



REVIEW OF NEW ZEALAND'S IMMIGRATION ACT 1987

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

A INTRODUCTION

1. The Government of New Zealand has invited comments on the *Review of the Immigration Act 1987 and various proposals included* therein. The Office of the United Nations High Commissioner for Refugees (“UNHCR”) welcomes the opportunity to comment on the proposals insofar as they impact on New Zealand’s international obligations as they relate to asylum-seekers and refugees.
2. UNHCR welcomes the Government of New Zealand's initiative to review and further strengthen the *Immigration Act 1987* (the “Immigration Act”). In doing so, UNHCR acknowledges that domestic legal frameworks do not always enable States to adequately respond to challenges posed by increasingly complex migratory flows and changes in the global security environment. It is therefore understandable and commendable that the New Zealand Government is seeking to update its legislation and fortify the humanitarian principles of refugee protection by doing so.
3. UNHCR would welcome the opportunity to comment in further detail on the Review of the *Immigration Act* prior to implementation of any introduced changes which would be introduced.
4. UNHCR takes this opportunity to reiterate its offer to cooperate with the Government of New Zealand in developing a response to the problem of irregular arrivals including refugees, which would strike an appropriate balance between security and border control concerns - the significance of which UNHCR fully appreciates - with the Governments obligations to afford international protection.

B UNHCR STANDING TO COMMENT

5. New Zealand has accepted responsibility in extending protection to refugees through accession to the 1951 Convention. Insofar as refugees are asylum-seekers prior to their being recognized as refugees, such responsibility also extends to asylum-seekers.
6. Pursuant to its Statute¹ and the 1951 Convention, UNHCR's competence to provide for the protection of refugees extends, *inter alia*, to encouraging the development of laws and regulations concerning refugees which are consistent with international protection requirements. Art. 35 of the 1951 Convention obliges Contracting States to cooperate with UNHCR in its duty of supervising the application of the provisions of the 1951 Convention. On this basis, UNHCR is regularly requested to comment on national legislation regarding refugees and related issues by Contracting States to the 1951 Convention.
7. This submission examines the proposals under the *Review of Immigration Act 1987 Bill* in light of relevant international instruments and Conclusions of UNHCR's governing body, the Executive Committee of the High Commissioner's Programme ("ExCom"), of which New Zealand is a member.

C COMMENTS ON THE PROPOSALS

SECTION 6: EXCLUSION AND EXPULSION

Proposal (in the Discussion Paper)

260 For the reasons noted above, the status quo is not considered desirable. The approach outlined below more closely meets the objectives of this review (include health and strengthened character requirements in legislation).

6.1 Key question

Do you agree that health and character grounds for exclusion should be included in legislation?

8. UNHCR answers this key question in the negative.
9. Exclusion
Article 1F of the 1951 Convention provides the relevant guidance on the sole grounds for exclusion. The rationale for the exclusion clauses in Art. 1F is that certain acts are so grave as to render their perpetrators undeserving of the international protection as normally extended to refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection. While the exclusion clauses must be applied scrupulously to protect the integrity of the institution of asylum, at the same

¹ General Assembly Resolution 428(V), 14 December 1950: Statute of the Office of the United Nations High Commissioner for Refugees.

time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should therefore be interpreted in a restrictive manner. The exclusion clauses under Art.1F are also exhaustive. Health and character are not grounds for exclusion contemplated within the framework of Art. 1F, as they do not constitute heinous criminal acts, or crimes.

