly, if the decision-maker is to assess the applicant's claim effectively and fairly, they have to rely on the interpreter to facilitate communication.

UNHCR promotes the use of trained and qualified interpreters in asylum and related interviews.[32] The critical nature of these situations calls for a well-trained and professional interpreter who has the requisite linguistic, cultural, and technical skills and is aware of their role and the responsibility they bear towards the other parties involved. To that end, it is important that interpreters are appointed on the strength of their language skills but also have specific training for the asylum situation.

Key matters to consider in engaging interpreters for asylum and refugee matters are:

- confidence by the applicant in the interpreter;
- comfort with the interpreter, including ensuring there is no conflict of interest;
- the existence of an exploitative relationship; and
- cultural, religious or ethnic biases or the gender of the interpreter.

If the applicant does not understand the language or dialect of the interpretation, or if the decision-maker has concerns regarding the quality of interpretation, the conduct/behaviour of the interpreter, or any other factors that are likely to affect disclosure, the decision-maker should stop the hearing and address such concerns with the interpreter and the applicant immediately.

In addition, as noted at Question 1, providing accessible, reliable, and high-quality government funded legal aid and legal representation is instrumental in establishing fair and transparent asylum procedures. Provision of legal aid and legal representation can go a long way in strengthening the quality of decision-making and can contribute to the efficiency of the refugee status determination (RSD) process, as it can strengthen an applicant's understanding of the process, lower the

[32] UNHCR, Handbook for Interpreters in Asylum Procedures, 2022, available at: https://www.refworld.org/docid/59c8b3be4.html.

number of appeals and subsequent applications, and shorten adjudication timelines. High-quality legal representation can also discourage the submission of false claims by dispelling misguided or exploitative information, and thus also contributes to the efficiency and expediency of the asylum process.

IX. How can the new body protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse? For example, what special processes may be needed in relation to information protection, participation in dispute resolution and hearings for at-risk applicants?

Asylum-seekers have been recognized as a particularly underprivileged and vulnerable population group in need of special protection.[33] Amongst them are asylum-seekers who have additional vulnerabilities as a result of their age, gender or other characteristics, or their traumatic experiences in the country of origin or in the course of flight, or as a result of a combination of these factors.
Asylum-seekers who are likely to be particularly vulnerable include children, unaccompanied and separated children/ adolescents, older persons, pregnant women or girls, single parents with minor children, victims (or potential victims) of trafficking, persons with diverse sexual orientation and/or gender identity, persons with physical and mental disabilities, stateless persons, members of ethnic and religious minorities, indigenous peoples, victims/survivors of torture, rape or other serious forms of psychological, physical or sexual abuse, and traumatized persons. Such persons may have specific needs during the asylum procedure and decision-makers need to be aware and take account of them in their handling of the claim. Legislation and implementing regulations can usefully highlight these needs and set out measures that need to be in place to take account of them.

Several hearings may be needed, particularly for victims of sexual and gender-based violence or other forms of trauma and for children, in order to establish a relationship of trust and to obtain all necessary information. With regard to any incomplete or late disclosure, it should be understood that this may not reflect a lack of credibility. Rather, it may be the result of the asylum-seeker's inability or reluctance to recall and recount the full extent of persecution suffered or feared and/or may be due to a lack of understanding that their experience may constitute grounds for refugee status.

Specialized training is needed to enhance decision-maker's awareness of and sensitivity towards asylum-seekers' vulnerabilities and specific needs and their awareness of legal and procedural issues that apply. This can help ensure the specific needs of particularly vulnerable asylum-seekers are taken into account and enable the sensitive and flexible handling of their matter. Respect for the human dignity of all asylum-seekers should be a guiding principle at all times.

It is important to recognize that the mental state and cognitive abilities of asylum-seekers may be impaired for a range of reasons including mental illness,

[33] M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: https://www.refworld.org/cases,ECHR,4d39bc7f2.html.

psychological trauma or torture, neurological disorders, intellectual and developmental disabilities, medications affecting mental state, physical illness and chronic pain. While asylum-seekers can submit documents and other evidence to support their asylum claim, there has been a growing awareness globally that independent expert medical reports play an increasingly important role in the asylum adjudication process. Such reports establish medical facts within a legal context and require an objective examination using an approach that is different to the therapeutic context. State commissioned independent expert medical evidence can greatly assist in the fair and accurate assessment of claims made by a psychologically vulnerable applicant. In particular, such medical evidence can assist in the following:

