

**Submission on behalf of the United Nations High Commissioner for Refugees**

**Joint Standing Committee on Migration  
Migration Legislation Amendment Bill No. 2 (2000)**

The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide its observations and comments to the Joint Standing Committee on Migration on *Migration Legislation Amendment Bill No. 2 (2000)*, in accordance with its supervisory functions and Article 35 of the *Convention relating to the Status of Refugees (1951)*.

The *Migration Legislation Amendment Bill No. 2 (2000)* has two main features. First, the Bill creates a prohibition on class actions in migration litigation and limitations on the commencement and continuance of proceedings in courts, effectively restricting the right of judicial review to individual applicants. Second, the Bill clarifies the powers of the Minister to substitute an adverse decision for a non-adverse decision of the Delegate or the Administrative Appeal Tribunal in matters relating to the character criteria for the issuance of visas.

As members of the Joint Standing Committee on Migration are aware, Australia is signatory to the *Convention relating to the Status of Refugees (1951)* and the *Protocol relating to the Status of Refugees (1967)*. A criterion for the grant of a Protection Visa under the *Migration Act 1958* is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under these two international instruments.

Although the Convention does not specify an obligation upon Contracting States to create procedures for the determination of refugee status, it implies the establishment of a mechanism to identify individuals who fall within the ambit of its provisions. UNHCR's governing body, the Executive Committee of the High Commissioner's Programme (EXCOM), of which Australia is a member, has established international standards for these procedures. Australia has established sophisticated procedures for the determination of refugee status, which are in compliance with the aforementioned standards.

A main strength of Australia's administrative processes, notably those relating to the determination of refugee status, has been the supervision of the courts. Although class actions in migration litigation are prohibited under the terms of the Bill, UNHCR welcomes the specific preservation of the possibility for individuals to petition courts for judicial review. Review by the courts in common law systems essentially ensures the correction of errors of law and maintains the integrity of the proper exercise of discretionary powers, both of which are crucial for a credible refugee status determination system. In Australia, review by courts has had two key benefits: allowing the correction of

error by the Refugee Review Tribunal, and contributing to the clarification of important areas of refugee law.

With respect to the first benefit of judicial review, although the Refugee Review Tribunal has proven itself to be an effective appellate authority, it has no system of precedent in respect of its own decisions, a limited scope for peer review and some Members who are not legal practitioners. In this respect, judicial review remains an essential avenue for the correction of error. It should be borne in mind that this function of the courts is not limited to remittals for reconsideration. Affirmation of Tribunal decisions serves the same purpose.

The second benefit of judicial review is equally important: the benefit of Australian jurisprudence extends far beyond Australia's borders. Reference to Australian precedent may be found in many developed common law jurisdictions, and has also served to inform UNHCR's own procedures in many countries where UNHCR undertakes refugee status determination. In this respect, Australian jurisprudence has made a substantial contribution to international refugee law. Similarly, jurisprudence from other common law jurisdictions has similar benefits for Australia. American, British and Canadian decisions, for example, have been cited by the High Court and Federal Court where Australian precedent is lacking. This "internationalisation" of the common law has made significant contribution to the clarification of refugee instruments, as has been noted by leading refugee law scholars. It is UNHCR's view, therefore, that the availability of judicial review is an important component of the refugee status determination process.

We now turn to the character provisions of the Bill. As above, a refugee within the meaning of the *Migration Act 1958* is a refugee as defined by the Convention (as amended by the Protocol). The definition of a refugee has three main elements: inclusion,<sup>1</sup> exclusion<sup>2</sup> and cessation<sup>3</sup> clauses. Inclusion clauses describe who falls within the ambit of the Convention's protections. Exclusion clauses describe the circumstances in which an individual may not be entitled to benefit from international protection, notwithstanding that s/he otherwise meets the criteria for recognition as a refugee.<sup>4</sup> Cessation clauses describe the circumstances in which continuing recognition of refugee status is no longer warranted.

The character provisions introduce, in essence, additional criteria concerning the applicability of the exclusion clauses, which are not foreseen by the international refugee instruments. It should be noted that the Convention

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<sup>1</sup> Article 1A

<sup>2</sup> Article 1D-F

<sup>3</sup> Article 1C

<sup>4</sup> These provisions are distinct from Article 32, dealing with the expulsion of refugees lawfully in the territory of a Contracting State on the grounds of national security or public order, and Article 33(2), dealing with exceptions to the principle of *non-refoulement*.

exhaustively enumerates the reasons for exclusion from refugee status in Article 1F, and, therefore, does not allow for the introduction of additional criteria or discretion in this regard. Exclusion clauses apply to persons who would otherwise fulfil the criteria for refugee status. Their application, not least because of obligations stemming from the principle of *non-refoulement*, has potentially serious consequences and needs to be restrictive, in light of all the circumstances of a case. For the purposes of the Convention -- and therefore the *Migration Act 1958* -- the exclusion clauses are taken as a complete prescription. The Convention contains no other provision that removes the benefit of international protection on character grounds. UNHCR would be pleased to provide additional information on the applicability of exclusion clauses.

It follows from the foregoing that two issues of concern are raised by the proposed extension of a power to the Minister to substitute an adverse decision for a non-adverse decision on the character component of Protection Visa applications. First, the extension of the power introduces an element of subjectivity to exclusion issues that is not contemplated by the Convention. Second, the extension of the power lacks in appropriate procedural safeguards.

On the first ground, reference is made to the character test contained in the *Migration Act 1958*<sup>5</sup> as a speculative example. (This example is not intended to suggest that the proposed amendment has a nefarious intent. To the contrary, this example is offered to show that the proposed amendment may have unintended consequences). A person does not pass the character test, *inter alia*, if:

- (b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct...

As traffickers would likely meet this definition, this provision could presumably be applied to all of the high number of recent unauthorised arrivals by sea. UNHCR deplores the practice of human trafficking and the violation of national immigration laws. However, UNHCR also recognises that *bona fide* asylum seekers often have no option but to resort to the services of traffickers in order to seek safety from persecution. In this sense, the "trafficked persons" are as much victims of the criminal conspiracy as Australia. It would be inconsistent with Australia's international obligations to deny protection on these grounds and thereby to expose a refugee to a risk of *refoulement*. Further, the criterion thus employed to exclude the asylum-seeker from refugee status, would not meet the strict threshold for the applicability of Article 1F, neither in terms of the seriousness of the crime, nor in terms of the determination of guilt by association, nor with respect to the required standard of proof concerning criminal acts.

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<sup>5</sup> Section 501(6)

Similarly, for the reasons outlined above in respect of judicial review, UNHCR would be concerned if a provision was enacted which lacked the opportunity for an independent review of a determination of refugee status. The character provisions of the *Migration Act 1958*, which are tantamount to exclusion clauses, are an integral component of these procedures. Under existing provisions of the *Migration Act 1958*, the rules of natural justice do not apply<sup>6</sup> and a decision by the Minister is neither compellable<sup>7</sup> nor reviewable<sup>8</sup>. As such, the substitution of an adverse decision on character would not meet the requirements of EXCOM Conclusion No. 8 (XXVIII) of 1977.

UNHCR is grateful for the opportunity afforded by the Joint Standing Committee on Migration to offer these submissions. The UNHCR Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific in Canberra remains at the disposal of the Joint Standing Committee on Migration.

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<sup>6</sup> Section 501A(3)

<sup>7</sup> Section 501A(6)

<sup>8</sup> Section 501A(7)