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 (Regaining Control Over Australia's Protection Obligations) Bill 2013

Senate Legal and Constitutional Affairs Committee
23 January 2014

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 (Committee) in respect of its inquiry into the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* (Bill).

II. UNHCR'S STANDING TO COMMENT

2. Australia is a party to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol relating to the Status of Refugees* (together, the 1951 Convention).[1]

3. UNHCR makes this submission pursuant to its supervisory mandate established by article 35 of the Refugee Convention and the *1950 Statute of the Office of the United Nations High Commissioner for Refugees*[2] (Statute).

4. The UN General Assembly, the UN Economic Social Council and UNHCR's Executive Committee (ExCom) have extended UNHCR's international protection mandate by empowering UNHCR to protect and assist particular groups of people whose circumstances do not necessarily fall within the scope of its mandate set out in the Statute, but who face serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.[3]

5. UNHCR additionally has been given a specific and global mandate to contribute to the prevention and reduction of statelessness by the UN General Assembly in 1974 and 1976, as well as through subsequent resolutions.[4]

6. UNHCR's supervisory role is complemented by ExCom Conclusions on International Protection which are developed through a consensual process.[5] Although not formally

[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), *Statute of the Office of the United Nations High Commissioner for Refugees* (1950), Annex.
[3] For full references to the resolutions, see Volker Türk, 'The role of UNHCR in the development of international refugee law' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 153-173.
[4] UN General Assembly, Resolutions 3274 (XXIX) of 10 December 1974 and 31/36 of 30 November 1976.

binding, ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of States.[6] The specialist knowledge of ExCom and the fact that its Conclusions are taken by consensus add further weight. Australia is a member of ExCom.

7. As part of UNHCR's supervisory role, UNHCR develops guidelines drawing on the 1951 Convention, ExCom Conclusions, and international human rights instruments including the *1966 International Covenant on Civil and Political Rights* (ICCPR),[7] the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)[8] and the *1989 Convention on the Rights of the Child* (CRC).[9]

III. UNHCR'S DEFINITION OF COMPLEMENTARY PROTECTION

8. UNHCR defines "complementary" forms of protection as referring to legal mechanisms for protecting and according a status to a person in need of international protection who does not fulfil the refugee definition contained in the 1951 Convention.

9. UNHCR considers such mechanisms to be a positive and pragmatic response to certain international protection needs not covered by the 1951 Convention, but emphasizes the need to ensure that this form of international protection complements, and does not undermine, a person's entitlement to refugee status under the 1951 Convention.

10. ExCom Conclusion No 103 (LVI) – 2005 on the Provision of International Protection Including Through Complementary Forms of Protection underlines the importance of developing the international protection system in a way which avoids protection gaps, and enables all those who are in need of international protection to find and enjoy it.[10]

11. State parties' *non-refoulement* obligations under the 1951 Convention and international human rights instruments are binding obligations.

12. UNHCR notes that Australia is a party to the ICCPR, the CAT and the CRC, which contain *non-refoulement* obligations and give rise to grounds for complementary protection.

IV. BACKGROUND ON COMPLEMENTARY PROTECTION IN AUSTRALIA AND THE BILL'S PROPOSED AMENDMENTS

13. UNHCR is of the view that it is desirable for refugee status assessment procedures to have a legislative basis which includes an assessment of a person's complementary protection needs if the person concerned does not meet the definition of a refugee.

14. UNHCR considers that a State's codification of its complementary protection obligations provides a clearer and more predictable framework within which assessments of certain international protection needs not covered by the 1951 Convention can be made.

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[5] 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.
[6] In 2012 Excom had 87 member States.
[7] 1966 ICCPR, opened for signature 26 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[8] 1984 CAT, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987).
[9] 1989 CRC, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[10] ExCom Conclusion No. 103 (LVI) – 2005.

15. On 24 March 2012, the *Migration Act 1958* (Cth) (Act) was amended by introducing a complementary protection framework, whereby applicants for protection visas who do not meet the definition of a refugee may be entitled to a protection visa if they establish (subject to specified exceptions and exclusions)[11] that there 'are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm' (see s 36(2)(aa) of the Act).