10. For exclusion to be justified, individual responsibility must be established in relation to a crime covered under Art. 1F. In general, individual responsibility flows from having committed the act, or having made a substantial contribution to it. Defenses may be raised by the individual concerned; the incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention. “Health” and “character” are not grounds which are susceptible to considerations of individual responsibility nor of proportionality.
11. Expulsion
In principle, while every state has the right to expel any non-national from its territory, such a right is circumscribed by a state’s obligations under international law, in particular human rights law. Specific provisions are applicable to non-nationals who are lawfully on the territory. With regard to refugees lawfully on the territory, expulsion to a third country is exhaustively limited under Articles 32 and 33(2) of the 1951 Convention.
12. Article 32 enumerates the permissible grounds for expulsion as “national security” and “public order”. These grounds do not permit expulsion or return (*refoulement*) to the country of origin, or to a third country where there the refugee’s life or liberty would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The *public order* exception allows the expulsion of a refugee if he/she has been convicted of crimes considered to be violations of public order. Even in cases where criminal offences are repeatedly committed, at least one of the offences should be particularly grave in order to justify expulsion. A separate finding is required to the effect that the continued presence of the offender is prejudicial to the maintenance of public order. In addition, the criminal convictions are only relevant if they indicate a present threat of reoccurrence. Since a refugee, unlike an ordinary alien, does not have a home country to return, expulsion may have particularly serious consequences, which justifies a restrictive interpretation of Art. 32.
13. The cardinal refugee protection principle of “*non-refoulement*” is provided in Art. 33(1) of the 1951 Convention. *Refoulement* under the 1951 Convention may only be justified when the stringent conditions of sub-Article (2) of Art. 33 are met. The permissible grounds for *refoulement* under Article 33(2) are limited to situations when there are reasonable grounds for regarding a

particular refugee as “a danger to the security of the country” of asylum or when he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the host community. Factors to be considered include the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, and whether most jurisdictions would consider the act in question as a serious crime. It should thus be considered that only egregious crimes warrant an exception to the *non-refoulement* principle. Additionally, conviction of a particularly serious crime in and of itself is not sufficient. The person concerned must, in view of this crime, also present a *danger to the community*. As with Article 32, this would require an assessment of the present or future danger posed by the wrong-doer.

14. Health problems, including being affected by HIV/AIDS, are not supportable by the 1951 Convention as grounds for expulsion, *a fortiori*, *refoulement*, of refugees or asylum-seekers. In relation to protection of refugees and asylum-seekers with HIV/AIDS, UNHCR’s position is that the health or HIV status of an asylum-seeker is not a legitimate reason for denying access to asylum procedures. The right to be protected against *refoulement* is the cornerstone of international refugee law and HIV status is not a ground for any exception to this principle.

15. UNHCR would like to refer the Department to the following Guidelines:

- *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (HIR/GIP/03/05) of 4 September 2003
- *Note on HIV/AIDS and the Protection of Refugees, IDPs and Other Persons of Concern*; issued 5 April 2006

Proposal (in the Discussion Paper)

289 For the reasons discussed above, the status quo does not meet the objectives of efficient and effective decision-making or transparent processes. The preferred approach is outlined below.

6.2 Key Questions

1 Do you agree that expulsion provisions should be streamlined by extending automatic liability for expulsion from unlawful stay in New Zealand to all grounds for expulsion?

2 Would a single term “expulsion” help create more understandable legislation?

3 Under the preferred option, the Minister of Immigration would have reduced role in making expulsion decisions. Do you agree with this approach?

16. UNHCR would like to reiterate the comments made in the answers to Key Question 6.1 above.

17. In general UNHCR supports an independent appeal or departmental assessment for remaining in the country when a person is liable to expulsion (see UNHCR Comments for Section 7).

SECTION 7: ACCESS TO REVIEW AND APPEAL

Proposal (in the Discussion Paper)

408 For the reasons discussed above, the status quo is not considered to be optimal for the future. Appeals on the facts and appeals on humanitarian grounds are discussed separately below. The options discussed would build on Option B in Section 6: Exclusion and expulsion to streamline initial decisions to expel and to revoke residence only on departure from New Zealand.

439 For the reasons discussed above, there is little justification for three separate humanitarian tests against expulsion. The status quo is not considered to meet the objectives of the review, particularly in light of the proposals to streamline expulsion provisions. A single test is proposed, as discussed below.

Key question: Do you agree that there should be a single humanitarian test against expulsion that asks: are there exceptional circumstances of a humanitarian nature, and is it contrary to the public interest to allow the person to remain?

