

MIGRATION LEGISLATION AMENDMENT (FURTHER BORDER PROTECTION) BILL 2002

Response of the Office of the United Nations High Commissioner for Refugees to the Senate, Legal and Constitutional Committee request for comments

INTRODUCTION

1. The Senate, Legal and Constitutional Committee has requested commentary regarding whether the Migration Legislation Amendment (Further Border Protection) Bill 2002 is consistent with Australia's international obligations. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on the proposed Act insofar as it impacts on Australia's international obligations as they relate to asylum seekers and refugees.

UNHCR STANDING TO COMMENT

2. Australia has assumed responsibility to extend protection to asylum seekers and refugees through accession to the *1951 Convention and the 1967 Protocol relating to the Status of Refugees* (the Refugee Convention). UNHCR is regularly requested to comment on national legislation regarding refugees and related issues by States, pursuant to the Preamble and Article 35 of the Refugee Convention as well as the Statute of the Office of the United Nations High Commissioner for Refugees (the Statute).
3. The supervisory role of UNHCR relating to the protection of refugees worldwide is complemented by the Conclusions developed annually by the Executive Committee of the High Commissioner's Programme (EXCOM), comprised of State Parties to the Refugee Convention and its Protocol. The EXCOM Conclusions are developed through a consensual process requiring the agreement of States, and set international protection standards. Australia has traditionally taken a leading role in the work of EXCOM.
4. This commentary examines the Migration Legislation Amendment (Further Border Protection) Bill 2002 in light of relevant international instruments and EXCOM Conclusions.

COMMENTS ON THE AMENDMENTS

Definitions

5. In a number of places the language used in this Bill, related legislation and debate diverges from accepted meanings. This may confuse discussion of the issues that the Bill relates to, and in some cases the use of international terminology for different purposes may lead to a failure of refugee protection mechanisms. Of particular concern is the manner in

which the following words and phrases are used: “resettlement”, “asylum seeker” and “safe country”. Following are some concerns relating to the use of language as well as the common understanding of these terms as set out in, among other places, EXCOM Conclusions.

6. “Unlawful asylum seeker”: Although an asylum seeker may arrive unlawfully, either as a result of a lack of appropriate documents or a failure to seek access to sovereign territory through legal entry points, the right to seek asylum, including for those arriving illegally, is a lawful act under international law. Linking the word “unlawful” to the term “asylum seeker” is therefore incorrect as entry in search of refuge and protection should not be considered an unlawful act. Further, asylum seekers are generally not to be penalised in any way for their unlawful manner of entry.
7. “Safe third country”: A country may be considered a safe third country, if pursuant to bilateral or multilateral agreements for the return of asylum seekers and refugees, the State in question will readmit the person, ensure protection against refoulement, provide the opportunity to seek and enjoy asylum and treat the person in accordance with international standards.
8. “Resettlement”: Resettlement involves the transfer of refugees from the country where they have sought refuge to another State, which has agreed to admit these persons. Resettlement is not the appropriate term to be used for the movement of refugees within a state's territory, including in situations where refugees are relocated from excised areas to locations not included within excision. Labelling such movements as “resettlement” risks confusing the meaning and value of this activity.

Excision of a Territory

9. The act of excision of a territory should be done in accordance with Australia's international legal responsibilities, voluntarily assumed. Under the *Vienna Convention on the Law of Treaties*, 1969,¹ to which Australia is a signatory, treaty obligations are binding in respect of the State's entire territory. This is reinforced by the Federal Clause contained in Annex III, Article VI of the 1967 Protocol, to which Australia, as a State Party, is bound.
10. Australia's international protection obligations to asylum seekers and refugee are therefore engaged at the frontiers of and throughout its entire sovereign territory including in any locations excised under national law.
11. The stated purpose for the creation of the national legislation regarding excision is to discourage the illegal entry of persons into Australia and curb people smuggling. UNHCR has no standing to intervene in relation to individuals seeking entry into Australia for reasons unrelated to those

