



UNHCR

United Nations High Commissioner for Refugees

Haut Commissariat des Nations Unies pour les réfugiés

**Submission by the Office of the United Nations High Commissioner for Refugees
*Inquiry into the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010***

**Senate Legal and Constitutional Affairs Committee
24 June 2011**

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee (“the Committee”) in its *Inquiry into Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010*.

II. UNHCR’S STANDING TO COMMENT

2. Australia is a Contracting State to the *1951 Convention relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees* (collectively, “the 1951 Refugee Convention”).¹
3. UNHCR has the duty of supervising the application of the 1951 Refugee Convention pursuant to the preamble and article 35 of the 1951 Convention, article II of the 1967 Protocol, and the *1950 Statute of the Office of the United Nations High Commissioner for Refugees* (“the UNHCR Statute”).² These instruments call for cooperation between Governments and UNHCR in dealing with refugee problems.
4. The Office’s supervisory role is complemented by the conclusions reached by consensus by UNHCR’s Executive Committee (“ExCom Conclusions”).³ Although not formally binding, ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. Australia takes an active role in the work of ExCom.
5. UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (“the

¹ The term ‘1951 Refugee Convention’ is used to refer to the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5, (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37, (entered into force for Australia 13 December 1973).

² UN General Assembly, Resolution 428 (V) of 14 December 1950.

³ ExCom Members are elected by ECOSOC on the basis of their (a) demonstrated interest in and devotion to the solution of refugee problems; (b) widest possible geographical representation; and, (c) membership of the United Nations or its specialized agencies.

UNHCR Handbook”)⁴ provides guidance to government officials concerned with the determination of refugee status in the various Contracting States. In addition, UNHCR’s Guidelines on International Protection complement and update the understanding in the UNHCR Handbook. These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff carrying out refugee status determination in the field.

6. More generally, UNHCR’s Thematic Guidelines are developed by drawing on the 1951 Refugee Convention, ExCom Conclusions, and general human rights treaties, including the *1966 International Covenant on Civil and Political Rights* (1966 ICCPR), *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984 CAT) and the *1989 Convention on the Rights of the Child* (1989 CRC).
7. UNHCR’s *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (“UNHCR’s Detention Guidelines”),⁵ issued in February 1999 (and which are currently under review), establish the applicable minimum standards which apply to all refugees, asylum-seekers and stateless persons who are being considered for, or who are in, detention or detention-like situations. The Guidelines provide that ‘[t]he detention of asylum-seekers is, in the view of UNHCR inherently undesirable’ and recommend that alternatives to detention of asylum-seekers should be considered.

III. SCOPE OF THE SUBMISSION

8. UNHCR’s submission addresses issues in the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 insofar as they affect refugees, asylum-seekers and stateless persons, and focuses specifically on their consistency with relevant international law and standards.

IV. DETENTION REFORM AND PROCEDURAL FAIRNESS BILL 2010

A. *Part 1 – Amendment establishing asylum seeker principles*

9. UNHCR notes that the intended amendments under Part 1 establish “asylum-seeker principles” to which persons making decisions affecting refugees, asylum-seekers or persons in immigration detention must have regard. The asylum-seeker principles reaffirm, with minor amendments, four of the seven Key Immigration Detention Values announced as part of the Government’s *New Directions in Detention* policy on 29 July 2008 by the then Immigration Minister, Chris Evans.⁶

⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/Eng/Rev.2 (1 January 1992).

⁵ UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (26 February 1999).

⁶ Senator Chris Evans, Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia’s Immigration System*, Seminar – Centre for International and Public Law, The Australian National University, 29 July 2008.

10. UNHCR had previously welcomed the introduction of the *New Directions in Detention* policy,⁷ the recommendation of the Joint Standing Committee on Migration that, as a priority, the Australian Government introduce amendments to the Migration Act 1958 to enshrine in legislation the reforms to immigration detention policy announced by the Minister for Immigration and Citizenship,⁸ and the then Immigration Minister's intention to codify the Key Immigration Detention Values in legislation by enactment of the Migration Amendment (Immigration Detention Reform) Bill 2009.⁹
11. UNHCR notes that the Bill lapsed at the end of Parliament on 28 September 2010 and, despite previous assurances of the Government of Australia that the *New Directions in Detention* policy would apply to territories excised from the migration zone, UNHCR understands that the Key Immigration Detention Values have not been systematically applied in territories excised from the 'migration zone'. UNHCR recalls the Minister's Second Reading Speech of the Migration Amendment (Immigration Detention Reform) Bill 2009 which stated that '[u]nlawful non-citizens, including offshore entry persons, in excised offshore places will continue to be subject to the existing detention and visa arrangements of the excision policy'.¹⁰ This is a regrettable dichotomy which discriminates between the classes of entrants, solely on the basis of method and place of entry to Australia and is not derived from the broader 'risk-based' determination that lies at the heart of the new detention values.
12. While noting the more discretionary nature of the power to detain in an excised offshore place under current legislation,¹¹ UNHCR is concerned that the Key Immigration Detention Values should also extend explicitly and by law to refugees, asylum-seekers and stateless persons on Christmas Island.