• In deciding whether the applicant is fit to undertake an interview/hearing;
• In understanding how the applicants' reduced psychological capacity affects their ability to articulate their protection claims and respond to questions about them;
• In understanding the applicant's psychological presentation and conduct during the interview/hearing;
• In deciding what procedural modifications to the interview/hearing should be made;
• In deciding whether an apparent inconsistency, confusion or inability to remember events in relation to the applicant's evidence is explicable in terms of the applicant's mental state;
• In deciding whether the applicant's late disclosure of a claim is explicable in terms of the applicant's mental state; and
• In considering whether an applicant's psychological presentation is consistent with their claims in relation to experiences of trauma etc.[34]

Independent expert medical reports can strengthen asylum systems by enabling decision-makers to make more accurate and reliable decisions, create efficiencies by preventing unforeseen delays in processes, and support decision-makers by ensuring they have relevant and reliable evidence to perform their statutory function. In turn, this improves the well-being of decision-makers by reducing the risk of moral injury, thereby improving retention rates. Psychologically vulnerable applicants can be appropriately supported during asylum adjudication processes, thereby enabling their meaningful participation, and reliance on such evidence would bring the migration jurisdiction into line with other administrative and judicial jurisdictions and international standards of best practice.

For example, in the United Kingdom, the Helen Bamber Foundation and Freedom from Torture (FTT) are the most established organizations which prepare medico-legal reports, and their work is widely respected. Medical reports are prepared based on the Istanbul Protocol, and this is regarded as best practice and standard for experienced practitioners.[35] Referrals are considered by a panel for suitability and are

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[34] UNHCR, Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process, November 2017, available at: https://www.refworld.org/docid/5ae2d74d4.html.
[35] UN Office of the High Commissioner for Human Rights (OHCHR), Istanbul Protocol Professional Training Series No. 8/Rev. 2, Manual on the Effective Investigation and Documentation of Torture and Other Cruel,

only likely to be accepted if it is considered that a medico-legal report has the potential to make a material difference to the outcome of the claim. Reports writers from these specialist clinical organizations are accepted by the Home Office as having recognized expertise in the assessment of the physical, psychological, psychiatric, and social effects of torture or serious harm.[36]
In the Netherlands, immigration authorities can commission an extensive medical examination of an asylum-seeker during the asylum procedure, if they consider it relevant for the assessment of the asylum claim. This examination is conducted by the Netherlands Forensic Institute (NFI) or the Dutch Institute for Forensic Psychiatry and Psychology (NIFP). The NFI's examination and report addresses how medical and psychological circumstances may influence an asylum-seeker's capacity to make statements during the asylum interview, and how these circumstances relate to the credibility findings.[37]

Asylum-seekers can request to be medically examined (physically and psychologically) by an NGO, called iMMO (Institute for Human Rights and Medical Assessment). iMMO is not funded by the government and operates independently of it. iMMO can only be approached after the immigration authorities issue an (intended) rejection of the asylum application. The Dutch authorities will only reimburse the costs if the iMMO report leads to the grant of international protection.

Medico-legal reports are produced as a result of the combined effort of medical doctors and psychologists/psychiatrists. iMMO conducts a lengthy and thorough examination of the applicants' physical and psychological signs and symptoms and assesses the correlation of these with the asylum-seekers own account, using the Istanbul Protocol. In its report, iMMO also comments on whether the physical and psychological situation of the asylum-seeker might have affected their ability to tell their story in a complete, consistent and coherent manner, both in the past and in the present. The iMMO reports also provide information on whether the medical and psychological situation of an applicant is likely to interfere with their capacities to be interviewed. The authorities have accepted iMMO as being an expert in its field and every year, iMMO, issues around 100 forensic medical reports.