18. In regard to expulsion of individuals, there should be scope for the individual concerned to present a claim based on his/her international protection needs. The refugee status of the individual should be examined on the basis of the 1951 Convention and where the criteria are not fulfilled, the individual's other international protection needs should be assessed and a complementary form of protection granted if there are grounds for doing so. Such grounds may include international obligations under human rights treaties, under the international customary law principle of *non-refoulement*, as well as on a humanitarian basis.

SECTION 9: THE USE OF CLASSIFIED INFORMATION

Proposal (in the Discussion Paper)

587 For the reasons noted above, retaining the status quo in the current form is not considered to be robust. It may prevent New Zealand from making accurate refugee determinations. The proposal below (allow the use of classified information in refugee/protection determinations, with appeals heard by a judge

of the independent immigration and refugee tribunal) builds on the approach on Section 9.2.

9.3 Key question

Do you support the proposal to allow the use of classified information in refugee/protection determinations with appeals heard by a judge of the independent immigration and refugee tribunal?

19. UNHCR is of the view that classified information can be used in refugee status determination (RSD) only if the asylum-seeker is duly informed of it. RSD should be a fair and transparent process which ensures that asylum claims are determined in accordance with natural justice principles, i.e. an applicant should be informed of information being used against him and be given a reasonable opportunity to present his side and/or provide further information or evidence. In asylum systems which are adversarial in nature, due process means that authorities should not rely on or use classified information, otherwise it places asylum-seekers at an unfair disadvantage.
20. The proposed amendment would deny natural justice to asylum-seekers and, as revealed in the discussion paper, would run counter to other state practice.
21. Notwithstanding the proposed mechanisms for review of decisions rejected upon the basis of classified information (in part or in full), UNHCR believes that the proposed amendments may also leave the refugee status determination process open to abuse. For instance, the discussion paper states that classified information might be used in determining the credibility of a claim and that classified country information and information that relates to the activities of the person could also be used. As acknowledged in the discussion paper, refugee/protection decision-making is different from standard immigration decision-making. Accordingly, UNHCR urges the Government of New Zealand to maintain the *status quo* and not to adopt practices that allow asylum claims to be determined and rejected on the basis of classified information. Classified information should not be used unless declassified and shared with all parties concerned. In UNHCR's view, such a practice would be at variance with international standards of best practice.
22. In addition, the Discussion Paper, at paragraph 569, states that "***It could be possible for the tribunal to establish a role for a security-cleared "special counsel" who could have access to the information and represent the person...***"
23. However, such a provision if properly elaborated, could overcome many of UNHCR's natural justice concerns over the use of classified information. UNHCR notes that the circumstances for availing of the assistance of a special counsel are not mentioned. It would, therefore, suggest that if the use of

classified information is to be developed relevant criteria be set out clearly in the Immigration Act.

SECTION 11: THE USE OF BIOMETRICS

Proposal (in the Discussion Paper)

766 Two options are presented here. Option A would maintain the status quo. Option B would meet the objectives of the review and is preferred. Option B would create a two-tier power in legislation that enables immigration officers to:

- require, use and store some types of biometric information, and**
- request the voluntary provision of DNA and age verification tests for the purpose of verifying credibility or relationships.**

11.1 Key question

Do you agree that the new legislation should create a two-tier power that enables immigration officers to:

- require, use and store internationally-agreed standard types of biometric information, and***
- request the voluntary provision of other types of biometric information (as specified in regulations in each case).***

24. In the absence of further information, UNHCR would not be in a reasonable position to respond to this key question in the affirmative or in the negative.
25. UNHCR recognises the legitimate interest of governments in combating identity fraud. However, UNHCR recommends the adoption of safeguards to prevent adverse consequences to concerned asylum-seekers, refugees and stateless persons.
26. In regard to the principles of privacy and confidentiality, UNHCR is of the view that the proposed legislation should specify that when information on biometric testing of certain individuals is to be shared with another country (notably in the context of ascertaining whether a person had sought protection in another country), such information-sharing should be the subject of specific agreements. These agreements should include, *inter alia*, restrictions on the parties who would be privy to this information, and prohibitions on the dissemination of this information to any party that is not specifically included in the agreement. It should also be clearly stated that this information should not be shared, under any circumstances, with the authorities of the country of origin of the individual concerned or of the foreign country in respect of which the application or claim is made. UNHCR remains available to provide additional information on New Zealand's proposed use of biometrics.