Recommendation 1:

13. **The Government's Key Immigration Detention Values, particularly the presumption against detention, should be explicitly incorporated into Australia's legal framework.**

Recommendation 2:

14. **It should be made clear that the Government's Key Immigration Detention Values apply throughout the Commonwealth of Australia, including any territories excised from the 'migration zone'.**

⁷ UNHCR, Submission No 46 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009*, 5 August 2009, 6 [24].

⁸ Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into Immigration Detention in Australia, Immigration Detention in Australia: A new beginning – Criteria for release from detention* (2008) [4.87].

⁹ Senator Chris Evans, 'Detention values to be enshrined in law' (Media release, 25 June 2009).

¹⁰ Second Reading Speech – Senate, Migration Amendment (Immigration Detention Reform) Bill 2009, 12.

¹¹ Migration Act, ss 189 (3) and (4).

B. *Part 2: Amendments facilitating judicial review of detention decisions*

(i) *Discretionary basis for detention*

15. UNHCR supports the general proposition, upon which the amendments under Part 2 are based, that detention of asylum-seekers should be discretionary rather than mandatory.
16. In UNHCR's view, any form of detention or deprivation of liberty should be humane with respect shown for the inherent dignity of the person and should be prescribed by law.¹² Article 31 of the 1951 Convention prescribes that:

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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
17. This takes into account the fact that refugees may be forced to enter a country illegally in order to escape persecution. Article 31 also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country.
18. The article applies to asylum-seekers as well as recognized refugees. Although not all asylum-seekers meet the refugee definition, a person is a refugee as soon as he or she does meet the refugee definition, even though formal determination and recognition of that status takes place later. An individual does not become a refugee because of recognition, but is recognized because he or she is a refugee.¹³
19. UNHCR's Detention Guidelines bring together important international law principles relating to detention and set out minimum standards for what might be considered acceptable State practice. They also offer greater clarity regarding the circumstances in which restrictions may be warranted and the alternatives which could be considered. They are not binding, but represent UNHCR's authoritative views which draw upon the 1951 Refugee Convention, relevant ExCom Conclusions,¹⁴ and binding human rights law and standards. The Guidelines are attached in extenso (Annex A).
20. UNHCR's Detention Guidelines state the principle that detention of asylum-seekers should be an exception, not the rule and should be for the shortest possible period.
21. The Guidelines reiterate the limited basis on which the detention of asylum-seekers may be permissible, if necessary and if prescribed by a national law, which is in conformity with

¹² UNHCR Detention Guidelines, above n 5, Guideline 10.

¹³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/Rev.2 (1 January 1992), [28].

¹⁴ See, for example, UNHCR, ExCom Conclusions Nos. 44 (XXXVII) – 1986; 46 (XXXVIII) – 1987, [f]; 47 (XXXVIII) – 1987 [e]; 50 (XXXIX) – 1988 [i]; 65 (XLII) – 1991 [c] and [j]; 71 (XLIV) – 1993 [f]; 85 (XLIX) – 1998 [cc] and [ee]; and 89 (LI) – 2000.

general norms and principles of international human rights law. The exceptional situations in which detention of asylum-seekers may be permitted are those agreed to by States in ExCom Conclusion No. 44 (XXXVII) of 1986 (attached in Annex B):¹⁵

- (i) to verify identity;
 - (ii) to determine the elements on which the claim for refugee status or asylum is based;¹⁶
 - (iii) to deal with cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
 - (iv) to protect national security or public order.
22. Furthermore, in assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved.
23. UNHCR is of the view that, in the case of ‘unauthorised arrivals’, once identity and security risks have been resolved, the purpose of detention has been achieved and the person should be released from detention. Efforts to resolve the substantive elements of the person’s immigration status, namely their need for international refugee protection, may be pursued while the person is in the community and ought to be de-linked from the assessment of risk associated with detention.
24. In circumstances where the purpose of detention is no longer achievable within a reasonable period, notably in the case of stateless persons, UNHCR is of the view that the detainee must be released (by granting some form of visa concomitant with their legal status), or else the continued detention may become arbitrary and indefinite.

