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

Review into the Migration Amendment (Removal and Other Measures) Bill 2024

Senate Legal and Constitutional Affairs Legislation Committee

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

12 April 2024

I. OVERVIEW

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee, in respect of its inquiry into the Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill), introduced by the Government to Parliament on 26 March 2024.

2. In summary, the Bill introduces three key measures aimed at achieving the stated objective of addressing circumstances where non-citizens who have no valid reason to remain in Australia are not cooperating with removal efforts. Firstly, the Bill introduces a power for the Minister to issue a direction to those on a removal pathway to facilitate their removal, non-compliance with which attracts a mandatory one-year sentence of imprisonment. Secondly, the Bill inserts a discretionary power for the Minister to designate a country as a 'removal concern country' with the effect of preventing new visa applications by most nationals of that country while they are outside Australia. Thirdly, the Bill expands the ability of the Minister to revisit the protection findings of non-citizens (not just unlawful-non-citizens in immigration detention) on a removal pathway who hold certain types of bridging visas.

3. The return of persons not in need of international protection is a difficult global challenge, and certainly not one that is new or unique to Australia.[1] In UNHCR's

[1] See for example: Platform for International Cooperation on Undocumented Migrants (PICUM), *Barriers to return: Protection in international, EU and national frameworks*, 2022, available at: https://picum.org/wp-content/uploads/2022/02/Barriers-to-return_Protection-in-international-EU-and-national-frameworks.pdf; Institute of Advanced Legal Studies, University of London, *Undesirable and Unreturnable? Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed*, 2016, available at: https://rli.sas.ac.uk/sites/default/files/uploads/Undesirable%20and%20Unreturnable_0.pdf; Flemish Refugee Action (Belgium), Detention Action (UK), France terre d'asile (France), Menedék – Hungarian Association for Migrants, and The European Council on Refugees and Exiles (ECRE), *A Face to the Story: The issue of unreturnable migrants in detention*, 2014, available at: https://www.ecre.org/wp-content/uploads/2014/01/pointofnoreturn.eu_wp-content_uploads_2014_01_Point_of_no_return.pdf; European Parliamentary Research Service, *The Return Directive 2008/115/EC European Implementation Assessment*, June 2020,

view, the prompt, safe and dignified return of those who are determined not in need of international protection and have no other basis for remaining in a host State promotes the integrity of the asylum system. In this regard, UNHCR urges States to go beyond short-term reactions and instead adopt a comprehensive approach and cooperate with each other within a framework of international solidarity and co-operation. **Any measures or strategies must deal humanely with individuals whose return is envisaged or carried out, in accordance with international refugee and human rights law**.

4. The term **"persons found not to be in need of international protection"** refers to individuals who have sought international protection and who, after due consideration of their asylum claims in fair procedures, are found neither to qualify for refugee status on the basis of criteria laid down in the *1951 Convention relating to the Status of Refugees*[2] and its *1967 Protocol relating to the Status of Refugees*[3] (1967 Protocol) (together, the 1951 Convention), nor to be in need of international protection in accordance with other international obligations or domestic law.[4] To prevent refoulement, return of people who have claimed international protection should only be pursued[5] for those whose claims have been refused by a final decision through a formal refugee determination process that is fair and in line with international standards. Such a process needs to involve the examination of complementary forms of protection under international human rights law. There should also not be any additional grounds under international human rights law or compelling humanitarian reasons for the person's continued stay in the host country.

5. Despite welcomed efforts by the Government to provide some limitations and exemptions under the Bill for persons under UNHCR's mandate, for the reasons discussed below, **UNHCR considers that the above requirements have not been satisfied to enable support for the measures contained in the Bill**.

6. UNHCR continues to express concern that some of the legal and administrative measures adopted by Australia, including the insertion of restrictive statutory criteria (see 'Incompatible national asylum determination system' heading below), are not consistent with a proper interpretation of Australia's obligations under the 1951 Convention and international human rights law. To safeguard against the refoulement of a refugee, Contracting States are required, *inter alia*, to apply the 1951 Convention in good faith and to implement asylum procedures which safeguard against the wrongful denial of refugee status.[6] Measures to expedite asylum

available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU(2020)642840_EN.pdf.

[2] UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

[3] UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

[4] UN High Commissioner for Refugees (UNHCR), Protection Policy Paper: The return of persons found not to be in need of international protection to their countries of origin: UNHCR's role, November 2010, https://www.refworld.org/policy/legalguidance/unhcr/2010/en/76475.

[5] In this context, 'return' does not refer to voluntary repatriation by a refugee or an asylum-seeker to their country of origin, undertaken on a fully informed and voluntary basis.

[6] The requirement of good faith in the implementation of international treaty obligations stems from principle of pacta sunt servanda. See Art. 26, United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969, www.refworld.org/legal/agreements/un/1969/en/73676. The

procedures through a fast track process without adequate procedural safeguards have also been adopted which place refugees in situations that could ultimately lead to their refoulement. Moreover, processes that are expanded in the Bill to determine that non-refoulement obligations are no longer owed to non-citizens do not adhere to the requirements of the cessation provisions of the 1951 Convention, also contributing to a heightened risk of refoulement for those captured by the operation of the Bill.

7. Additionally, UNHCR is concerned that the measures in the Bill designed to induce compliance with removal directions risk further perpetuating an unacceptable cycle of deprivation of liberty. For over a decade, UNHCR has continued to observe first-hand the detrimental impact that long-term and open-ended immigration detention has had on many who may be caught by the operation of the Bill. **These individuals have been deprived of many of their fundamental rights under international law which has, in some instances, resulted in irreparable harm, and even death**. UNHCR's significant concerns with respect to Australia's immigration detention arrangements continue to be shared by numerous UN treaty monitoring bodies, UN special procedures, the UN Human Rights Council Working Group on Arbitrary Detention and by the international community through the Universal Periodic Review.[7]

8. UNHCR's observations are structured as follows: **Section II** sets out the scope of UNHCR's authority. **Section III** sets out observations to clarify the scope and application of the Bill. **Section IV** outlines UNHCR's concerns with respect to removal pathway directions, including the inadequate protections against non-refoulement, the incompatibility of Australia's national asylum determination system with international law, and the inadequacy of safeguards to ensure adherence to Australia's international human rights obligations. **Section V** outlines UNHCR's concerns with respect to the designation of removal concern countries and **section VI** sets out concerns with respect to reconsidering protection findings and the requirements for cessation of refugee status. **Section IV** sets out the conclusion.