SECTION 12: DETENTION

794 The current detention system is fundamentally considered to be fair and effective, and there are no proposals to make changes to the reasons for detaining people, or how frequently detention is used. In particular, there are no proposals to change release on reporting conditions and open detention.

27. UNHCR would like to take this opportunity to reiterate that detention of asylum-seekers is, in its view inherently undesirable. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law. There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives² to detention, such as reporting obligations or guarantor requirements, these should be applied first, unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose. In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary, it should only be imposed in a non discriminatory manner for a minimal period.³

28. The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with Executive Committee Conclusion No. 44 (XXXVII), the detention of asylum-seekers may only be resorted to, if necessary:

(i) to verify identity.

This relates to those cases where identity may be undetermined or in dispute.

(ii) to determine the elements on which the claim for refugee status or asylum is based.

This statement means that the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for

² See also Field, O “*Alternatives to Detention of Asylum Seekers and Refugees*”, April 2006, paper prepared on behalf of UNHCR, available online at <http://www.unhcr.org>

³ See UNHCR *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, (February 1999)

the entire status determination procedure, or for an unlimited period of time.

(iii) in cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum.

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there **is an intention** to mislead, or a refusal to co-operate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

(iv) to protect national security and public order.

This relates to cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he/she be allowed entry.

29. Detention of asylum-seekers for purposes other than those listed above, for example as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. Detention should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related residency at reception centres, or refugee camps.

Proposal (in the Discussion Paper)

908 Two options are presented here. Option A would maintain the status quo. Option B would enable any person who claims refugee status to be detained (or accommodated in open detention or released on conditions) regardless of when they make the claim, provided they meet the same strict criteria for detention. Option B is preferred.

12.5 Key question

Should the gap in the current Immigration Act be closed to enable high-risk refugee status claimants to be detained, regardless of when the claim is made?

30. UNHCR answers the question in the affirmative PROVIDED that the same strict criteria for detention as stated at Paragraph 896 of the Discussion Paper are applied and UNHCR's relevant Guidelines on Detention are duly taken into account.

Proposal (in the Discussion Paper)

938 Two options are presented here. Option A would maintain the status quo. Option B would enable immigration officers to undertake immigration detention in a place designated by the Chief Executive of the Department of Labour. It would enable the Department of Labour to manage detention outside of Police or Corrections facilities on a short-term case-by-case basis, if practical. Option B is preferred.

12.6 Key question

Should the Immigration Act give effect to the Chief Executive of the Department of Labour's power to designate a place of immigration detention by enabling designated immigration officers to undertake secure detention?

31. UNHCR answers this question in the affirmative.
32. As acknowledged at paragraph 930 of the discussion paper, UNHCR has not been supportive of the Government of New Zealand's practice of using police or correctional facilities to detain asylum-seekers.
33. Where there are viable alternatives to detention, UNHCR recommends that these should be applied first, unless there is evidence to suggest that such an alternative will not be effective in the individual case. As previously stated, the detention of asylum-seekers is, in UNHCR's view, inherently undesirable.⁴ This is even more so in the case of vulnerable groups, such as women, children, and those with special medical or psychological needs.
34. UNHCR emphasises that that any alternative detention facilities should comply with international standards as set out in the UNHCR '*Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*', Executive Committee Conclusions and the '*UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*' (Adopted by General Assembly resolution 43/173 of 9 December 1988) amongst others.⁵
35. In addition, UNHCR would refer to Option B stated between Paragraphs 941 and 942 of the Discussion Paper which states "**...Enable certain immigration**

⁴ Article 31 of the 1951 Convention relating to the Status of Refugees exempts refugees from punishment on account of their illegal stay or presence in the host country, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Pursuant to Article 2 of the 1951 Convention, aliens and asylum-seekers are obliged to conform to the laws and regulations of their host country.