16. UNHCR welcomed this introduction as it provided a legislative basis to protect persons who may not qualify as refugees under the 1951 Convention, but who are nonetheless in need of international protection in accordance with Australia's *non-refoulement* obligations, specifically under the ICCPR and the CAT.[12]

17. The Bill proposes to amend the Act by removing the complementary protection framework from the Act, so that Australia's *non-refoulement* obligations are only considered through an administrative process, which was the procedure in place prior to 24 March 2012.

V. REMOVING THE SINGLE LEGISLATIVE PROCESS TO ASSESS COMPLEMENTARY PROTECTION

18. UNHCR's Agenda of Protection, a Programme of Action adopted by the Office and Contracting States to the 1951 Refugee Convention in 2002 recommended:

> 'States to consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.'[13]

19. ExCom Conclusion No 103 (LVI) – 2005 on the Provision of International Protection Including Through Complementary Forms of Protection encourages:

> 'States to consider whether it may be appropriate to establish a comprehensive procedure before a central expert authority making a single decision which allows the assessment of refugee status followed by other international protection needs as a means of assessing all international protection needs without undermining refugee protection and while recognizing the need for a flexible approach to the procedures applied.'[14]

i) Proposed amendments in respect of a single procedure

20. The Act currently sets out a single process for any application for a protection visa, involving first an examination of the 1951 Refugee Convention grounds, to be followed, as necessary and appropriate, by an examination of the possible grounds for the grant of a complementary form of protection.

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[11] See ss 36(2B) and 36(2C).
[12] UNHCR has previously expressed its concern that the Act does not address Australia's *non-refoulement* obligations under the CRC.
[13] UNHCR, *Agenda for Protection* (3rd ed, October 2003), 34.
[14] ExCom Conclusion No. 103 (LVI) – 2005, (q).

21. UNHCR notes that the Explanatory Memorandum for the Bill states that: '…the government's position is it is not appropriate for complementary protection to be considered as part of a protection visa application and that *non-refoulement* obligations are a matter for the government to attend to in other ways.'[15]

22. UNHCR acknowledges, as highlighted in the second reading speech for the Bill,[16] that there is no obligation imposed on Australia to follow a particular process in respect of fulfilling its *non-refoulement* obligations. However, UNHCR is of the view that a single procedure enhances the fairness and efficiency of Australia's asylum system, as international protection obligations owed by Australia are considered during the initial assessment by a decision maker, which provides greater certainty for applicants and enhances efficiency (both time and cost efficiency).

23. Removal of the complementary protection framework from the Act, so that Australia's *non-refoulement* obligations are only considered through an administrative process means that there are two separate processes in place to consider international protection claims. UNHCR's view is that this is not fair and efficient as it involves separate decision makers and legal processes to consider international protection claims.

ii) Proposed amendments in respect of procedural fairness and existing legal safeguards

24. UNHCR notes that the second reading speech for the Bill states that consideration of complementary protection:

> '…will happen either as part of pre-removal procedures, which are undertaken by departmental officials to assess whether the removal of an asylum-seeker could engage Australia's non-refoulement obligations, or through the use of Minister for Immigration and Border Protection's discretionary and non-compellable intervention powers under the act.'[17]

25. UNHCR is of the view that by limiting consideration of complementary protection grounds to an administrative process, a person's access to procedural fairness and due process is significantly undermined, as he or she does not have a legislative basis to seek to have the minister consider grounds for complementary protection and has no right to appeal any decision rejecting protection on complementary grounds.

26. UNHCR further notes the statement in the second reading speech for the Bill that the Minister's: '… personal powers have advantage of being able to deal flexibly and constructively with genuine cases of individuals and families whose circumstances are invariably unique and complex, and who may be disadvantaged by a rigidly codified criterion'.[18]

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[15] Explanatory Memorandum, 'Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (Cth), 1.
[16] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2013, 1522 (Scott Morrison MP).
[17] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2013, 1522 (Scott Morrison MP).
[18] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2013, 1522 (Scott Morrison MP).