Recommendation 3:

25. **All decisions to detain a refugee, asylum-seeker or stateless person should be based on an individualized (case-by-case) basis and the reasons should be limited to those authorized by international law and standards.**

(ii) Justification of the decision and duration of detention

26. UNHCR supports the general proposition, upon which the further amendments under Part 2 are based, that the circumstances of detention, reasons for the decision to detain, grounds for the necessity of ongoing detention and period of detention, should be justified in writing and notification provided to the detained person.

¹⁵ UNHCR, ExCom Conclusion No. 44 (XXXVII) – 1986 on Detention of Refugees and Asylum-Seekers.

¹⁶ UNHCR elaborates that ‘the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim ... and would not extend to a determination of the merits or otherwise of the claim’; UNHCR Detention Guidelines, above n 5, 4; UNHCR, ExCom Conclusion No. 44 (XXXVII), above n 15.

27. UNHCR, additionally, supports the general proposition that the detained person should be able to apply to an independent authority for a release order when there are no reasonable grounds to justify the decision to detain, or the continuation of that detention.
28. In UNHCR's view, judicial review, independent of the determining authority, provides greater oversight and accountability to the decision to detain. The 1966 ICCPR provides the relevant international legal standards in respect of detention of persons. Article 9 provides that:
1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
 - ...
 2. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
29. The Report of the Working Group on Arbitrary Detention ("the Working Group") on its visit to Australia in 2002 noted its concern with 'the lack of sufficient judicial review of the detention. Under international law anyone deprived of his/her liberty shall be entitled to take proceedings before an independent court in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is unlawful'.¹⁷ The Human Rights Committee observed that:
- every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.¹⁸
30. The Working Group acknowledges that the general (common) law right of habeas corpus would be available to challenge the lawfulness of immigration detention where, for example, the detainee contests that he/she is an unlawful non-citizen.¹⁹ However, because detention on the basis of 'unlawful arrival' is authorized by law, habeas corpus is not available to secure the release from detention. The Human Rights Committee has reasoned that:

If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods

¹⁷ Commission on Human Rights, 'Civil and Political Rights including the Question of Torture and Detention', 59th sess, Annex: Report of the Working Group on Arbitrary Detention on its visit to Australia (24 May-6 June 2002), [19], UN Doc E/CN.4/2003/8/Add.2 (2002).

¹⁸ *A v Australia*, CCPR Communication No 560/1993, [9.4.], UN Doc CCPR/C/59/D/560/1993 (1997).

¹⁹ Commission on Human Rights, above n 17, [21].

for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release “if the detention is not lawful”, article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.²⁰

31. In accordance with UNHCR’s Detention Guidelines, asylum-seekers, if detained, should be entitled to the following minimum procedural guarantees:²¹
- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order, in a language and in terms they understand;
 - (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
 - (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuance of detention at which the asylum-seeker or his representative would have the right to attend;
 - (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain; and
 - (v) to contact and be contacted by the local UNHCR office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.

Recommendation 4:

32. **All decisions to detain a refugee, asylum-seeker or stateless person should be subject to review in accordance with Article 9(4) of the 1966 ICCPR. In all cases, reasons should be given in writing to record the basis of the detention, and include periodic reviews for its ongoing necessity.**²²

Recommendation 5:

33. **Mechanisms established to provide review of the decision to detain should be prescribed in legislative form to ensure clarity, transparency and predictability.**

²⁰ *A v Australia*, above n 18, [9.5.].

²¹ UNHCR, Detention Guidelines, above n 5, Guideline 5.

²² *Ibid* Guideline 3.