⁵ See also United Nations' *Standard Minimum Rules for the Treatment of Prisoners* (adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611) and the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* (G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990))

officers to undertake detention outside of police or correctional facilities in places designated by the Chief Executive of the Department of Labour”.

Whilst UNHCR welcomes this option in line with some of its comments in the context of previous detention monitoring visits, it would nevertheless suggest that the phrase ““certain immigration officers” as well as the word ““undertake” be defined clearly in the Immigration Act.

36. UNHCR would further seek clarification as to when approval by the Chief Executive, as stated under Paragraph 942, would take place. UNHCR is of the view that such approval should be strictly prior to detention and not after its commencement.

SECTION 14: NEW ZEALAND’S ROLE AS AN INTERNATIONAL CITIZEN

Proposal (in the Discussion Paper)

1107 The obligations under article 3 of the Convention Against Torture and articles 6 and 7 of the ICCPR would be incorporated into New Zealand’s immigration legislation. Clear guidelines would be set out to aid interpretation.

1108 New Zealand would clarify (in the appropriate legislation) the mechanisms for dealing with persons who have committed very serious crimes including, for example, torture or genocide, or who are security threats but who cannot be expelled (for example, prosecution, extradition or surrender to an international tribunal).

14.1 Key question

Should New Zealand’s international commitments to protect persons facing torture; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment be set out in immigration legislation?

37. UNHCR answers this key question in the affirmative.
38. A number of asylum countries have in place administrative or legislative mechanisms for regularising the stay of persons who are not recognised as refugees but who cannot safely return to their home country. UNHCR welcomes these mechanisms; insofar as they address international protection needs which may not be covered by the 1951 Convention. Persons who are unable to return to their countries because of serious and indiscriminate threats to life, liberty or security of person resulting from generalised violence or events seriously disturbing public order, may be regarded by States as not covered by the 1951 Convention if such threats are not linked to one of the specific Convention grounds. Such persons may nevertheless still require international protection.

39. UNHCR's position is supported by Executive Committee Conclusion (No. 103 (LVI) 2005). The Executive Committee encourages the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention. Accordingly, measures to provide complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing international refugee protection regime. The Executive Committee also acknowledges that complementary forms of protection provided by states to ensure that persons in need of international protection actually receive it are a positive way of responding pragmatically to certain international protection needs.
40. Universal human rights principles argue for persons permitted to remain for protection reasons being afforded a status that allows them to continue their lives with human dignity. Given the disruption they have suffered, a suitable degree of certainty and stability is necessary. A mere withholding of deportation is, in UNHCR's view, not sufficient. Beneficiaries of complementary forms of protection should enjoy a formal legal status with defined rights and obligations, and should be issued with documents certifying that status. The status should extend for a period of time which is long enough to allow the beneficiaries to regain a sense of normalcy in their lives. It should last for as long as protection is required.
41. The status afforded to beneficiaries should provide for recognition and protection of basic rights as defined in relevant international and regional instruments.⁶ In some States or regions, domestic or regional human rights provisions may require standards of treatment which are higher than those of other States or regions, but the standards to be respected should not fall below a certain minimal level.
42. In the area of civil and political rights, beneficiaries should, in particular:
- be protected from *refoulement* and expulsion;
 - not be subjected to discrimination on the basis of race, religion, political opinion, nationality, country of origin, gender, physical incapacity or other such basis;
 - never be subjected to torture or cruel, inhuman or degrading treatment or punishment;
 - enjoy basic freedom of movement and, in any case, not be subject to restrictions on their freedom of movement, other than those which are necessary in the interest of public health and public order; and
 - have access to the courts of justice and administrative authorities.

⁶ The International Bill of Rights (consisting of the Universal Declaration of Human Rights and the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights) sets out fundamental human rights. Regional instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights ("Pact of San Jose") also provide useful guidance regarding fundamental human rights.

43. Their protection should, moreover, include basic social and economic rights comparable to those generally available in the host country, including, in particular:

- access to adequate housing;
- access to assistance or employment;
- access to health care as needed; and
- access to primary and secondary education.

