



## **Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019**

### **Senate Legal and Constitutional Affairs Legislation Committee**

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

**August 2019**

#### **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 Amendment (Strengthening the Character Test) Bill 2019 (the Bill).
2. The Bill would expand the scope of the “character test” in section 501(6) of the *Migration Act 1958* (Cth) (the Act), and thereby expand the category of non-citizens who are liable to consideration for visa cancellation or refusal, and therefore at risk of detention and removal from Australia under Australian law. Following the expansion of the framework for visa cancellation and refusal in 2014, UNHCR considers that the Bill would further weaken the ability of Australian law to ensure the protection of refugees and stateless persons in accordance with relevant international instruments.

#### **II. UNHCR’S AUTHORITY**

3. 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 to the problem of refugees.<sup>1</sup> 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.”<sup>2</sup> UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,<sup>3</sup> according to which State Parties undertake to “co-

---

<sup>1</sup> 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).

<sup>2</sup> Statute, para. 8(a).

<sup>3</sup> UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

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).<sup>4</sup>

4. 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 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<sup>5</sup> and 31/36,<sup>6</sup> UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),<sup>7</sup> 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.<sup>8</sup> UNHCR’s statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR’s Executive Committee.<sup>9</sup>
5. Australia is a Contracting Party 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.

---

<sup>4</sup> UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

<sup>5</sup> 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).

<sup>6</sup> 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.

<sup>7</sup> UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

<sup>8</sup> UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 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.

<sup>9</sup> 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.

6. Although the amendments in the Bill are capable of affecting any non-citizen, UNHCR's submission focuses on their effect on refugees, asylum-seekers and stateless persons in Australia, in light of relevant international legal obligations.

### III. THE NATURE OF THE PROPOSED AMENDMENTS

7. The Act establishes a framework under which the Minister or their delegate may refuse to grant a visa to, or cancel the visa of, a non-citizen who does not pass the character test.<sup>10</sup> The Act sets out the circumstances in which a person does not pass the character test, including on the basis of a wide range of conduct.<sup>11</sup> These circumstances are very broad, and were significantly expanded by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*, which also introduced mandatory visa cancellation in certain circumstances. In situations where a person does not pass the character test, the decision as to whether or not their visa is cancelled, or visa application is refused, is generally guided by Direction No. 79, which sets out considerations that should be taken into account by decision-makers.<sup>12</sup>
8. The Bill would extend the power to cancel or refuse a non-citizen's visa to circumstances in which the non-citizen has been convicted of an offence that involves certain "physical elements" and which is punishable by a term of imprisonment of two years or more. A person who is convicted of such an offence would fail the character test irrespective of the custodial sentence imposed (if any).
9. The cancellation or refusal of a visa on character grounds has significant consequences. If the person affected is in Australia, they must be detained until they are granted a visa or removed from Australia.<sup>13</sup> 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 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 removed from Australia, Australian law allows them to remain in detention indefinitely. Even in those cases where a person is subsequently granted a visa and is able to enter or return to the Australian community, the period of detention may be in the order of years. Indeed, UNHCR is aware of a considerable number of refugees and asylum-seekers who have been in detention in Australia for longer than two years, and some for many years longer. These include some refugees who currently have no legal avenues for applying for a visa.

---

<sup>10</sup> *Migration Act 1958*, subsections 501(1), (2), (3A). Subsection 501(3) also provides that the Minister may personally refuse or cancel a visa if he or she reasonably suspects the person does not pass the character test, and is satisfied the refusal or cancellation is in the national interest.

<sup>11</sup> *Migration Act 1958*, subsection 501(6) specifies the circumstances in which a person does not pass the character test.

<sup>12</sup> Direction No. 79 also applies to the exercise of the discretion to revoke the mandatory cancellation of a mandatory cancellation decision.

<sup>13</sup> *Migration Act 1958*, sections 189; 196.

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

10. Visa refusal or cancellation due to the operation of Australian law does not negate a person's refugee status, 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.
11. In UNHCR's view, 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.
12. 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,<sup>14</sup> the application of exclusion for crimes against peace, war crimes, crimes against humanity,<sup>15</sup> or of acts contrary to the purposes and principles of the United Nations<sup>16</sup> 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.<sup>17</sup> In respect of stateless persons, Article 1F of the Refugee Convention is mirrored in Article 1(2)(iii) of the 1954 Statelessness Convention.
13. The Refugee Convention also foresees that States may, under certain, exhaustively defined circumstances, expel a refugee. Article 32 of the Refugee Convention 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, 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

---

<sup>14</sup> Article 1F(b) of the Refugee Convention.

<sup>15</sup> Article 1F(a) of the Refugee Convention.

<sup>16</sup> Article 1F(c) of the Refugee Convention.

<sup>17</sup> 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\*](#), December 2011, HCR/1P/4/ENG/REV. 3, p. 28.