¹ The Vienna Convention on the Law of Treaties, Art 29, states that unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory. [Article 27 provides also that a State may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.](#)

contained in Article 1A(2) of the Refugee Convention. However, where such legislation limits access to territory for individuals seeking asylum who may be subject to persecution for a reason articulated therein, consideration should be given to the prohibition against refoulement, as contained in Article 33² and the prohibition against penalising unlawful arrivals for their illegal entry or presence, as contained in Article 31 of the Refugee Convention.³

Consequence of excision on the processing and treatment of refugees and asylum seekers

12. The Migration Amendment (Excision from Migration Zone) Act 2001 and Migration Amendment (Consequential Provisions) Act 2001 introduced in September 2001 (hereafter referred to as the excision Acts)⁴ provide for individuals to remain in the excision area or for their transfer to a third country. Treatment under each option must be in accordance with Australia's international protection responsibilities which include the following:

- (i) Respect for the principle of non-refoulement and the right to seek and enjoy asylum. Article 33 of the Refugee Convention prohibits refoulement of a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
- (ii) Adequate refugee status determination procedures to identify those in need of international protection. EXCOM has noted the need for fair and effective procedures for determining refugee status and protection needs.⁵ Absent such procedures, it is impossible for States to identify individuals as being in need of international protection, and to extend this in accordance with their obligations,

² "Prohibition of expulsion or return ("refoulement") (1). No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (2). The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

³ "Refugees unlawfully in the country of refuge: (1). The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

⁴ [As stated in the Explanatory Memorandum of the Migration Legislation \(Further Border Measures\) Bill 2002, these Acts were part of a package that also included the Border Protection \(Validation and Enforcement Powers\) Act 2001.](#)

⁵ Australia has adopted these Conclusions along with other States, consensually, including Conclusion No. 81 (1997); Conclusion No. 82 (1997), Conclusion No. 85 (1998).

unless protection is extended on a group basis recognising them as refugees prima facie.

- (iii) Treatment in accordance with international human rights standards and international refugee standards, including those contained within the Refugee Convention. The effect of transfer of asylum seekers to a third country, or of their remaining in an excised area, is reviewed below.

PROCESSING IN THE EXCISED AREAS

Procedures in excised areas

13. Neither the current Bill nor the previous excision Acts outline the asylum procedure to be implemented in the excised areas. Traditionally, national refugee status determination procedures as conducted in Australia have met or exceeded standards. UNHCR is concerned at the current lack of formal procedures for the determination of refugee status in excised areas. Where different procedures than those used elsewhere in Australia are envisaged for excised areas, at a minimum these should be in conformity with Conclusion No. 8 (XXVIII).
14. However, DIMIA has noted that all persons who seek asylum in the excised areas will have their claims for refugee status assessed against the criteria contained in the Refugee Convention, which would include an internal administrative review of a negative decision.⁶ UNHCR has been verbally advised by DIMIA that they are finalizing these procedures.
15. The introduction of different systems for determination of refugee status for different asylum seekers depending on their location in Australia raises concerns. Having two different determination systems is discriminatory and in UNHCR's view undesirable. If lesser standards relating to procedures or lesser status accorded under these procedures are envisaged due to the nature of arrival of asylum seekers, this would not be in accord with international protection obligations.

Restrictions on Freedom of Movement

16. In the excised areas, Section 46A of the Migration Act prevents an "unlawful asylum seeker" or a recognised refugee from making a valid visa application under existing asylum procedures unless the Minister of Immigration exercises his discretion and determines that it is in the public interest that such a person should be able to make such an application.
17. A refugee who has been recognised as such by the competent authorities has obtained a regularised status legalising that individual's presence in Australia. Despite this, national law requires that in order for a refugee to move from an excised area to the rest of Australia's territory, the Minister

⁶ Question and Answer, Introduction of New Legislation, Refugee and Humanitarian Division, DIMIA, November 2001, p.9.

must lift the bar and allow the recognised refugee to apply for a valid visa, a subclass 447 Secondary Movement Offshore Entry (Temporary) Visa.⁷ According to the requirements of this visa, in addition to refugee like criteria, the person must also meet standard offshore health and character requirements.