X. Do you have any other suggestions for the design and function of a new administrative review body?

Inhuman or Degrading Treatment or Punishment, updated 2022, available at: https://www.ohchr.org/sites/default/files/documents/publications/2022-06-29/Istanbul-Protocol_Rev2_EN.pdf

[36] See further: Freedom from Torture, Make a referral for therapy and practical help (Referrals to The Medical Foundation Medico Legal Report Service), available at: https://www.freedomfromtorture.org/help-for-survivors/medico-legal-reports; UK Home Office, Medical evidence in asylum claims, 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008966/medical-evidence-in-asylum-claims-v1.0ext.pdf

[37] See further: UNHCR, Identification of asylum seekers with special reception and procedural needs in the Dutch asylum procedure, 2018, available here: https://acmrl.org/wp-content/uploads/2018/09/Reneman_Migration-Law-Series-No-16-Final-version.pdf; Institute for Human Rights and Medical Assessment (iMMO) et al, Medical Examination in the Asylum Procedure, Manual for Health Professionals and Legal Workers, Article 18 Directive 2013/32/EU, available at: https://www.stichtingimmo.nl/wp-content/uploads/2017/12/iMMO018_Manual_Digitaal_linked.pdf.

UNHCR considers that the value of a review into an administrative review mechanism in isolation of the asylum system in which it operates will arguably be limited. Thus, UNHCR strongly urges the adoption a comprehensive and holistic reform strategy to strengthen Australia's asylum system end to end. For it is well recognized that good quality asylum processes at first instance lend greater credibility to the fairness and efficiency of the asylum system overall, including the administrative review system. Moreover, while Australia's asylum system is well-developed and sophisticated, numerous laws have been introduced, especially in recent years, that are not consistent with existing State practice and a proper interpretation of Australia's obligations under the 1951 Refugee Convention which effectively operate to restrict the availability of protection to those in need. Developing an asylum system that enables the government to fully fulfil its international obligations in good faith will require statutory reform. However, such reform would not be inconsistent with the government's National Platform which states inter alia that "Labor will treat people seeking our protection with dignity and compassion in accordance with our international obligations, the rule of law and the principles of fairness".[38]

A fair and efficient asylum system should be administered by impartial and properly trained decision-makers, but importantly also be built on legal and policy frameworks that meet international standards. The 1951 Refugee Convention affirms in its preamble that the refugee protection regime is about the 'widest possible exercise' of refugees' 'fundamental rights and freedoms'.[39] Indeed, refugees are owed international protection precisely because their human rights are under threat. 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 Refugee Convention in good faith and to implement asylum procedures to safeguard against the wrongful denial of refugee status.

Over the years, Australia has introduced numerous laws that are not consistent with existing State practice and a proper interpretation of Australia's obligations under the 1951 Refugee Convention. Leaving aside for present purposes the significant concerns that UNHCR has long held with respect to Australia's laws restricting access to asylum (especially those arriving irregularly by sea), mandatory detention, and externalisation, Australia has in recent years codified its interpretation of the 1951 Refugee Convention and narrowed the application of the refugee definition as established by Article 1A(2) of the 1951 Refugee Convention, by:

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[38] Australian Labor Party (ALP), ALP National Platform: As adopted at the 2021 Special Platform Conference, March 2021, ALP website, para 64, available at: https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf.

[39] 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 Refugee 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).

• disregarding consideration of the 'reasonableness' of the proposed area of internal flight or relocation;
• 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;
• 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;
• 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;
• concluding that a particular social group requires a cumulative, rather than alternative, application of the 'protected characteristics' and the 'social perception' approaches;
• disregarding the special protection regime established by Article 1D of the 1951 Refugee Convention and thereby requiring 'Palestinian refugees' to establish their need for international refugee protection by reference to Article 1A(2).[40]

Moreover, in UNHCR's view, the 1951 Refugee Convention provides the appropriate legal framework according to which matters relating to the conduct of a refugee may be considered, and this framework is already reflected in Australian law.[41] While these provisions limit eligibility for refugee status and the rights attaching to such status, the 'character test' contained in s 501(6) of the Migration Act operates above and beyond these provisions and bears no relation to the provisions of the 1951 Refugee Convention. Yet the character test operates in Australian law to effectively deny refugees the status and thereby access to the rights to which they are entitled.

Secure and durable legal residency status

UNHCR considers that when an asylum-seeker is recognized as a refugee in Australia (or in a regional processing country), they should be granted a secure legal residency status upon recognition. Providing refugees at a minimum with lawful stay, if not permanent residence, is a legitimate and necessary measure to enable Australia to implement its obligations under the 1951 Convention and to enable refugees to enjoy the rights to which they are entitled. A secure residency status is also one of the most effective measures States can adopt to facilitate refugees' integration, their prospects of establishing a definitive and permanent home, and assuming their role as full and equal members of society. When Australia provides for a time-limited visas that are renewable (such as in the form of temporary

[40] See further: UNHCR, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 31 October 2014, available at: available at: https://www.refworld.org/docid/58a6c42f4.html.
[41] see ss 5H(2) and 36(1C) Migration Act 1958.

protection or bridging visas), such legal residency status upon recognition is not compatible with the form of residency ultimately required for refugees to access rights, including access to naturalization and family reunification.

