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

Inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

Senate Legal and Constitutional Affairs Legislation Committee

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

19 February 2021

I. INTRODUCTION

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 provisions of the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (the Bill).

2. This Bill will principally amend the *Migration Act 1958* (Migration Act) and the Australian *Citizenship Act 2007* (Citizenship Act) to introduce a framework to prevent unauthorised disclosure of confidential information provided by a law enforcement or intelligence agency for consideration in visa decisions or for consideration in character related citizenship decisions.

3. While UNHCR acknowledges the importance of robust information and intelligence sharing to inform accurate visa and citizenship decision-making, UNHCR is concerned that the confidential nature of the proposed framework by which an affected person is unable to have access to and, if necessary, contest and correct non-disclosable information relating to their character will operate to prevent asylum-seekers, refugees and stateless persons from effectively challenging a negative migration or citizenship decision based on such information.

4. The statutory basis upon which a negative visa decision can be made on character grounds in Australia is significantly broader than the legal framework established in international law. However, visa refusal or cancellation due to the operation of Australian law does not negate a person's refugee or statelessness status or need for on-going international protection. Rather, it may result in undue restrictions of their entitlement to the rights established by the Refugee Convention (or the equivalent status and rights of stateless persons under the 1954 Statelessness Convention), in addition to rights arising from international human rights law.

5. The cancellation or refusal of a visa on character grounds has significant consequences for asylum-seekers, refugees and stateless persons in Australia. The ordinary operation of Australian law has the practical effect that a person whose

visa is cancelled or refused on character grounds remains in detention until they are removed from Australia. Where a person is not able to be removed, because they continue to be in need of international protection, Australian law allows them to remain in immigration detention indefinitely. As at mid- 2020, there were more than 550 asylum-seekers, refugees and stateless persons in immigration detention in Australia (including persons transferred from Nauru and Papua New Guinea), the majority of whom are not engaged in any type of visa assessment process and who nonetheless remain in indefinite detention, some for up to 14 years.[1]

6. In view of the nature of the risks involved and the grave consequences of an erroneous determination, including the risk of return in breach of Australia's non-*refoulement* obligations, it is essential that asylum-seekers, refugees and stateless persons be afforded full procedural safeguards and guarantees at all stages of the visa and citizenship determination process. The use of information supplied by law enforcement and intelligence agencies requires an appropriate balance to be found between the protection of the Australian community and Australia's international protection obligations. In the absence of appropriate procedural safeguards, this Bill represents a further weakening of the ability of Australian law to ensure the protection of asylum-seekers, refugees and stateless persons in accordance with relevant international instruments to which Australia is party.

II. UNHCR'S AUTHORITY

7. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees, and for assisting governments in seeking permanent solutions to the problem of refugees.[2] 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.'[3] UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,[4] 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 relating to the Status of Refugees* (1967 Protocol).[5]

8. UNHCR has specific additional international responsibilities for refugees who are stateless, pursuant to paragraphs 6(A)(II) of the Statute and Article 1(A)(2) of the

[1] Senate Committee on Legal and Constitutional Affairs, Budget Estimates, 19-20 October 2020, Question numbers BE20/352; BE20/243; BE20/355; BE20/356.
[2] 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).
[3] Statute, para. 8(a).
[4] UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.
[5] UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

Refugee Convention, both of which specifically refer to stateless persons who meet the refugee criteria. Moreover, in accordance with UN General Assembly resolutions 3274 XXIX[6] and 31/36,[7] UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),[8] 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.[9] UNHCR's statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR's Executive Committee.[10]

9. Australia is a Contracting State to the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (together, the Refugee Convention), as well as the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Statelessness Convention), and the 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.

10. UNHCR's submission focuses on the amendments in the Bill that are capable of affecting refugees, asylum-seekers and stateless persons, in light of relevant international legal obligations.

III. OVERVIEW OF THE PROPOSED AMENDMENTS

11. Of principal concern to UNHCR, the Bill would amend the Migration Act and the Citizenship Act to:

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[6] 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).
[7] 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.
[8] UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.
[9] 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.
[10] 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.