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fundamental importance of the observance of the non-refoulement principle of all persons who may be subjected to persecution if returned to their country of origin or habitual residence irrespective of whether or not they have been recognized as refugees, was also confirmed by the Executive Committee of UNHCR in its Conclusions No. 6 (XXVII), 1977, on Non-refoulement, and No.15 (XXX), 1979, on Refugees without an Asylum Country.

[7] See for example: UN Committee against Torture, Concluding observations on the sixth periodic report of Australia, 5 December 2022, CAT/C/AUS/CO/6, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F6&Lang=en; The United Nations Subcommittee on Prevention of Torture (SPT), *UN torture prevention body suspends visit to Australia citing lack of co-operation*, media statement, 23 October 2022, available at: https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation; UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 1 December 2017, CCPR/C/AUS/CO/6, available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsoAl3%2FFsniSQx2VAmWrPA0uA3KW0KkpmSGOue15UG42EodNm2j%2FnCTyghc1kM8Y%2FLQ4n6KZBdggHt5qPmUYCI8eCslXZmnVlMq%2FoYCNPyKpq; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, 24 April 2017, A/HRC/35/25/Add.3, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/91/PDF/G1709891.pdf?OpenElement.

II. UNHCR'S AUTHORITY

9. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions for refugees.[8] As set forth in the *Statute of the Office of the United Nations High Commissioner for Refugees*, UNHCR fulfils its international protection mandate by, *inter alia*, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.[9] UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention, according to which State Parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees […] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the 1967 Protocol.

10. In accordance with UN General Assembly resolutions 3274 XXIX[10] and 31/36,[11] UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),[12] as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly entrusted UNHCR with a global mandate for the identification, prevention, and reduction of statelessness and for the international protection of stateless persons.[13] UNHCR's statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR's Executive Committee.[14]

11. Australia is a Contracting Party to the *1951 Convention*, as well as the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Statelessness Convention), and the

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[8] See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).
[9] Statute, para. 8(a).
[10] UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).
[11] UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.
[12] UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.
[13] UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons,* 20 October 1995.
[14] Executive Committee Conclusion No. 90 (LII), Conclusion on International Protection, 5 October 2001, para. (q); Executive Committee Conclusion No. 95 (LIV), General Conclusion on International Protection, 10 October 2003, para. (y); Executive Committee Conclusion No. 99 (LV), General Conclusion on International Protection, 8 October 2004, para. (aa); Executive Committee Conclusion No. 102 (LVI), General Conclusion on International Protection, 7 October 2005, para. (y); Executive Committee Conclusion No. 106 (LVII), Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, paras. (f), (h), (i), (j) and (t); all of which are available in: *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017.

1961 Statelessness Convention. Through accession to these instruments, Australia has assumed international legal obligations in relation to refugees, asylum-seekers, and stateless persons in accordance with their provisions.

III. CONSIDERATION OF THE PROPOSED AMENDMENTS

12. The Bill's Explanatory Memorandum notes that the amendments in the Bill are necessary to address circumstances where non-citizens who have no valid reason to remain in Australia, and who have not left voluntarily as expected, are not cooperating with appropriate and lawful efforts to remove them.[15] The Bill would amend the *Migration Act 1958* (Cth) (the Migration Act) to introduce three key measures.

13. **Firstly**, a duty for non-citizens on a removal pathway[16] to cooperate with removal processes – through a power to issue a 'removal pathway direction' to that non-citizen to take certain actions (such as applying for a passport or attending an interview with consular officials). The amendments provide for certain circumstances in which the Minister must *not* give a direction, including: if the non-citizen has applied for a protection visa and the application is not yet finally determined; to do a thing in relation to a country against which a protection finding has been made for the non-citizen; in relation to an Australian visa application; to a child under the age of 18 years; and regarding court or tribunal proceedings. While a non-citizen on a removal pathway cannot be directed to interact with, or be removed to, a country in respect of which they have a protection finding, they may be given a direction to do certain things necessary to facilitate their removal to a safe third country. UNHCR acknowledges and welcomes these important exceptions.

14. Moreover, a failure to comply with a direction, without a reasonable excuse, will be a criminal offence carrying a mandatory minimum sentence of 12 months' imprisonment, and a maximum available sentence of five years' imprisonment or 300 penalty units, or both. Importantly, proposed s 199E(4) sets out certain matters that cannot be relied on by a person as a 'reasonable excuse' defence, such as that the person has a subjective fear of persecution or significant harm, is or claims to be a person who engages Australia's non-refoulement obligations, or believes that they would suffer other adverse consequences if they complied with the removal pathway direction.

15. **Secondly**, a discretionary power for the Minister to designate a country as a 'removal concern country' with the effect of preventing new visa applications by most nationals of that country while they are outside Australia. The Explanatory Memorandum notes

[15] Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024, p. 2.
[16] A "removal pathway non-citizen" is defined in proposed s 199B(1) and is broader than unlawful non-citizens who are required to be removed from Australia under section 198 of the Migration Act. It also includes a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) visa; and a lawful non-citizen who holds a Subclass 050 (Bridging (General)) visa and at the time the visa was granted, satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia. **There is also the ability to prescribe other categories of visa holders who could be brought under the definition**. Any regulations made for the purposes of this paragraph would be a disallowable legislative instrument for the purposes of the *Legislation Act 2003*, and thus subject to parliamentary scrutiny.

that this amendment, contained in proposed section 199G, reflects the Government's expectation that a foreign country will cooperate with Australia to facilitate the lawful removal of a non-citizen who is a national of that country and is available if necessary "to slow down that entry pipeline into Australia and reduce growth in the cohort of potentially intractable removals over time".[17] UNHCR acknowledges and welcomes important exemptions provided to allow for continued processing of visa applications by a national of a removal concern country including when made by a person in Australia; or where the person is close family (spouse, de facto partner or dependent child) of Australian citizens and permanent residents; or the person is the parent of an under-18 child who is in Australia; or the person is applying for a Refugee and Humanitarian (Class XB) Visa.[18]

16. **Thirdly**, an ability to reconsider the protection findings of non-citizens on a removal pathway who hold certain types of bridging visas. As well as unlawful non-citizens to whom section 198 applies, amended section 197D will apply to removal pathway non-citizens, including holders of Subclass 070 (Bridging (Removal Pending)) visas and Subclass 050 (Bridging (General)) visas granted on 'final departure'[19] grounds. The Explanatory Memorandum notes that "the affected persons are those who are on a removal pathway following the refusal or cancellation of a protection visa, usually on character or security grounds, and have, in most cases, completed merits review and judicial review of those decisions".[20] Further, "where the circumstances of the person or the country in relation to which a protection finding has been made have changed, it may be necessary to revisit the protection finding".[21] If under subsection 197D(2) a decision is made to set aside the protection finding, the removal of the non-citizen will, or would, no longer be prevented by subsection 197C(3).