Similarly, when asylum-seekers are determined to be refugees on administrative review, their case is returned to the first instance decision-making authority, sometimes for determination of other domestic visa criteria including character issues. Such persons remain in legal limbo for protracted and sometimes indefinite periods of time (often in detention) while these processes conclude and in the interim, there is no legal avenue to gain access to the rights that attach to such recognition of status under international law to which refugees are entitled, separate to the visa process determinative of lawful stay arrangements.

<u>Cessation of refugee status</u>

Recognition of a person's refugee status is not limited in time.[42] It only ceases when the so-called 'cessation clauses' (under Article 1C of the 1951 Convention) are met. These articulate the conditions under which a refugee ceases to be a refugee and are based on the consideration that international protection should not be maintained where it is no longer necessary or justified. Since the application of the cessation clauses in effect operates as a formal loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation and procedures should respect the rules of fairness and natural justice.

The 1951 Refugee Convention does not envisage a loss of status triggered by domestic visa arrangements (such as through visa cancellation on character grounds), nor the imposition on refugees to periodically re-establish their refugee status – either as a result of the grant of temporary protection status or effective loss of refugee status as a result of a Ministerial determination under section 197D of the Migration Act to the effect that a person is no longer a person in respect of whom any protection finding would be made, even when such a decision is subject to administrative review.

This results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin. When a State wishes to apply the ceased circumstances clauses, the burden rests on the country of asylum to demonstrate that there has been a fundamental, stable and durable change in the country of origin and that invocation of Article 1C(5) or (6) is appropriate.

Even when circumstances have generally changed to such an extent that refugee status would no longer be necessary, the specific circumstances of individual cases may warrant continued international protection. All refugees affected by general

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[42] Refugee status may only be withdrawn on the basis of a cancellation or revocation or if the conditions for cessation of refugee status are met.

cessation must therefore have the possibility, upon request, to have such application in their case reconsidered on international protection grounds relevant to their individual case. Both the ceased circumstances clauses allow a refugee to invoke "compelling reasons arising out of previous persecution" for refusing to re-avail him- or herself of the protection of the country of origin. This exception is intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin or former habitual residence. In addition, UNCHR's Executive Committee, in Conclusion No. 69, recommends that States consider "appropriate arrangements" for persons "who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links".[43]

Single asylum procedure to incorporate obligations owed to stateless persons

The 1954 Convention relating to the Status of Stateless Persons, to which Australia is a signatory, requires States Parties to ensure a certain standard of treatment for stateless persons within their jurisdictions. Whilst the 1954 Convention establishes the international legal definition of 'stateless person' and the standards of treatment to which such individuals are entitled, it does not prescribe any mechanism to identify stateless persons as such. Yet, it is implicit in the 1954 Convention that States must identify stateless persons within their jurisdictions to provide them appropriate treatment in order to comply with their obligations. Recognition of statelessness plays an important role in enhancing respect for the human rights of stateless persons, particularly through access to a secure legal status and enjoyment of rights afforded to stateless persons under the 1954 Convention.

Many States have accordingly established statelessness determination procedures to identify individuals who meet the definition of a stateless person, and to extend to them appropriate rights and protection.[44] Establishing such procedures is the most effective and reliable means for State Parties to ensure compliance with the Convention in this regard. In recent years, there has been a marked increase in the number of States that have adopted a domestic procedure for statelessness status determination. While models vary, 'best practice' guidance is provided in UNHCR's Handbook on Protection of Stateless Persons and UNHCR's Good practices in nationality laws for the prevention and reduction of statelessness.[45] For example, in the Netherlands, the House of Representatives adopted a law establishing a statelessness determination procedure in 2022. The introduction of the procedure provides the means to determine statelessness clearly and consistently, and ensure stateless persons are protected and have access to rights. This was in line with recommendations made by UNHCR in the report Mapping on statelessness in

[43] UNHCR Executive Committee Conclusion No. 69 (XLIII) Cessation of status, (a), 1992, available at: http://www.refworld.org/docid/3ae68c431c.html.
[44] The definition of stateless person established in Article 1(1), as "a person who is not considered as a national by any State under the operation of its law", is recognized as a rule of customary international law.
[45] UNHCR, Handbook on Protection of Stateless Persons, 30 June 2014, available at: https://www.refworld.org/docid/53b676aa4.html. UNHCR, Good practices in nationality laws for the prevention and reduction of statelessness, November 2018, Handbook for Parliamentarians N° 29, available at: https://www.refworld.org/docid/5be41d524.html.