- Expand the definition of 'non-disclosable information' in the Migration Act to include information disclosed by a gazetted agency[11] where the Minister is of the opinion that further disclosure of such information or matter would (after consulting the agency) be contrary to the national interest. The proposed amendments do not prescribe the type of information that will be captured by the legislative framework other than the source. Importantly, the procedural fairness obligation under s. 57 of the Migration Act to provide applicants with particulars of 'adverse information', ensure they understand why the information is relevant and invite them to comment on it does *not* apply when the information is 'non-disclosable information' as defined in s. 5(1) of the Migration Act, as amended;

- Provide that an officer performing functions under the Migration Act or Citizenship Act commits an offence if information disclosed by a gazetted agency is communicated to them and they disclose it to another person (including the applicant and their legal representative) or body (including a court, tribunal, a parliament or parliamentary committee or any other body);[12]

- Provide the Minister with a non-compellable discretion to declare in writing that information provided by a gazetted agency may be disclosed, in specified circumstances, to the courts or tribunal, after consulting with the gazetted agency. However, a member of the tribunal must not disclose the information to the applicant and their legal representative unless permitted by the Minister.[13] Thus, a member of the tribunal conducting merits review of an adverse visa or citizenship decision may likely not have access to the information supplied by a gazetted agency that was considered by the primary decision maker; and

- Provide that an applicant and their legal representative can only make a submission or tender evidence to the courts regarding information supplied by a gazetted agency if they are lawfully aware of the content of the information. If not, an applicant must be excluded from the hearing of those submissions. Moreover, the court is prevented from disclosing the information to any person, including the applicant and their legal representative if disclosure would create a 'real risk of damage to the public interest', having regard to a specified list of matters (and only those matters). It is noteworthy that 'Australia's relations with other countries' is listed as a matter to which the court may have regard, but Australia's international obligations is not.[14]

[11] 'Gazetted agency' means: (a) in the case of an Australian law enforcement or intelligence body—a body specified in a notice published by the Minister in the Gazette; or (b) in the case of a foreign law enforcement body—a body in a foreign country, or a part of a foreign country, that is a foreign country, or part of a foreign country, specified in a notice published by the Minister in the Gazette; or (c) a war crimes tribunal established by or under international arrangements or international law: *Migration Act 1958*, subsection 503A(9).
[12] *Australian Citizenship Act 2007*, proposed section 52A, *Migration Act 1958*, proposed subsection 503A.
[13] *Australian Citizenship Act 2007*, proposed section 52B, *Migration Act 1958*, proposed subsection 503B.
[14] *Australian Citizenship Act 2007*, proposed section 52C, *Migration Act 1958*, proposed subsection 503C.

IV. CONSIDERATION WITH RESPECT TO INTERNATIONAL LEGAL STANDARDS RELATING TO REFUGEES AND STATELESS PERSONS

Procedural requirements

12. The Refugee Convention defines those who are eligible for international protection and it establishes key principles such as non-penalisation of irregular entry in certain circumstances and *non-refoulement*. It also provides that States shall as far as possible, facilitate the assimilation and naturalization of refugees and make every effort to expedite proceedings.[15] However, it does not set out procedures for the determination of refugee status as such. Yet it is generally recognized that fair and efficient procedures are an essential element in the full and inclusive application of the Refugee Convention.[16] Moreover, international human rights law provides for the right to a fair hearing and prohibits the expulsion of aliens without due process.[17] In view of the nature of the risks involved and the grave consequences of an erroneous determination, it is essential that asylum-seekers, refugees and stateless persons be afforded full procedural safeguards and guarantees at all stages of the assessment process.[18]

13. While UNHCR acknowledges the importance of robust information and intelligence sharing to inform accurate visa or citizenship decision-making, the use of information supplied by law enforcement or intelligence agencies requires the striking of an appropriate balance between the protection of the Australian community and Australia's international protection and human rights obligations. Noting that the information to be shared is likely to consist of 'a person's criminal background or associations'[19] and the existence of the *National Security Information (Criminal and Civil Proceedings) Act 2004* which operates to protect national security information,[20] UNHCR believes it is possible to have a process that protects the interests of the State but which also offers an affected individual access to the evidence against him or her, and which would allow some meaningful opportunity to challenge the information and adverse decision upon which it is made.