IV. CONCERNS WITH RESPECT TO REMOVAL PATHWAY DIRECTIONS

Inadequate protection against refoulement

17. The principle of non-refoulement is the cornerstone of international refugee protection and constitutes a fundamental principle from which no derogation can be permitted.[22] It is enshrined in Article 33(1) of the 1951 Convention, which prohibits a Contracting State from 'expelling' or 'returning' a refugee 'in any manner whatsoever' to the frontiers of territories where his or her life or freedom would be threatened on account

[17] Explanatory Memorandum, p. 3.
[18] The power to prescribe other classes of persons and visas will permit other exceptions to be made and subsection 199G(4) enables the Minister to allow a national of a removal concern country to make a valid visa application if the Minister thinks it is in the public interest to do so.
[19] This includes some lawful non-citizens who were granted this visa and who, at the time the visa was granted, satisfied a criterion relating to them making acceptable arrangements to depart Australia as per the criterion set out by subclause 050.212(2) of Schedule 2 to the Migration Regulations 1994.
[20] Explanatory Memorandum, p. 24.
[21] Explanatory Memorandum, p. 18.
[22] Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. See also, UNHCR, Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, para. 4, https://www.refworld.org/docid/3d60f5557.html.

of his or her race, religion, nationality, membership of a particular social group or political opinion.

18. The protection against refoulement in Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, irrespective of whether or not the refugee is lawfully in the country. A person does not become a refugee because of recognition but is recognised because they are a refugee.[23] It follows that the principle of non-refoulement applies not only to persons whose refugee status has been formally recognised, but also to asylum-seekers for whom a final decision has not been reached on their case.[24]

19. International human rights law complements international refugee law[25] and provides additional forms of protection to prevent refoulement. Article 3 of the 1984 UN Convention against Torture stipulates that no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Similarly, Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights have been interpreted as prohibiting the return of persons to places where they would be exposed to a real risk of irreparable harm such as a threat to life or a danger of torture or of cruel, inhuman or degrading treatment or punishment.[26] While Article 33 (2) of the 1951 Convention foresees certain limited exceptions to the principle of non-refoulement, international human rights law sets forth an absolute prohibition, without exceptions of any sort.

20. Although the principle of non-refoulement does not itself equate to a right to enjoy asylum in a particular country, **a State exercising jurisdiction in relation to an asylum-seeker or refugee must not implement measures that result in their removal, either directly or indirectly,[27] to a place where their lives or freedom would be in danger or there are substantial grounds to believe that they would be at risk of being subject to torture or other serious violations of human rights**.[28]

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[23] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (1979, reissued 2011), UN Doc. HCR/1P/4/ENG/REV.3.
[24] UNHCR Executive Committee, Conclusion No. 6 (XXVII) (1977) para. (c); UNHCR Executive Committee, Conclusion No. 15 (XXX) (1979) paras. (b) and (c); UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007); UNHCR, Note on International Protection, UN Doc. A/AC.96/694 (3 August 1987).
25 Article 5, 1951 Convention.

[26] HRC, General Comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant (2004), UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 12. It should be noted that the HRC lists violation of Articles 6 and 7 of the ICCPR as non-exhaustive examples of violation of rights that would trigger non-refoulement obligations. Similarly, in its General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin, U.N. Doc. CRC/GC/2005/6, 1 September 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child "[…] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment.
[27] The prohibition against refoulement also protects from indirect (or chain) refoulement, i.e. the removal of a refugee to a third country where they are not at risk of persecution *per se*, but where no protection is available against onward transfer to a place of persecution or serious harm.
[28] UNHCR, Note on Non-Refoulement, para. 4. See also E. Lauterpacht and D. Bethlehem, at paragraph 124.

21. Section 197C(1) of the Migration Act provides that "for the purposes of section 198 [removal powers], it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen". Further, s 197C(2) provides that "an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen".

22. Rather than repeal s 197C of the Migration Act (as recommended by many including the Committee Against Torture and the Human Rights Committee),[29] the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (Cth)* (CIOR Act), which commenced operation on 25 May 2021 instead qualified the provision's operation. Amended s 197C now provides under sub-section (3) that the Migration Act does not require or authorise the removal of an unlawful non-citizen who has been found to engage protection obligations through a finally determined protection visa process in circumstances where to do so would be inconsistent with Australia's non-refoulement obligations. However, **UNHCR maintains that amended section 197C remains incompatible with Australia's non-refoulement obligations under international law because** it **does not safeguard against the removal of all asylum-seekers and refugees over which Australia exercises jurisdiction,** such as those with pre-existing refugee status at international law and those precluded by domestic law or policy from accessing asylum through the protection visa process by virtue of their mode or manner of arrival.[30]

23. **The exemptions afforded under the current Bill by proposed subsection 199B(3) further embeds the flawed premise that subsection 197C(3) provides adequate protection against refoulement**. UNHCR draws the Committee's attention to the concerns raised in its submission to the Parliamentary Joint Committee on Intelligence and Security Review into the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*.[31]

24. Moreover, during its regular independent immigration detention visits and regular engagement with detained asylum-seekers, refugees, and stateless persons, UNHCR has routinely met with persons who arrived in Australia as refugee and humanitarian

[29] The Committee Against Torture (in its Concluding Observations) recommended Australia to "[c]onsider repealing section 197C (1) and (2) of the Migration Act 1958 and introduce a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations." See UN Committee against Torture, Concluding observations on the sixth periodic report of Australia, 5 December 2022, CAT/C/AUS/CO/6, paras. 25(b) and 26(c), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FAUS%2FCO%2F6&Lang=en; The Human Rights Committee, while noting "[Australia]'s commitment to international protection and to upholding the principle of non-refoulement [expressed regret] that section 197C of the Migration Act has not been repealed. It reiterate[d] its recommendation." See HRC, Report on follow-up to the concluding observations of the Human Rights Committee, Addendum: Evaluation of the information on follow-up to the concluding observations on Australia, UN Doc. CCPR/C/134/3/Add.1, 20 May 2022, p. 2.