Netherlands.[46] In 2011, at the Ministerial Intergovernmental Event on Refugees and Stateless Persons held in Geneva to commemorate the anniversary of the adoption of the Refugee Convention and the 1961 Convention, Australia pledged to "better identify stateless persons and assess their claims" and to "continue to work with UNHCR, civil society and interested parties to progress this pledge."[47] However, Australia has not yet established in its national law a statelessness status determination procedure to identify stateless persons.

Some States have adopted a single procedure to examine refugee status and other international protection needs at the same time, although primacy is given to refugee status before eligibility for other complementary status is assessed. Complementary protection was introduced into Australian law by the Migration Amendment (Complementary Protection) Act 2011 (Cth) to give effect to some of Australia's international obligations arising under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.[48] The criterion in s 36(2)(aa) Migration Act 1958 (Cth) (the Migration Act) was intended to introduce greater efficiency, transparency and accountability into Australia's arrangements for adhering to its non-refoulement obligations under these instruments.[49]

Some of Australia's leading academics have advocated that a statelessness status determination in Australia should form part of a single asylum procedure.[50] Just as decision-makers first assess applicants against the refugee criteria (s 36(2)(a) of the Migration Act), and then (if found not to be a refugee) against the complementary protection grounds (s 36(2)(aa)), the final step (if the person is neither a refugee nor found to be in need of complementary protection) would be to assess the claim against the statelessness criteria. It is argued that such a process would provide a streamlined, efficient, and workable means of assessing whether a person is stateless and would not require the creation of any new institutional machinery. It would also build on the existing relevant expertise and knowledge of asylum decision-makers.[51]

In the context of Australia's support for UNHCR's Global Campaign to End Statelessness by 2024, Australia is urged to accelerate action to implement a statutory statelessness determination procedure with appeal rights to an administrative review

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[46] UNHCR, Mapping Statelessness in the Netherlands, November 2011, available at: https://www.refworld.org/docid/4eef65da2.html.
[47] UNHCR, Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011, October 2012, pp. 49-50, available at: http://www.refworld.org/docid/50aca6112.html.
[48] Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011, p. 1.
[49] Before the introduction of the criterion in s 36(2)(aa), protection on the basis of obligations arising from these instruments could only be granted under s 417 of the Act, pursuant to which the Minister may exercise a discretion to grant a visa to a non-citizen where the Minister considers it in the public interest to do so. However, that discretion could only be exercised by the Minister personally, and only after the non-citizen had been refused a protection visa by a delegate of the Minister and unsuccessfully sought administrative review.
[50] M. Foster, J. McAdam, and D. Wadley, Part One: The Protection of Stateless Persons in Australian Law — The Rationale for a Statelessness Determination Procedure, 2019, UNSWLRS 27, p. 448, available at: http://classic.austlii.edu.au/au/journals/UNSWLRS/2019/27.html.
[51] Ibid. pp.448-449.

body in its asylum system.[52] The absence of such determination procedures is impeding stateless persons accessing their basic human rights and from fully participating in society, especially stateless persons currently in protracted and indefinite immigration detention, some for up to eight years who are not engaged in any visa assessment process.[53]

[52] UNHCR, Global Action Plan to End Statelessness, 4 November 2014, available at: http://www.refworld.org/docid/545b47d64.html.

[53] As at 31 December 2022, there were 35 stateless non-citizens in held immigration detention in Australia. The average period of detention for stateless persons is 1,105 days (3 years). 5 had been in held detention for between 5 to 8 years. 8 of the 35 in held detention had not applied for a protection visa and 10 stateless persons were not engaged in any visa application process, merits review, judicial review or Ministerial intervention process. Department of Home Affairs, Supplementary Budget Estimates, 13-14 February 2023, Response to questions taken on notice, available at: https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2022-23_Supplementary_budget_estimates.