18. This restricts the recognised refugee's movement within the State's territory, and is inconsistent with Article 26 which provides that a refugee has the right to move freely within a Contracting State's territory and to choose their place of residence. Further, it imposes restrictions on the movement of a refugee whose status in the country has been regularised, in contravention of Article 31(2) of the Refugee Convention.

Use of "resettlement" to relocate individuals from within excised areas of Australia

19. In early May, the Minister of Immigration announced that included in this year's offshore refugee resettlement quota are those accepted by Australia from excised areas. UNHCR does not consider resettlement to be the appropriate term in this case. Resettlement is a discretionary and voluntary act, which provides for the movement of refugees from one State where they do not have a durable solution to another State. This process should clearly be distinguished from the movement of refugees within a State's territory, to whom that State has protection obligations under the Refugee Convention.

Use of Temporary Protection Visas:

20. If the Section 46 bar is lifted, offshore entry persons in the excised areas, who arrive unlawfully are generally only eligible for an ongoing temporary protection visa⁸, unless the Minister exercises his discretion to allow the application of a different type of visa. The excision Acts created a new temporary protection visa, subclass 447 for those in the excised areas or who are subsequently transferred to a third country for processing of their asylum claim.⁹ UNHCR is concerned that the application of these visa restrictions negatively impact family reunification and access to travel documents.

TRANSFER OF ASYLUM SEEKERS FROM EXCISED AREAS TO A THIRD COUNTRY FOR PROCESSING

⁷ In DIMIA web site, www.immi.gov.au New Visa Regime, Questions and Answers, If the s46 bar is lifted and the person remains in the excision zone, s/he will be eligible for subclass 447 Secondary Movement Offshore Entry (Temporary) visa.

⁸ In DIMIA web site, www.immi.gov.au New Visa Regime, Questions and Answers. If the Section 46 bar is lifted and the offshore entry person is taken to the mainland they may be able to apply for a temporary protection visa, subclass 785. If the s46 bar is lifted and the person remains in the excision one, they will be eligible for subclass 447 Secondary Movement Offshore Entry (Temporary) visa only.

⁹ Ibid

21. Transfer of an asylum seeker or refugee to a third country is provided for by Section 198(1) of the Migration Act, which permits Australian Officials to take an asylum seeker, known as an “offshore entry person”, from the excised area to a safe third country, being a country in respect of which there is a Ministerial declaration.¹⁰
22. In UNHCR's view, as a signatory to the Refugee Convention Australia's international protection responsibilities to asylum seekers in the excised areas continue to be engaged following their transfer to a third country for processing. Only when a durable solution is found does this cease. Australia has acknowledged this responsibility by undertaking the refugee status determination on Nauru and Manus Island, PNG, albeit not under Australia's regular procedures.
23. The transfer of asylum seekers to a third country may be permissible under international refugee law under certain conditions and subject to appropriate protection safeguards.¹¹
- (i) In principle, such transfer would be permissible if a valid link can be established with the third country (such as previous stay on the territory, although not mere transit; previous issuance of an entry visa or close family or similar links). However, even in the absence of any clear link, international law does not as such seem to bar a country from negotiating with another country the admission of asylum seekers for asylum purposes, including but not confined to the processing of asylum requests.
- (ii) However, as is clear from relevant Executive Committee Conclusions, any such transfer arrangements would need to respect basic protection standards.¹² To conform to standards, a transfer agreement must include provision:
- a) that the person will be admitted to that (third) country and accepted as an asylum seeker;
 - b) that the asylum seeker will enjoy effective protection against refoulement;
 - c) that the asylum seeker will have access to a fair and effective asylum procedure;

¹⁰ According to Section 198(1) the Minister declares that the country (i) provides access for persons seeking asylum, to effective procedures for assessing their need for protection; and (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and (iii) provides protection to persons who are given refugee status pending their voluntary repatriation to their country of origin or resettlement in another country; and (iv) meets relevant human rights standards in providing protection.