[30] For example, s 46A Migration Act 1958 (Cth) (visa applications by unauthorised maritime arrivals); s 46B Migration Act 1958 (Cth) (visa applications by transitory persons); exercise of maritime powers (see also s 75A *Maritime Powers Act 2013* (Cth)); Kaldor Centre for International Refugee Law, Policy Brief 9 - Assessing Protection Claims at Airports: Developing procedures to meet international and domestic obligations, 15 September 2020, available at: https://www.kaldorcentre.unsw.edu.au/publication/policy-brief-9-airports.

[31] UNHCR, Submission to the Parliamentary Joint Committee on Intelligence and Security, Review into the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, 23 June 2023, also available at: https://www.unhcr.org/au/media/2023-06-23-unhcr-submission-cior-act-2021-pdf.

entrants (some as children from refugee camps) or refugees who travelled to Australia through general migration pathways (such as an orphan relative visa) who have not engaged in the protection visa application process for reasons that their status at international law has not changed. **These refugees are not protected from removal under subsection 197C(3) Migration Act, and thus the limitations proposed in subsection 199B(3) of the Bill.** Further, if these refugees fail to comply with the Minister's direction to, for example, provide documents, attend an interview or report to the authorities from their country of origin, due to a fear this will place either themselves or family members who remain in the country of origin at risk of serious harm, they will be mandatorily sentenced for a minimum of one year or up to five years.[32]

25. It is important to underscore that visa refusal or cancellation due to the operation of Australian law does not necessarily negate a person's refugee status at international law. In UNHCR's view, the 1951 Convention and 1954 Statelessness Convention provide the appropriate legal framework according to which matters relating to the conduct of a refugee or stateless person may be taken into account, insofar as such matters relate to questions of eligibility for international refugee protection and measures to address security concerns. This framework is already reflected in Australian law.[33]

26. Clearly, refugees, asylum-seekers and stateless persons are required to conform to the ordinary laws and regulations of the country of asylum, as well as measures taken for the maintenance of public order. This is articulated in Article 2 of both the 1951 Convention and the 1954 Statelessness Convention. Those who commit punishable offences are, in general, liable to criminal prosecution and the imposition of penalties.[34]

27. Article 1F of the 1951 Convention exhaustively sets out the grounds on which a person who satisfies the inclusion criteria of the refugee definition in Article 1A(2) shall nonetheless be excluded from international refugee protection due to the commission of certain serious crimes or heinous acts. While a serious non-political crime gives rise to exclusion only where the acts in question were committed outside, and prior to the person's admission to, a country of asylum,[35] the application of exclusion for crimes against peace, war crimes, crimes against humanity,[36] or for acts contrary to the purposes and principles of the United Nations[37] is not subject to geographic or temporal restrictions and may result in the revocation of refugee status if a refugee engages in conduct giving rise to individual responsibility for such acts after his or her recognition.[38] In respect of stateless persons, Article 1F of the 1951 Convention is mirrored in Article 1(2)(iii) of the 1954 Statelessness Convention.

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[32] See UNHCR, Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information, 31 March 2005 paras. 16-17.
[33] See for example *Migration Act 1958*, subsections 5H(2), 36(1C), 501(6)(f).
[34] Article 2 of the 1951 Convention.
[35] Article 1F(b) of the 1951 Convention.
[36] Article 1F(a) of the 1951 Convention.
[37] Article 1F(c) of the 1951 Convention.
[38] Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In cases where it is determined that refugee status recognition should not have been granted in the first place, the cancellation of the decision previously

28. The 1951 Convention also foresees that States may, under certain, exhaustively defined circumstances, expel a refugee, without, however, resulting in the ending of the person's refugee status. UNHCR emphasizes that Article 32 of the 1951 Convention is not an exception to the principle of non-refoulment; it permits the expulsion of a refugee who is lawfully in the territory on grounds of national security or public order, subject to strict procedural safeguards, albeit only to a country where he or she would not be at risk of persecution, or from where he or she would not risk being sent on to a place where he or she could face the threat of persecution. This is mirrored in Article 31(1) of the 1954 Statelessness Convention. For both refugees and stateless persons, expulsion on such grounds may only occur pursuant to a decision reached in accordance with due process of law. Furthermore, except where compelling reasons of national security otherwise require, the refugee or stateless person must be allowed to submit evidence to clear themselves, and to appeal to, and be represented before, a competent independent and impartial authority.[39]

29. Expulsion of a refugee to a country where a risk of persecution exists is permitted under international refugee law only as a measure of last resort, and again subject to procedural safeguards as well as considerations of necessity and proportionality, if one of the exceptions to the principle of non-refoulement provided for under Article 33(2) of the 1951 Convention applies. This may be the case with regard to a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is", or "who, having been convicted of a particularly serious crime, constitutes a danger to the community of that country."[40] The application of Article 33(2) is without prejudice to other non-refoulement obligations of Australia under international human rights law, which do not contain any exceptions to the prohibition of refoulement.[41]

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taken would be consistent with the Refugee Convention. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, p. 28. See also UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, para. 1, https://www.refworld.org/docid/41a5dfd94.html. A note on terminology: the term 'revocation' is used by UNHCR when referring to the application of Article 1F(a) or (c) of the Refugee Convention to a refugee after recognition., whereas 'cancellation', in UNHCR's terminology, refers to the invalidation of a refugee status recognition decision that was incorrectly made.

[39] Article 32(2) of the Refugee Convention; Article 31(2) of the 1954 Statelessness Convention.