44. The importance of putting in place measures that ensure respect for the unity of the refugee family has been highlighted by the Executive Committee on a number of occasions⁷. The family is acknowledged in human rights instruments as the natural and fundamental group unit of society: maintaining or reinstating family unity is one of the most important ways in which persons in need of international protection can enjoy the stability and certainty they require to continue their lives. Accordingly, any complementary protection regime should build in appropriate provisions for close family members to be reunited, over time, in the host country.⁸

Proposal (in the Discussion Paper)

1127 For the reasons discussed above, the status quo is not considered desirable for the future. At this stage, only one approach is considered likely to meet the principles of fairness, and effective and efficient decision-making.

14.2.1 Key question

Should Refugee, Convention Against Torture and articles 6 and 7 of the ICCPR claims be assessed in a single procedure with a single right of appeal?

45. UNHCR answers this key question in the affirmative.

46. In the same manner that States have put in place procedures for determining who fulfils the criteria for refugee status in the 1951 Convention, there should likewise be some method by which a state will determine who is in need of, and thus entitled to, complementary protection. UNHCR believes that the requirements of fairness and efficiency can best be met through the implementation of a broadly comprehensive system in which one central and expert authority would determine, in a single procedure, the protection needs of an applicant. At the end of such a procedure, a deserving applicant would be

⁷ Most recently in Executive Committee Conclusions No. 101 (LV) 2004 (n) and No. 93 (LIII) 2002 (b)

⁸ For further information please see UNHCR's paper entitled 'The International Protection of Refugees: Complementary Forms of Protection' (2001)

- awarded refugee or other protected status, depending on his or her reasons for requiring protection.
47. As recognized at the Global Consultations on International Protection, in many cases, a single, consolidated procedure which assesses whether an asylum-seeker qualifies for refugee status or other complementary protection represents the clearest and swiftest means of identifying those in need of international protection.⁹ It could offer a more economical and less fragmented approach, which would ultimately lend itself more readily to the establishment of a more coherent interpretation of international protection needs. The key to a credible asylum system that protects refugees and discourages people who do not have a legitimate asylum claim is quality decision-making, done promptly, and with the results enforced, including the return of those not in need of international protection.
48. In this way, time or other limitations would not prematurely preclude consideration of any applications for protection, duplication could be avoided, and the expertise of existing refugee status authorities could be utilised in determining other related international protection needs. UNHCR fears there would be a great potential for fragmentation of the international protection regime if different procedures, using vastly different standards, are established within and among States for refugee determination and complementary protection purposes.
49. As in all such determination systems, there should be an opportunity for a meaningful review of any negative decision, with suspensive effect, so that no applicant would be removed before a final determination of his or her need for protection. A meaningful review normally requires that reasons be provided for the decision at first instance including reasons for rejecting an asylum claim or denying refugee status.

Proposal (in the Discussion Paper)

Two options are presented, including the status quo. Option B (Provide for the recognition and selection of refugees selected offshore) is likely to introduce greater clarity and transparency and is preferred.

⁹ Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures), 2nd Meeting, 31 May 2001, (EC/GC/01/12). See also Executive Committee Conclusion No. 103 (LVI) at (q) which encourages States to consider whether it may be appropriate to establish a comprehensive procedure before a central expert authority making a single decision which allows the assessment of refugee status followed by other international protection needs, as a means of assessing all international protection needs without undermining refugee protection and while recognizing the need for a flexible approach to the procedures applied.

14.2.2 Key question

Should immigration legislation recognise refugees selected offshore?

50. UNHCR answers this key question in the affirmative in the context of refugee resettlement.
51. UNHCR agrees that the proposed amendment would clarify that refugees selected offshore have the same status as persons found to be refugees on-shore, where they have been assessed according to the 1951 Convention.
52. ***Paragraph 1165 of the Discussion Paper states “ Requiring the onus of proof to rest on the claimant and empowering the Refugee Status Appeals Authority to require information from anybody both assist in creating robust, defensible decision-making processes. They provide important mechanisms for testing identity and credibility”.*** Importantly, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (the Handbook) states that while as a matter of general legal principle, the burden of proof lies on the person submitting the refugee claim, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Paragraph 196 states:

“It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt”.