14. In view of the very serious consequences flowing from negative decisions (that is, protracted or even indefinite detention, removal in contravention of Australia's non-*refoulement* obligations and deprivation of rights), UNHCR believes that some adjustment to the procedures in such cases should be considered. UNHCR is of the view that open disclosure of all prejudicial information should be encouraged and the use of confidential information in determinations which affect asylum-seekers,

[15] Article 34 of the Refugee Convention.
[16] See UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, at paras. 4–5.
[17] Articles 13 and 14 of the International Covenant on Civil and Political Rights.
[18] The necessity to provide fair and efficient refugee status determination procedures in the context of individual asylum systems stems from the right to seek and enjoy asylum, as guaranteed under Article 14 of the Universal Declaration of Human Rights, and the responsibilities derived from the Refugee Convention, international and regional human rights instruments, as well as relevant Executive Committee conclusions.
[19] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, Attachment A: Statement of Compatibility with Human Rights, p. 48.
[20] Ibid., pp. 46-48.

refugees or stateless persons should only be maintained on an exceptional basis. However, even in such exceptional circumstances, the person affected by the confidential information should be provided with as much information as possible to ensure a fair determination process in accordance with the principles of natural justice.

International legal framework to consider criminal conduct

15. As noted in an earlier submission,[21] the Refugee Convention and 1954 Statelessness Convention provide an appropriate legal framework according to which matters relating to the conduct of a refugee or stateless person may be considered, and this framework is already established in Australian law. 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 Refugee Convention and the 1954 Statelessness Convention. Those who commit punishable offences are liable to criminal prosecution and the imposition of penalties.

16. In addition, Article 1F of the Refugee Convention sets out the grounds on which a person who satisfies the definition of *refugee* in Article 1A(2) may 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,[22] the application of exclusion for crimes against peace, war crimes, crimes against humanity,[23] or of acts contrary to the purposes and principles of the United Nations[24] is not subject to geographic or temporal restrictions and may give rise to the revocation of refugee status if a refugee engages in conduct giving rise to individual responsibility for such acts after his or her recognition.[25] In respect of stateless persons, Article 1F of the Refugee Convention is mirrored in Article 1(2)(iii) of the 1954 Statelessness Convention.

17. The Refugee Convention also foresees that States may, under certain, exhaustively defined circumstances, expel a refugee. Article 32 of the Refugee Convention

[21] UNHCR, Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019, August 2019, available at: https://www.unhcr.org/en-au/publications/legal/5d5b85e47/submission-to-the-legal-and-constitutional-affairs-legislation-committee.html.
[22] Article 1F(b) of the Refugee Convention.
[23] Article 1F(a) of the Refugee Convention.
[24] Article 1F(c) of the Refugee Convention.
[25] 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 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*, April 2019, HCR/1P/4/ENG/REV. 4, p. 28, available at: https://www.refworld.org/docid/5cb474b27.html.

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 (including being allowed to submit evidence to clear himself or herself), and only to a country where he or she would not be at risk 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, and the refugee or stateless person must be allowed to submit evidence except where compelling reasons of national security otherwise require.[26] Expulsion to a country where a risk of persecution exists is permitted under international refugee law only if one of the exceptions to the principle of *non-refoulement* provided for under Article 33(2) of the Refugee Convention applies. This may be the case with regard to a refugee who is assessed to be a danger to the security of the country, or "who, having been convicted of a particularly serious crime, constitutes a danger to the community of that country."[27]

18. The above-mentioned articles, which limit eligibility for refugee status and the rights adhering to refugee status, are given effect in Australia by existing provisions in the Act.[28] The character test is significantly broader than these provisions, and has the effect that those asylum-seekers, refugees, and stateless persons who are subject to visa cancellation or refusal or citizenship refusal or revocation are unable to enjoy the rights to which they are entitled under relevant international instruments.

Indefinite detention of asylum-seekers, refugees and stateless persons

19. Importantly, visa refusal or cancellation due to the operation of Australian law does not negate a person's refugee status or need for on-going international protection, although it may result in undue restrictions of their entitlement to the rights established by the Refugee Convention (or the equivalent status and rights of stateless persons under the 1954 Statelessness Convention), in addition to rights arising from international human rights law.