[40] For details on the criteria for the application of Art. 33(2) of the 1951 Convention, see e.g. UNHCR, *Intervention before the Supreme Court of Canada in Suresh v. Minister of Citizenship and Immigration, (Canada)*, 8 March 2001, www.refworld.org/jurisprudence/amicus/unhcr/2001/en/23298 , paras. 74-84; UNHCR, *Intervention before the United States Court of Appeals for the Tenth Circuit in N- A- M- v. Mukasey, Attorney General*, Case no. 08-9527 & 07-9580, 19 June 2008, www.refworld.org/jurisprudence/amicus/unhcr/2008/en/59516, pp. 10-18; see also, E. Lauterpacht and D. Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, Cambridge University Press, June 2003, www.refworld.org/reference/research/cup/2003/en/49371.

[41] Non-refoulement obligations under international human rights law allow no exception or derogation, and protection against refoulement under the relevant provisions is afforded to every individual, irrespective of their legal status. This means that even if a person could be returned to the country where they face a risk of persecution in accordance with Article 33(2) of the Refugee Convention, international human rights law may still prohibit the transfer. For instance, the non-refoulement obligation under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, which prohibits transferring persons to a place where they would be at risk of torture has an absolute character. Similarly, non-refoulement obligations under Articles 6 and 7 of the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee, prohibit transferring persons to a place where their life would be at risk or where they would be at risk of torture or other forms of cruel, inhuman, or degrading treatment or punishment.

30. While the above-mentioned provisions of the 1951 Convention, which limit eligibility for refugee status and permit States to take measures, which affect certain rights adhering to refugee status, are given effect in Australia by existing provisions in the Migration Act, **the character test contained in subsection 501(6) of the Migration Act operates above and beyond these provisions and is not in line with the provisions of the 1951 Convention or the 1954 Statelessness Convention**. Not only does the application of such a test increase the risk that asylum-seekers, refugees and stateless persons may be detained or removed from Australia in circumstances other than those permitted by international law, such a test also effectively restricts the enjoyment of the rights guaranteed to asylum-seekers and refugees by the 1951 Convention, and to stateless persons by the 1954 Statelessness Convention, but also to asylum-seekers, refugees and stateless persons under international human rights law.

UNHCR recommends:

1. delete subsection 199E(4) of the Bill to strengthen the safeguards against non-refoulement for asylum-seekers, refugees, stateless persons, and others in need of international protection;
2. expand section 199D of the Bill to provide that the Minister must not give a removal pathway direction (including for the purposes of third country removal) in circumstances where to do so would be inconsistent with Australia's international human rights and non-refoulement obligations;
3. delete the mandatory minimum sentence contained in subsection 199E(2) of the Bill to enable the judiciary to exercise appropriate discretion; and
4. repeal section 197C of the Migration Act or in the alternative, further amend section 197C as it fails to provide adequate protection against non-refoulement for all persons in need of international protection.

Incompatible national asylum determination system

31. When it comes to the establishment and implementation of national procedures for the determination of refugee status, measures are required to ensure that respect for the principle of non-refoulement remains the guiding principle and ultimate objective of any refugee protection regime. As previously mentioned, **UNHCR continues to express concern that some of the legal and administrative measures adopted by Australia, including the insertion of statutory criteria that are not consistent with a proper interpretation of Australia's obligations under the 1951 Convention, and measures to expedite asylum procedures without adequate procedural safeguards may result in placing refugees in situations that could ultimately lead to refoulement**.

32. In this context, UNHCR draws the Committee's attention to the earlier submission made in respect of the inquiry into the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*.[42] Therein UNHCR

[42] 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: https://www.unhcr.org/au/media/submission-senate-legal-and-constitutional-affairs-legislation-committee-migration-and.

expressed concern with respect to Australia's codification of its interpretation of the 1951 Convention and narrowed application of the refugee definition as established by Article 1A(2) of the 1951 Convention, including by:

- 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; and
- disregarding the special protection regime established by Article 1D of the 1951 Convention and thereby requiring 'Palestinian refugees' to establish their need for international refugee protection by reference to Article 1A(2).[43]

33. In this context, it is critical to also emphasise deficiencies with Australia's fast track review mechanism, in the form of the Immigration Assessment Authority (IAA). Since its commencement following enactment of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, **UNHCR has expressed concern that key procedural safeguards are absent from the review process**. Firstly, the IAA is not required to accept or request any new information from the asylum-seeker and must not consider any new information unless it is satisfied that there are exceptional circumstances, and such information was not and could not be put before the Minister at first instance.

34. UNHCR considers that for a remedy to be effective, it must allow access to a tribunal or court (independent from the first instance decision making body)[44] and those appeal procedures must allow consideration of issues of law and fact. Additionally, the IAA does not hold a hearing, yet a fundamental right and key procedural safeguard to an effective remedy includes the entitlement to a fair hearing. Any accelerated asylum procedure must respect minimum procedural safeguards both in law and in practice including, *inter alia*, to be given the opportunity of a personal interview.

[43] 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.
[44] Article 2(3) of the International Covenant on Civil and Political Rights ICCPR.

35. Not only has the fast track review process resulted in consistently high rejection rates, especially for particular nationalities since commencement,[45] moreover, the fast track review process is not available to all those who receive a negative outcome at the primary determination stage. As of 31 October 2023, close to 100 people 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.[46]

36. The fast track review process was created on the presumption that asylum-seekers would have already had ample opportunity to present all their claims and supporting evidence before a first instance decision is made. **However, in the context of other policy changes designed to deter future arrivals, such as the removal of free legal assistance, the imposition of strict deadlines, ineligibility to seek asylum for years, and prolonged family separation, it is apparent that the fast track review process** is **inadequate to ensure a fair and efficient protection assessment process to identify persons in need of international protection**.[47]

37. UNHCR has welcomed the proposed repeal of Part 7AA of the Migration Act and related consequential amendments under the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024 which will abolish the IAA if it secures passage through Parliament.[48] Since its commencement, UNHCR has considered that the efficiencies created by such a review process have come at the expense of key procedural safeguards, the lack of which has ultimately undermined the reliability and accuracy of such decisions. Consequently, a heightened risk of refoulement arises for those who have received a negative outcome or were altogether denied access to merits review.

38. While transitional arrangements have been proposed for some unresolved fast track reviewable decisions, including those excluded from review to have access to the proposed new Administrative Review Tribunal, **UNHCR urges the government to address the situation of those with resolved cases who may require re-adjudication or access to alternative solutions. Considering the recognised deficiencies of the fast track review process, and in some cases, the significant passage of time since the assessment of claims for protection, humanitarian solutions are needed to ensure adherence with Australia's obligations under international refugee and human rights law**.