Proposal (in the Discussion Paper)

1174 For the reasons noted above, the status quo is not considered to be robust. The approach outlined below (Strengthened obligations, powers and offence provisions) is preferred and should be considered alongside the options to extend the powers to require information set out in *Subsection 10.1.2* and *Section 11: The use of biometrics*.

53. Before proceeding to the key question, UNHCR would like to query what is meant by “false information” in the context of Paragraphs 1178 and 1184 of the Discussion Paper and how it would be proved.

14.2.3 Key question

Do you agree that the powers of protection status decision-makers and related offence and penalty provisions should be strengthened as outlined?

54. Turning to the key question, UNHCR answers this question in the negative.
55. UNHCR does not support the introduction of prosecutable offences for asylum-seekers who provide false information in support of a refugee claim or appeal or where asylum-seekers resist or intentionally obstruct any refugee/protection officer in the exercise of their powers. Though it appears such measures would only be applied in clearly abusive cases to act as a disincentive to other asylum-seekers, UNHCR emphasizes that the process of refugee status determination is a unique situation and one that will necessarily involve an assessment of credibility. The possibility of providing false statements and documents to persons conducting refugee status determination is acknowledged in the UNHCR Handbook. Importantly, the Handbook states at paragraph 199 that such information forms part of an applicant's case and should merely be assessed in light of all the circumstances of the case:

“199. While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case”.

56. Similarly, Executive Committee Conclusion No. 58 acknowledges that the practice of destroying or submitting false documents may simply weaken the case of the person concerned,

(h) The problem of irregular movements is compounded by the use, by a growing number of refugees and asylum-seekers, of fraudulent documentation and their practice of willfully destroying or disposing of travel and/or other documents in order to mislead the authorities of their country of arrival. These practices complicate the personal identification of the person concerned and the determination of the country where he stayed prior to arrival, and the nature and duration of his stay in such a country. Practices of this kind are fraudulent and may weaken the case of the person concerned;¹⁰

57. It is UNHCR's view that though the practice of making false statements and providing false documents to refugee status determination officers is certainly undesirable, it is not a reason to deny refugee status nor should it be a basis upon which to prosecute.

Proposal (in the Discussion Paper)

¹⁰ Executive Committee Conclusion No. 58 (XL) 1989 (h) *Destruction of Documents/Fraudulent Documents*.

Two options are presented, including the status quo. At this stage, there is no clear preference for Option A (status quo) or Option B (Allow subsequent claims when personal circumstances (material to refugee status) change).

14.2.4 Key question

Should subsequent claims be explicitly allowed on the basis of a change in personal circumstances (that is material to refugee status), either in the home country or otherwise?

58. UNHCR answers this key question in the affirmative.

59. It is UNHCR's view that subsequent claims should be explicitly permitted where there is sufficient evidence of a significant change in the personal circumstances of an asylum-seeker or the circumstances in their country of origin (including under criteria for a *sur place* claim¹¹), that may substantially effect eligibility for refugee status.

60. Paragraph 96 of the UNHCR Handbook states that “A person may become a refugee “*sur place*” as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well founded fear of persecution must be determined by careful examination of the circumstances [...]”

Proposal (in the Discussion Paper)

Are legislative provisions required to expedite determination in some cases?

14.2.5 Key question

Do you agree that there is no need for legislative change to deal with manifestly unfounded claims, persons coming from or via “safe countries” or mass arrivals?

61. UNHCR answers this key question in the affirmative.

62. As acknowledged at paragraph 1212, UNHCR does not recommend the creation of lists of “safe countries of origin” or “safe third countries” to deal with manifestly unfounded claims. In fact, the experience of some States demonstrates that, where relatively few applications are generally received, a

¹¹ See paragraph 94–96 of the Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*.

focus on prompt quality decision-making under a single procedure is likely to be a more effective option than determination under an accelerated procedure.¹²

Proposal (in the Discussion Paper)

1227 For the reasons discussed above, the status quo is not considered to be optimal for the future. The approach outlined below (establish clear and coherent procedures for expulsion) is likely to meet the objectives of efficiency and understandable legislation and is preferred.