C. *Part 3: Amendments repealing excised offshore places and declared countries*

34. UNHCR notes the amendments repealing the *Migration Amendment (Excision from Migration Zone) Act 2001*, which restricts the application of certain provisions of the Migration Act, notably the ability to lodge a protection visa application, to asylum-seekers who are interdicted attempting to enter Australia's migration zone or land at an excised offshore place.
35. UNHCR has long expressed concerns with the parallel processes for determining refugee status in Australia. UNHCR is of the view that that offshore procedures for assessing refugee status on Christmas Island discriminate on the basis of arrival and should be as closely aligned as possible with onshore procedures and subject to appropriate legal frameworks and accountability, and due process. Furthermore, discriminatory offshore procedures may be viewed as a punitive or disciplinary measure for illegal entry or presence in the country contrary to article 31 of the 1951 Convention.
36. UNHCR is of the view that there should be a legislative basis for decisions, to ensure clarity and to ground the decisions, to the extent possible, in Australian law in a non-discriminatory manner. A legislative basis for offshore refugee status determinations would ensure coherency and consistency between UNHCR's international protection standards, Australian jurisprudence and statutory interpretations.
37. UNHCR is also concerned by the discretionary character of the offshore refugee status determination system in which Convention refugees, subsequent to their recognition by the competent authorities, must apply to seek the exercise of the discretionary power of the Immigration Minister to facilitate their entitlement to the rights and obligations associated with their international legal status. In UNHCR's view, reliance on the discretion of the Executive Government ('[i]f the Minister thinks that it is in the public interest to do so')²³ is not, in itself, sufficient to implement Australia's international legal obligations pursuant to the 1951 Convention because of its non-compellable, non-reviewable and non-delegable character without procedural safeguards.²⁴
38. UNHCR notes the amendments repealing the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001*, which currently allows an offshore entry person to be taken to a declared country.
39. In UNHCR's view, primary responsibility for refugee status determination remains, in principle, with the Contracting State on whose territory the claim for refugee status has been lodged. UNHCR recognizes, however, that the 1951 Refugee Convention does not explicitly require that the determination of refugee status has to take place within the territory of the country where the claim is lodged and that a transfer of responsibilities, or extra-territorial processing, is permissible.

²³ *Migration Act 1958* (Cth), s 46A(2).

²⁴ *Ibid* s 46A(7); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26 ("*Pacta sunt servanda*") and art 27 (*Internal law and observance of treaties*). UNHCR, Submission No 30 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002*, 11 October 2002.

40. In certain and limited circumstances, such arrangements must contain appropriate protection safeguards for those who may be subject to a transfer of responsibilities, or extra-territorial processing. However, this is a complex area of international law and practice relating to State responsibility and burden sharing under the 1951 Refugee Convention and, for current purposes, further guidance is available in UNHCR's *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010 (attached in Annex C).²⁵

Recommendation 6:

41. **All asylum-seekers in Australia should be subject to a single procedure to determine their eligibility to refugee status, or at least very similar and closely aligned processes, which are embedded in legislation and contain appropriate safeguards.**

D. *Part 4: Amendments restoring fair processes and procedural fairness*

42. UNHCR notes amendments repealing the privative clauses, and provisions relating to the processing and cancellation of visa applications, at first instance and review, which limit the requirements of the natural justice hearing rule in relation to these matters.
43. It is UNHCR's view that all procedures relating to refugee status determination and entitlement to Convention rights should contain appropriate natural justice and procedural fairness safeguards. At a minimum, ExCom recommends that refugee status determination procedures should satisfy certain basic requirements at first instance and appeal, including that:
- (i) The competent (immigration or border police) officials should have clear instructions and should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.
 - (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
 - (iii) There should be a clearly identified authority with responsibility for examining requests for refugee status and taking a decision in the first instance.
 - (iv) The applicant should be given the necessary assistance to submit his or her case to the authorities and should also be given the opportunity to contact UNHCR.
 - (v) If the applicant is recognized as a refugee, he or she should be informed accordingly and issued with documentation certifying his refugee status.
 - (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem.

²⁵ UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010 <<http://www.unhcr.org/refworld/docid/4cd12d3a2.html>>

- (vii) The applicant should be permitted to remain in the country pending a decision on his or her claim, and any appeal to a higher administrative authority or to the courts.

Recommendation 7:

44. **All asylum-seekers should have access to an effective appeal mechanism for a formal reconsideration of the decision relating to their refugee status, either to the same or to a different authority, whether administrative or judicial, and should have the opportunity to respond to adverse information upon which the decision is based.**

Recommendation 8:

45. **Health, character and security assessments, which determine the acquisition of visas and Convention rights, should be based on clear and transparent criteria, with the affected person given the opportunity to know the case against them and an opportunity to respond in the event of an adverse finding.**

VIII. CONCLUSION

46. UNHCR believes that the *Inquiry into Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* has highlighted some important issues affecting Australia's international legal obligations to protect refugees, asylum-seekers and stateless persons which require further and deeper consideration.

*UNHCR Regional Representation for Australia,
New Zealand, Papua New Guinea and the Pacific
Canberra, 24 June 2011*