[45] Immigration Assessment Authority, Statistics, available at: https://www.iaa.gov.au/about/statistics.
[46] Department of Home Affairs, Supplementary Budget Estimates, 23 October 2023, Response to question taken on notice, Question SE23-827.
[47] See further, UNHCR, Fact Sheet on the Protection of Australia's So-Called "Legacy Caseload" Asylum-Seekers, 1 February 2018, available at: https://www.unhcr.org/au/media/protection-australias-so-called-legacy-caseload-asylum-seekers.
[48] UNHCR, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023, 24 February 2024, available at: https://www.unhcr.org/au/media/sub018-united-nations-high-commissioner-refugees-unhcr-pdf.

UNHCR recommends:

5. repeal the codification of Australia's interpretation of the refugee definition and replace it with the criteria established by Article 1A(2) of the 1951 Convention;
6. reinstate key procedural safeguards in law and practice at the merits review stage to prevent against risk of refoulement; and
7. the government address the situation of unsuccessful fast track review applicants with resolved cases who may require re-adjudication or access to alternative solutions to ensure adherence with Australia's obligations under international refugee and human rights law.

Inadequate safeguards to prevent violation of human rights obligations.

39. Seeking asylum is not an unlawful act. Detention ought, in accordance with international human rights standards, to be an exceptional measure of last resort and any decision to detain should be strictly limited to the purposes authorized by international law.[49] Among other requirements, detention must be demonstrated to be necessary, reasonable in all the individual circumstances of the case, proportionate to a legitimate purpose, non-discriminatory, and subject to judicial oversight.[50] Indefinite detention is arbitrary and so illegal under international law; maximum limits on periods of detention should also be established in law.[51]

40. It is of ongoing concern to UNHCR that Australia's detention arrangements do not adhere to these international laws and standards. There are close to 1,000 people remaining in held immigration detention facilities across Australia.[52] **Hundreds of asylum-seekers, refugees and stateless persons have been detained for prolonged periods of time in unacceptable conditions of detention including in Alternative Places of Detention (APODs) such as hotels or in highly securitized detention facilities; while others have been transferred to remote detention facilities where they have been geographically removed from their families and support networks**. UNHCR emphasises that immigration detention should not be punitive in nature[53] and it should not be used to indirectly coerce people to return to their home countries, especially in situations where they might be at risk of serious harm.

41. Australia also has not yet established in its domestic law a statelessness status determination procedure to identify non-refugee stateless persons. For stateless persons, the absence of status determination procedures to verify identity or nationality has often resulted in prolonged or indefinite detention because

[49] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012). See also UNHCR, *Stateless Persons in Detention: A Tool for their Identification and Enhanced Protection* (2017).
[50] Ibid. para 34
[51] Ibid. See also: WGAD, Opinion No.2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia), para.96; Opinion No 7/2019 Concerning Ibrahim Toure (Canada); WGAD, Opinion No. 35/2020 concerning Jamal Talib Abdulhussein (Australia).
[52] Department of Home Affairs, Immigration Detention Statistics, 31 December 2023, https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention.
[53] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, para 48 and 32, available at: https://www.refworld.org/docid/503489533b8.html.

statelessness, by its very nature, severely restricts access to basic identity and travel documents.[54]

42. **UNHCR remains concerned that a considerable number of refugees, asylum-seekers and stateless persons who will be capable of being caught by this Bill remain in situations of protracted and open-ended immigration detention and may become liable to imprisonment as a result of non-compliance with a removal pathway direction, which will consequently perpetuate the cycle of deprivation of liberty and cause even further harm**. This is particularly concerning for refugees who fear that any contact with the authorities of their country of origin may place themselves, or family members or associates who remain there, at risk of serious harm. They may have no option but to be subjected to mandatory imprisonment and subsequently immigration detention, rather than comply with the Minister's direction.

43. During its regular independent immigration monitoring detention visits and engagement with detained asylum-seekers, refugees and stateless persons, UNHCR has observed first-hand the significant detrimental impact long-term immigration detention (sometimes in excess of ten years) has had on the health and psycho-social wellbeing of those affected, many of whom have already suffered from torture or trauma before arriving in Australia.[55] Family separation, as well as inadequate transparency surrounding processes and timeframes for release, contribute greatly to diminished mental health, often leading to depression, resignation, and self-harm. Many have also become institutionalised and lost their self-agency over time.

44. **There is now an even broader suite of viable and practical alternatives to held detention which could enable people to be released, on conditions and with appropriate support, as necessary**.[56] While not all in immigration detention have a criminal offending history, those that do, have served their custodial sentence for the crimes they have committed and are not significantly dissimilar from a sizeable proportion of a typical prison population in Australia. Just like Australian citizens who have been released from prison, many unlawful non-citizens in immigration detention and those recently released into the community following the High Court's ruling in

[54] UNHCR, Handbook on Protection of Stateless Persons, 30 June 2014, p.45, available at: https://www.refworld.org/docid/53b676aa4.html.
[55] See for example: Hedrick, K., Armstrong, G., Coffey, G. *et al.* Self-harm among asylum seekers in Australian onshore immigration detention: how incidence rates vary by held detention type. *BMC Public Health* **20**, 592 (2020), available at: https://doi.org/10.1186/s12889-020-08717-2; Procter, N.G., Kenny, M.A., Eaton, H. and Grech, C. (2018), Lethal hopelessness: Understanding and responding to asylum seeker distress and mental deterioration, *Int J Mental Health Nurs*, 27, pp. 448-454, available at: https://doi.org/10.1111/inm.12325; Tosif S, Graham H, Kiang K, Laemmle-Ruff I, Heenan R, Smith A, et al. (2023) Health of children who experienced Australian immigration detention, PLoS ONE 18(3), available at: https://doi.org/10.1371/journal.pone.0282798; Silove D, Austin P, Steel Z. No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia, *Transcult Psychiatry*, 2007, 44(3), pp. 359-93.
[56] See for example: *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*, available at: https://www.legislation.gov.au/C2023A00110/asmade/text; Migration Amendment (Bridging Visa Conditions) Act 2023, available at: https://www.legislation.gov.au/C2023A00093/asmade/text; Migration Amendment (Bridging Visa Conditions) Regulations 2023, available at: https://www.legislation.gov.au/F2023L01629/asmade/text; Crimes Legislation Amendment (Community Safety Orders and Other Measures) Regulations 2023, available at: https://www.legislation.gov.au/F2023L01628/asmade/text.

NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor,[57] have family in Australia (including children, siblings, and parents) and significant ties to the community – as many have been in Australia for decades.

45. **UNHCR emphasises that safeguards are also needed to ensure that removal pathway directions are not given in circumstances which would be inconsistent with Australia's international human rights obligations**. While recognising the limitations afforded under the Bill to exempt children and preserve family unity,[58] UNHCR emphasises that the Committee on the Rights of the Child[59] has stated that the term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom" in accordance with Article 5 of the *1989 Convention on the Rights of the Child* (CRC).[60] Furthermore, the Committee has stated that the protections under Article 9 of the CRC concerning the separation of children from their parents also extend "to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship".[61] UNHCR's Executive Committee have also stressed that "all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity".[62]

46. With respect to the imposition of the measures proposed in the Bill, UNHCR underscores that under international human rights law, **the family is recognized as the fundamental group unit of society and as entitled to protection and assistance** in Article 16(3) of the *1948 Universal Declaration of Human Rights* (UDHR);[63] in Article 23(1) of the *1966 International Covenant on Civil and Political Rights* (ICCPR);[64] and in Article 10(1) of the *1966 International Covenant on Economic, Social and Cultural Rights* (ICESCR).[65] The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (CMW) contains similar language,[66] as do the preambles to the CRC and the *2006 Convention on the Rights of Persons with Disabilities* (CRPD).[67] **UNHCR considers that the stated protections afforded by the visa refusal or cancellation process in the assessment of protection visas are inadequate to**

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[57] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37; 97 ALJR 1005, also available at: https://jade.io/j/?a=outline&id=1055542.
[58] Proposed s 199D(4) and s 199G(2).
59 CRC Committee, General Comment No. 14, 2013, available at: https://www.refworld.org/legal/general/crc/2013/en/95780.
[60] UNGA, Convention on the Rights of the Child, 20 November 1989, UNTS, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html.
61 Ibid. Para. 60.
[62] UNHCR, Executive Committee (ExCom), *Refugee Children*, Conclusion No. 47 (XXXVIII), 12 October 1987, available at: http://www.refworld.org/docid/3ae68c432c.html, para. (d).
[63] 9 UN General Assembly (UNGA), Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html.
[64] UNGA, International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html
[65] UNGA, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html
[66] UNGA, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, available at: http://www.refworld.org/docid/3ae6b3980.html, Article 44.
[67] UNGA, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, available at: http://www.refworld.org/docid/4680cd212.html.

appropriately preserve and protect family unity of those capable of being impacted by this Bill.[68] **Reliance on the Minister's personal non-compellable intervention powers to safeguard against derogation of these rights is similarly considered an inadequate protection.** UNHCR reiterates that many of those capable of being captured by the ambit of this Bill have close family in Australia (including children, siblings, and parents). For those deprived of their liberty, the impact is compounded.

V. CONCERNS WITH RESPECT TO DESIGNATION OF REMOVAL CONCERN COUNTRIES

47. Under international law, it is well recognised that States have the sovereign power to regulate the entry of non-citizens. However, they are still bound to respect their international refugee and human rights obligations. UNHCR acknowledges and welcomes the exceptions to the proposed bar on visa applications from certain nationals of a removal concern country outside Australia, including those that enable people to apply for Refugee and Humanitarian (Class XB) visas. However, it is important to emphasise that **in recent years, policy parameters have shifted and increasingly refugees are also accessing non-humanitarian program pathways** to Australia. This includes complementary pathways or migratory pathways.

48. Moreover, in the context of the exceptions made for close family of Australian citizens and permanent residents, UNHCR emphasises that the right to family unity is a fundamental principle of international law. While there is no single, universally agreed legal definition of family, **the question of what constitutes a family should be assessed on a case-by-case basis and informed by the principle of dependency and, in the case of children, best interest procedures**. Relevant considerations include biological and social connections, cultural variations as well as social, emotional, and economic ties or dependency factors. An open, culturally sensitive, and inclusive interpretation to considerations of family membership is encouraged.

49. While UNHCR recognises the overstaying of persons rightly identified as not in need of international protection poses many problems to States, **the return of persons not in need of international protection is a complex global challenge.** The General Assembly of the United Nations has repeatedly underlined the responsibility of countries of origin vis-à-vis the return of their nationals who are not refugees.[69] The need for States to co-operate in the adoption of measures regarding the orderly return of migrants to their countries of origin has also been highlighted by the *1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, which entered into force on 1 July 2003 and the *2000 United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air* also sets out the obligation of States parties to facilitate and accept, without undue or unreasonable delay, the return of a person who has been smuggled and who is its national or who has the right of permanent residence in its territory at the time of return.

50. Obstacles to the orderly and humane return of persons not in need of international protection are numerous. They can include: non-issuance of travel documents by the

[68] Explanatory Memorandum, pp. 28-29.
[69] UNGA, Resolution 45/150 of 14 December 1990; 46/106 of December 1991; 47/105 of 16 December 1992.

country of origin; denial or non-recognition of citizenship; bureaucratic delays; logistical problems in enforcing returns, including transit through third countries; inadequate reception/re-integration facilities in the country of origin.[70]

51. From the perspective of the prospective returnee, several elements may impede implementation of a return measure. The perceived advantages and disadvantages of a continued illegal stay are necessarily weighed against the advantages and disadvantages of return. Relevant factors include the degree of integration in the sending State (which may depend, e.g., on the length of the asylum procedure itself); the anticipated responses to return of the authorities in the country of origin, of family, friends, etc.; and the need to preserve one's own dignity and self-respect. **Access to proper and thorough information, and sensitive counselling, often appear to be keys to a successful implementation of return.**[71]

52. UNHCR considers that greater international co-operation is needed, and it needs to be translated into innovative mechanisms and programmes. Technical assistance, capacity-building measures and advisory services may also be required and made available by national, regional, or international institutions. International co-operation can also take the form of a transparent exchange of information. The issuance of travel documents and other practical modalities of return, as well as the necessary guarantees for the individuals concerned, can be better regulated by re-admission agreements – though in some cases improvements may also be needed in domestic legislation regarding, e.g., evidentiary requirements for proof of citizenship.