14.3 Key question

Do you agree that specific provisions and procedures should be set out in legislation to clarify when refugees or persons in need of international protection may be expelled?

63. UNHCR answers this key question in the affirmative.

64. UNHCR acknowledges that the Immigration Act currently prohibits the removal or deportation of a person recognized as a refugee in New Zealand unless Articles 32(1) or 33(2) of the Refugee Convention allow it. Accordingly, UNHCR welcomes the inclusion and clarification of legislative provisions providing for the removal of persons only in accordance with New Zealand's international obligations under the Refugee Convention and other international instruments such as the ICCPR, the Convention against Torture, and the Stateless Persons Convention (if applicable), so as to ensure that adequate safeguards are incorporated into the legislation.

Proposal (in the Discussion Paper)

1252 Two options are presented, including the status quo. At this stage there is no preferred approach.

14.4 Key question

Should New Zealand become party to the 1954 Stateless Persons Convention?

65. UNHCR answers this key question in the affirmative.

¹² Global Consultations on International Protection, *Asylum Processes (Fair and Efficient Asylum Procedures)*, 2nd Meeting, 31 May 2001, (EC/GC/01/12). For further information on the use of procedural safeguards for accelerated procedures for manifestly unfounded applications for refugee status or asylum see UNHCR's position paper on *Manifestly Unfounded Applications for Asylum* (1992)

66. As acknowledged at paragraph 1247, “The UNHCR is clear that the Stateless Persons Convention is an important instrument to avoid and resolve situations of statelessness and further the protection of stateless persons. It encourages all countries to become party”.
67. The Universal Declaration of Human Rights underlines that “everyone has the right to a nationality”. A Statelessness Protocol originally attached to the draft 1951 Convention was made a Convention in its own right in 1954. Stateless refugees benefit from the provisions of the 1951 Refugee Convention, in which they are included by virtue of Article 1 (A)(2), the definition provision. With 146 State parties to this Convention and/or its 1967 Protocol, a basic protection regime for the stateless refugee is in place. These instruments do not, however, specifically address problems for refugees arising directly out of their statelessness, except through Article 34, which requires Contracting States to “as far as possible, facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings”.
68. A more comprehensive legal approach to the problem of statelessness generally is set out in the two international conventions specifically on the subject:
- the 1954 *Convention relating to the Status of Stateless Persons*, which lays down basic rights, obligations and standards of treatment, for the non-refugee stateless persons; and
 - the 1961 *Convention on the Reduction of Statelessness*, which sets out measures to ensure that persons do not become stateless, or are enabled to regain an effective nationality.
69. Article 1 of the 1954 *Convention relating to the Status of Stateless Persons* defines a stateless person as “a person who is not considered a national by any state under the operation of its law. As refugee-statelessness problems often overlap, the UN General Assembly designated UNHCR as the natural interlocutor in the absence of any other specific statelessness organization, both to provide legal assistance to the disenfranchised and to help promote the avoidance and elimination of statelessness globally.
70. The discussion paper at paragraph 1251 highlights concerns that other states may have in relation to persons becoming stateless as a result of renouncing citizenship. UNHCR notes that one of the main principles with regard to avoidance of statelessness is that legislation should not allow the renunciation of nationality prior to the person concerned acquiring or having serious guarantees of obtaining another nationality. This principle is incorporated in the 1997 *European Convention on Nationality* which relevantly states,

Article 8 – Loss of nationality at the initiative of the individual

1. Each State Party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless.

2. However, a State Party may provide in its internal law that renunciation may be effected only by nationals who are habitually resident abroad.

71. UNHCR strongly encourages the Government of New Zealand to accede to both statelessness Conventions and establish statelessness determination processes in accordance with New Zealand's position as a country that supports efforts to maintain human rights standards. UNHCR remains available to provide legal and technical advice and to generally assist New Zealand's accession to both Conventions.