¹¹ Conclusion No. 85 (XIX) 1998, Conclusion No. 87 (L) 1999.

¹² Conclusion No 85 (1998) stresses that, as regards the return to a third country of an asylum seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum seeker(s) in accordance with accepted international standards, will ensure effective protection against refoulement and will provide the asylum seeker(s) with the possibility to seek and enjoy asylum. Conclusion 58 on irregular movements indicates that asylum seekers and refugees may be returned to the country of first asylum if the person can remain there, is protected against refoulement and treated in accordance with basic human rights standards, will not be subject to persecution or threats to safety and liberty, and has access to a durable solution.

- d) that the asylum seeker will be treated in accordance with international refugee law and international human rights standards.

Admission Agreement

24. The right to protection from refoulement from third countries must be addressed in an admission agreement. Of fundamental concern is the potential that third countries which have not assumed international obligations through Refugee Convention accession, or do not have national legislation regarding the implementation of these obligations, may not feel constrained from forcibly returning those in need of international protection to a place where their life or freedom is at risk. Where s198(1) does not refer to the need for an admission agreement that protects against such chain refoulement, Australia's protection obligations may not be met in cases of transfer to declared third countries.

Procedures for the determination of Refugee Status

25. The lack of formal procedures for the determination of refugee status in third countries may also be of concern. Protection against refoulement would be better ensured by the guaranteed existence of such procedures. On Nauru and Manus Island, PNG where the Australian Government is undertaking refugee status determination, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) has verbally advised that they are finalising formal procedures to be used by their officials in third countries. UNHCR has worked closely with DIMIA on Nauru on the processing of asylum claims and it appears that generally a fair and effective refugee status determination system is in place. DIMIA has advised that a similar system is applied on Manus Island, PNG.

Detention

26. Detention or similar restrictive measures applied to asylum seekers are inherently undesirable and should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; or for reasons of national security or public order.¹³ Detention, where this lacks appropriate safeguards such as humane conditions and access to periodic judicial review may be considered arbitrary.¹⁴

¹³ Conclusion 44 (XXXVII) 1986, Conclusion No. 3 (XXVIII) 1997, Conclusion No. 7 (XXVIII) 1997, Conclusion No. 36 (XXXVI) 1985, Conclusion No. 46 (XXXVIII) 1987, Conclusion No. 47 (XXXVIII) 1987, Conclusion No. 50 (XXXIX) 1988, Conclusion No. 55 (XL) 1989, Conclusion No. 65 (XLII) 1991, Conclusion No. 68 (XLIII) 1992, Conclusion No. 71 (XLIV) 1993, Conclusion No. 85 (XLIX) 1998, Conclusion No. 89 (LI) 2000.

¹⁴ [The United Nations Working Group on Arbitrary Detention issued a set of ten principles which bring together the main criteria for determining whether or not the deprivation of liberty of asylum seekers and immigrants may be arbitrary. "Report of the Working Group on Arbitrary Detention" E/CN.4/2000/4, 28 December 98](#)

27. Of concern to UNHCR in the cases of Nauru and Manus Island, is that refugees who have been recognized and therefore have had their status regularised remain detained until a durable solution is found. This detention is without time limits or periodic review. The ongoing detention of persons recognized as refugees is a restriction of freedom of movement in breach of Article 26 of the 1951 Convention. Furthermore, such detention is not consistent with Article 31(2) of the Refugee Convention, which provides that restrictions of freedom of movement shall only be applied until the status of refugees in the country is regularised. Even though these recognised refugees are no longer on Australia's territory, Australia's obligations under the Refugee Convention continue to be engaged until a durable solution is found.