53. It is essential that the persons concerned by a return measure be prepared for such an eventuality. **Sensitive counselling is recommended, at all stages of the asylum procedure.** Non-governmental organisations have an important contribution to make in this area and should be involved as much as possible. **Unsuccessful asylum seekers must be helped to retain or regain their self-esteem, independence, and self-agency, including those who have become institutionalised in detention environments**. Negative public narratives which vilify and marginalise such persons are damaging and counter-productive to these efforts. For return to succeed, they must also be assisted in maintaining contact with their families and friends in the country of origin; and in acquiring or developing skills and knowledge that they can take back home.

54. It must be acknowledged that some obstacles may continue to stand in the way of return, or to delay it, which may give rise to specific problems in respect of a population of "overstayers" with no defined status. To leave such persons in a legal limbo risks leading to a host of problems, and inevitably, constitute irritants in inter-State relations. There are also particular problems faced by persons whose legal status in the country of return is unclear. Such persons may be stateless, or their citizenship may be difficult to prove. **Their problems range from a lack of identity and travel documents to prolonged, and in some cases indefinite, detention**. Whatever the genesis of the uncertainty, the solution will require a range of mechanisms in a comprehensive framework, some of which may be implemented by the country of return, some by the

[70] UNHCR, Protection Policy Paper: The return of persons found not to be in need of international protection to their countries of origin: UNHCR's role, November 2010, https://www.refworld.org/policy/legalguidance/unhcr/2010/en/76475.
[71] UNHCR, Background paper No.1: Legal and practical aspects of the return of persons not in need of international protection, May 2001, https://www.refworld.org/policy/legalguidance/unhcr/2001/en/74024.

country in which the person finds him or herself. **It is important to recognise that, in order to avoid repetitive cycles of migration and displacement for such persons, some concerned individuals will need, at some point, to be able to benefit from a legal status**.[72]

55. The resolution of irregular situations might also require a differentiated approach that addresses, to the extent possible, the specific needs of particular individuals. Return strategies are well complemented by opportunities for regular migration, group-based regularization programmes and possibilities for certain individuals to legalize their stay if established criteria are met.[73]

VI. CONCERNS WITH RESPECT TO RECONSIDERING PROTECTION FINDINGS

Cessation of refugee status under international law

56. International refugee law exhaustively specifies the circumstances in which refugee status comes to an end. Recognition of refugee status may accordingly only be withdrawn on the basis of cancellation or revocation or if the conditions for cessation of refugee status are met.[74] The so-called 'cessation clauses' (under Article 1C of the 1951 Convention) are relevant in the context of the Minister deciding under s 197D that a refugee – that is, a person who meets the 'inclusion' criteria in Article 1A(2) of the 1951 Convention and does not fall within the scope of one of its exclusion clauses – is no longer a person in respect of whom a protection finding would be made. Article 1C articulates the conditions under which a refugee ceases to be a refugee at international law,[75] 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.

57. The 1951 Convention does not envisage a loss of status triggered by domestic visa arrangements (such as through visa cancellation on character grounds), nor a requirement for refugees to periodically re-establish their refugee status – either as a result of the grant of temporary protection or effective loss of refugee status as a result of a Ministerial decision under section 197D of the Migration Act.

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[72] Ibid.

[73] UNHCR, Protection Policy Paper: The return of persons found not to be in need of international protection to their countries of origin: UNHCR's role, November 2010, https://www.refworld.org/policy/legalguidance/unhcr/2010/en/76475.

[74] A note on terminology: the term 'revocation' is used by UNHCR when referring to the application of Article 1F(a) or (c) of the Refugee Convention to a refugee after recognition., whereas 'cancellation', in UNHCR's terminology, refers to the invalidation of a refugee status recognition decision that was incorrectly made. See further: UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, https://www.refworld.org/policy/legalguidance/unhcr/2003/en/33331.

[75] Articles 1C(5)-(6), provide that—absent compelling reasons arising out of previous persecution—a person's refugee status ceases if the circumstances in connection with which she was recognized as a refugee have ceased to exist, such that the person can no longer refuse to avail herself of the protection of her country of nationality (or, in the case of a stateless refugee, is now able to return to her country of former habitual residence).

58. 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) of the 1951 Convention is appropriate**. Further, a refugee can 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.

59. In addition, the right to family life and the principle of family unity are entrenched in international human rights and humanitarian law instruments, and apply to all human beings, regardless of their status.[76] Respect for the right to family unity requires not only that States refrain from action which would result in family separation, but also that they take positive measures to maintain the family unity and reunite family members who have been separated. UNHCR'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"**.[77]

UNHCR recommends:

8. the repeal of section 197D which enables the Minister to determine, for removal purposes, that a refugee is no longer a person in respect of whom a protection finding would be made.

VII. CONCLUSION

60. UNHCR welcomes the Government's continued commitment to upholding its international human rights and non-refoulement obligations. However, in UNHCR's view, the consequences of implementing domestic statutory interpretations and processes that are not aligned with the obligations arising under the 1951 Convention, coupled with inadequate procedural safeguards in determination procedures, has created a heightened risk of refoulement for those who are capable of being captured by this Bill. Moreover, the consequence of these measures, if implemented may likely result in the continued deprivation of liberty for many, contrary to international

[76] Although there is not a specific provision in the 1951 Convention, the strongly worded Recommendation in the Final Act of the Conference of Plenipotentiaries reaffirms the "essential right" of family unity for refugees. See UN General Assembly, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, A/CONF.2/108/Rev.1, 25 July 1951, www.refworld.org/legal/leghist/cpsrsp/1951/en/89635, Sec. IV B.
[77] UNHCR Executive Committee Conclusion No. 69 (XLIII) Cessation of status, (a), 1992, available at: http://www.refworld.org/docid/3ae68c431c.html.

refugee and human rights law, including the right to liberty and the prohibition against torture or ill-treatment.

61. UNHCR urges the Committee to recommend the Bill not proceed or be amended in accordance with UNHCR's recommendations contained herein. Additionally, UNHCR urges the Government to make the necessary amendments to the Migration Act as referenced in previous submissions to the Committee to better align Australia's asylum determination system with the 1951 Convention.

UNHCR
12 April 2024