20. The cancellation or refusal of a visa on character grounds has significant consequences for asylum-seekers, refugees and stateless persons. If the person affected is in Australia, they must be detained until they are granted a visa or removed from Australia.[29] Notwithstanding limited avenues for the subsequent grant of a visa, including the broad power available to the Minister to release a person from immigration detention, the ordinary operation of Australian law has the practical effect that a person whose visa is cancelled or refused on character grounds remains in detention until they are removed from Australia. Where a person is not able to be removed, because they continue to be in need of international protection, Australian law allows them to remain in detention indefinitely.

[26] Article 31(2) of the 1954 Statelessness Convention.
[27] Article 33(2) of the Refugee Convention does not affect *non-refoulement* obligations arising under international human rights law.
[28] See for example *Migration Act 1958*, subsections 5H(2), 36(1C), 501(6)(f).
[29] *Migration Act 1958*, sections 189; 196.

21. UNHCR remains concerned that a considerable number of asylum-seekers, refugees, and stateless persons in Australia are consequently in situations of protracted detention. As at 31 December 2020, the average period of detention had steadily increased to 616 days.[30] For stateless persons, the average period of detention was 783 days.[31] As at 31 December 2020, approximately half of the entire immigration detention population comprising 1, 513 persons, were detained on the basis of visa cancellation on character grounds, including 237 persons detained on remote Christmas Island (including asylum-seekers, refugees and stateless persons removed from their support networks and with little or no prospect of release or removal).[32]

22. As at mid- 2020, there were more than 550 asylum-seekers, refugees and stateless persons in immigration detention in Australia (including persons transferred from Nauru and Papua New Guinea), the majority of whom are not engaged in any type of visa assessment process and who nonetheless remain in indefinite detention, some for up to 14 years.[33]

23. The length of time in immigration detention is far higher in Australia than in comparable jurisdictions. As recently observed by the Australian Human Rights Commission, in the United Kingdom, in December 2018, 87 per cent of all detainees had been in immigration detention for less than 6 months and 30 per cent for fewer than 28 days. In Canada, the average length of detention was 12.3 days between January and March 2019.[34]

24. It has long been recognized that detention can have severe and detrimental effects on health and psycho-social wellbeing of those affected, many of whom have already suffered from torture or trauma before arriving in Australia. Although beyond the remit of this submission, detaining authorities, should, in UNHCR's view, make every effort to resolve cases in a timely manner, including through practical steps to regularly reassess and confirm the necessity of continued detention in conformity with international human rights law, noting that indefinite immigration detention is arbitrary and unlawful. There are viable and practical alternatives to Australia's immigration detention regime which are able to satisfy the legitimate security concerns of the Government, but which, nevertheless, allow for an asylum-seeker, refugee or stateless person to be released, on appropriate conditions, into the community. Where such options exist, detention cannot be considered necessary nor proportional, rendering it arbitrary. Alternatives should be pursued as a matter of priority.

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[30] Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 December 2020, p 12.
[31] Senate Committee on Legal and Constitutional Affairs, Budget Estimates, 19-20 October 2020, Question number BE20/351.
[32] Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 December 2020, p. 4.
[33] Senate Committee on Legal and Constitutional Affairs, Budget Estimates, 19-20 October 2020, Question numbers BE20/352; BE20/243; BE20/355; BE20/356.
[34] Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019 Report*, December 2020, p. 16, available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention .

V. CONCLUDING REMARKS

25. UNHCR believes it is possible to implement a process that protects the interests of the State but which also offers asylum-seekers, refugees and stateless persons access to the evidence against him or her, and which would allow some meaningful opportunity to challenge the information and adverse decision upon which it is made. In view of the very serious consequences flowing from negative decisions (that is, protracted or even indefinite detention, removal and deprivation of rights afforded under international law), UNHCR believes that some adjustment to the proposed procedures should be considered.

26. UNHCR is of the view that open disclosure of all prejudicial information should be encouraged and the use of confidential information in determinations which affect asylum-seekers, refugees and stateless persons should only be maintained on an exceptional basis. However, even in such circumstances, the person affected by the confidential information should be provided as much information as possible to ensure a fair determination process in accordance with the principles of natural justice.

27. Accordingly, UNHCR recommends that the Bill not be passed in its current form.

United Nations High Commissioner for Refugees
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