Family Unity

28. The unity of the family members is a fundamental human right, and the impact of transfer of asylum seekers to third countries upon this right is of grave concern. This right includes maintaining family unity for members arriving in Australian territory together, as well as assuring family reunion for members arriving separately. When coupled with the use of Temporary Protection Visas by Australia, which do not provide for family reunion as a basic individual right, the impact of such State action may result in a breach of Australia's formal obligations under various human rights instruments, including the Convention on the Rights of the Child, as well as ignoring standards that Australia has helped to create and promote.¹⁵

Temporary protection visa

29. Solutions envisaged for refugees recognized in other countries subsequent to transfer from excised areas must assure meaningful and durable protection. UNHCR is concerned that refugees transferred from the excision zones and subsequently resettled to Australia from the offshore processing centers are only granted ongoing temporary protection visas, subclass 447. Resettlement is a durable solution, not a transitory solution, and it would be preferable if Australia offered long term resettlement opportunities. Concerns raised elsewhere regarding the provision of Temporary Protection Visas to those in the excision zone are also relevant here.

CONCLUDING REMARKS

30. UNHCR stands ready to participate in further dialogue on the various matters raised insofar as they relate to the protection of asylum seekers and refugees, and thanks the Senate, Legal and Constitutional Committee for this invitation to comment on the Migration Legislation Amendment (Further Border Protection) Bill 2002.

¹⁵ Conclusion No. 1 (XXVI) 1975, Conclusion No. 9 (XXVIII) 1977, Conclusion No. 15 (XXX) 1979, Conclusion No. 22 (XXXII) 1981, Conclusion No. 24 (XXXII) 1981, Conclusion No. 47 (XXXVIII) 1987, Conclusion No. 74 (XLV) 1994, Conclusion No. 84 (XLVIII) 1997, Conclusion No. 85 (XLIX) 1998, Conclusion No. 88 (L) 1999.



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

MIGRATION LEGISLATION AMENDMENT (FURTHER BORDER PROTECTION) BILL 2002

Supplementary Submission

Response of the Office of the United Nations High Commissioner for Refugees (UNHCR) to the Senate, Legal and Constitutional Committee to questions that were put “on notice” during the public hearing on 06 August 2002

UNHCR is pleased to complement its submission to the inquiry with the following comments to questions from the Senate Committee, which were put “on notice”. (Refer to the transcripts of hearing of 06 August 2002 as published by Proof Committee Hansard.)

1. p. 51, para. 7 - On the number of families from DIMIA caseload who were not given derivative status:

R: UNHCR confirms that there are seven families from the DIMIA caseload who have approached UNHCR on the basis that they were not recognised as refugees on their own merit nor granted derivative status despite being immediate relatives of refugees on Temporary Protection Visas in Australia.

2. p. 52, para. 8 – On up to date statistics on resettlement from Indonesia:

R: As of 31 July 2002, out of 528 refugees recognised by UNHCR in Indonesia, 124 had been accepted for resettlement and were awaiting departure; 234 of them were submitted for resettlement but are still pending decision from resettlement countries; and, 170 were still to be submitted or re-submitted. In addition, 283 persons had already departed for resettlement.

3. p. 54, paras. 1-5 – Whether there might be a breach of Article 31 of the 1951 Convention in the legislation:

R: Reference is made to paragraph 18 of the submission which states that legislation imposes restrictions on the movement of a refugee whose status in the country has been regularised, in contravention of Article 31(2) of the Refugee Convention.

With regard to Article 31 (1), UNHCR views that the Bill is not in itself a breach. The denial of access to the regular asylum procedure in mainland Australia or the requirement of the Minister to lift the bar for entry to “mainland Australia” is not a penalty, within the meaning of Article 31 (1).

However, as noted in paragraph 12 of our submission, treatment once in the excision area must be in accordance with Australia’s international obligations. Section 189 of the Migration Act 1958 provides that a person in an excised offshore place may be detained.

As a general principle, asylum seekers should not be detained. The detention of such persons should only be resorted in cases of necessity, and on exceptional grounds, i.e., to verify identity, to determine the elements on which the refugee claim is based, in cases where the asylum seekers have destroyed their travel/identity documents or have used fraudulent documents in order to mislead the country of asylum, and to protect national security and public order.

In UNHCR's understanding detention of asylum seekers arriving in a manner covered by Article 31 (1) for purposes other than those above, for instance as a deterrent or a punitive measure for illegal entry/presence is considered to be at variance with Article 31.

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