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.<sup>18</sup> 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.”<sup>19</sup>

14. 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, and do not require additional legislation.<sup>20</sup> The character test is significantly broader than these provisions, and has the effect that refugees, asylum-seekers and stateless persons who are subject to visa cancellation or refusal are unable to enjoy the rights to which they are entitled under relevant international instruments.
15. Although the decision-making process for character-related cancellation and refusal decisions allows *non-refoulement* obligations to be taken into account, it is of concern to UNHCR that decision-makers are not required to consider *non-refoulement* as a primary or paramount obligation.<sup>21</sup> This has the effect that a person’s visa may be cancelled on character grounds even where it is recognized that the consequences of doing so may include indefinite detention or *refoulement*.
16. UNHCR acknowledges the Australian Government’s position that that “persons who are found to engage Australia’s *non-refoulement* obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations.”<sup>22</sup>
17. However, UNHCR remains deeply concerned by section 197C of the Act, which provides that Australia’s *non-refoulement* obligations are irrelevant for the purposes of exercising removal powers. The principle of *non-refoulement* is the cornerstone of international refugee protection and enshrined in Article 33 of the Refugee Convention. Article 33(1) provides:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

---

<sup>18</sup> Article 31(2) of the 1954 Statelessness Convention.

<sup>19</sup> Article 33(2) of the Refugee Convention does not affect *non-refoulement* obligations arising under international human rights law.

<sup>20</sup> See for example *Migration Act 1958*, subsections 5H(2), 36(1C), 501(6)(f).

<sup>21</sup> Direction No. 79, *Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, (Direction under s 499 of the *Migration Act 1958*).

<sup>22</sup> Migration Amendment (Strengthening the Character Test) Bill 2019, Explanatory Memorandum, *Attachment A: Statement of Compatibility with Human Rights*.

18. Section 197C, by expressly permitting the removal of persons from Australia unconstrained by *non-refoulement* obligations, is incompatible with Australia's obligations under Article 33 of the Refugee Convention. UNHCR notes that the Parliamentary Joint Committee on Human Rights has made the same observation in relation to *non-refoulement* obligations under the *International Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>23</sup>
19. Even where visa cancellation or refusal does not result in a person's removal from Australia, it renders a person subject to immigration detention. Detention is an exceptional measure and any decision to detain a refugee, asylum-seeker or stateless person should be strictly limited to the purposes authorized by international law.<sup>24</sup> Among other requirements, detention must be demonstrated to be necessary, proportionate to any threat, non-discriminatory, and subject to judicial oversight.<sup>25</sup> Indefinite detention is arbitrary, and maximum limits on periods of detention should be established in law.<sup>26</sup>
20. Refugees, asylum-seekers and stateless persons are particularly vulnerable to arbitrary detention as a result of visa cancellation or refusal. UNHCR remains concerned that a considerable number of refugees, asylum-seekers and stateless persons in Australia are currently in situations of protracted detention. The annual number of protection visas and refugee visas cancelled on character-grounds increased from fewer than ten in 2013-14 to 126 in 2016-17.<sup>27</sup> According to statistics published by the Australian Government, at mid-2019 there were 56 stateless persons held in immigration detention facilities, and 455 people who arrived without a visa by air or sea.<sup>28</sup> At mid-2019, the Australian Government reported that the average period of detention was 485 days.<sup>29</sup> UNHCR is aware of many refugees in Australia who have been detained for significantly longer than this average. The Australian Government reported in 2017 that the average period of detention for stateless persons was 836 days.<sup>30</sup>

---

<sup>23</sup> Parliamentary Joint Committee on Human Rights (PJCHR), [Fourteenth Report of the 44th Parliament](#), October 2014, pp. 77-78; [Twelfth Report of the 45th Parliament](#), November 2018, pp. 4-7. Note that the PJCHR examines legislation for compatibility with human rights in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, which defines human rights as the rights and freedoms contained in seven core human rights treaties to which Australia is a party. The PJCHR does not consider compatibility with the Refugee Convention or 1954 Statelessness Convention.

<sup>24</sup> 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).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Senate Legal and Constitutional Affairs Committee, Additional Budget Estimates, 26-27 February 2018, Question number AE18/084.

<sup>28</sup> Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 30 June 2019, pp. 7-8. As Australia lacks a dedicated statelessness determination procedure in order to properly identify stateless persons, it is possible that the actual number of stateless people in detention is higher than this figure.

<sup>29</sup> *Ibid.* p. 11.

<sup>30</sup> Senate Committee on Legal and Constitutional Affairs, Budget Estimates, 22 May 2017, Question number BE17/052.

21. By expanding the grounds for character-related visa refusal or cancellation, the Bill further increases the risk of refugees and stateless persons being detained in circumstances that are inconsistent the international standards described above.
22. 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. Detaining authorities, should, in UNHCR's view, make every effort to resolve cases in a timely manner, including through practical steps to identify and confirm the necessity of continued detention in conformity with international human rights law, and to pursue alternatives to detention wherever possible.

## **V. CONCLUDING REMARKS**

23. UNHCR is concerned that the legal framework for visa cancellation and refusal in Australian law permits the unreasonable restriction of the enjoyment of the rights guaranteed to refugees by the Refugee Convention, and to stateless persons by the 1954 Statelessness Convention.
24. It is foreseeable that the proposed amendments would have a disproportionately adverse impact on refugees, asylum-seekers and stateless persons, who are especially vulnerable in situations involving immigration detention and removal. In particular, by further expanding the scope of the character test, the Bill would increase the risk that refugees, asylum-seekers and stateless persons may be detained or removed from Australia in circumstances other than those permitted by international law.
25. Accordingly, UNHCR recommends that the Bill not be passed.

United Nations High Commissioner for Refugees  
August 2019