27. UNHCR appreciates the intention to allow the Minister to deal flexibly and constructively with cases that may not satisfy the criteria under the Act, but may nevertheless raise compelling humanitarian reasons to allow a person to stay in Australia.

28. However, under the current Act if a person's application for a protection visa is unsuccessful, the Minister is not prevented from exercising his/her personal power of intervening if he or she is of the view that the complementary protection criterion under the Act has been too rigidly applied. Of particular concern to UNHCR is that the proposed amendments by the Bill will mean that a person in need of complementary protection will only have recourse to an administrative process, unlike the current regime whereby an individual has recourse both to the statutory basis for complementary protection and the administrative process (assuming the Minister decides to exercise his/her discretion) if the complementary protection criterion is too rigid and inflexible.

29. UNHCR further notes the statement in the second reading speech of the Bill that "complementary protection provisions … are complicated, convoluted, difficult for decision makers to apply, and are leading to inconsistent outcomes".[19] UNHCR is of the view that to address this issue identified by the Government of Australia, the preferred option would be to amend the existing complementary protection provisions under the Act rather than removing the process entirely.

30. By removing the complementary protection framework from the Act, existing procedural and legal safeguards are significantly undermined, which may have potentially serious ramifications for the persons concerned.

VI. *NON-REFOULEMENT* OBLIGATIONS UNDER THE ICCPR AND THE CAT

31. The 1951 Convention envisages that a person who is properly excluded under article 1F of the 1951 Convention may be returned to his or her country of nationality, or former habitual residence, notwithstanding the existence of a well-founded fear of persecution. However, if such a person would face torture, cruel and inhuman or degrading treatment or punishment, then he or she cannot be returned because of the absolute and non-derogable nature of the *non-refoulement* obligation pursuant to the ICCPR and the CAT.

32. UNHCR welcomes the statement in the Explanatory Memorandum that the Bill "…does not propose to resile from Australia's international obligations… Anyone who is found to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations".

33. In this regards, UNHCR notes the submission made by the Department of Immigration and Border Protection which seems to infer that persons who may have been involved in serious crimes arguably do not engage Australia's *non-refoulement* obligations under international law.[20]

34. While UNHCR accepts the proposition that Australia is not required to grant a particular type of visa to a person who is entitled to complementary protection, but who has committed a

[19] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2013, 1522 (Scott Morrison MP).
[20] Department of Immigration and Border Protection, Submission No 3 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*, 5.

serious crime, UNHCR wishes to note its position that Australia's *non-refoulement* obligation under the CAT and the ICCPR, as a matter of international law, are non-derogable.[21] As a matter of international law (indeed customary international law), no State is permitted under any circumstances to *refoule* a person who may be subjected to torture, cruel and inhuman or degrading treatment or punishment, even if the person has committed a serious crime.[22]

VII. CONCLUSION

35. For the reasons outlined above, UNHCR is concerned about the Bill's proposed amendments to the Act as they:

a) remove the legislative basis for complementary protection which provides a clear and predictable framework for a person who may not meet the definition of a refugee, but may be in need of complementary protection;

b) weaken existing guarantees of procedural fairness and due process as administrative decisions are non-compellable and non-reviewable; and

c) revert back solely to an administrative process to assess Australia's *non-refoulement* obligations that may be owed to a person who does not satisfy the refugee definition. This weakens Australia's international protection framework as persons will no longer have the legal safeguard of having their complementary claims considered both on a statutory basis and potentially (if the Minister exercises his discretionary power) through an administrative process.

36. UNHCR would welcome the opportunity to discuss its concerns with the Committee.

UNHCR Regional Representation
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[21] This proposition is supported elsewhere in the Department of Immigration and Border Protection's submission, which states 'Australia accepts that the position under international law is that Australia's *non-refoulement* obligations under the CAT and the ICCPR are absolute and cannot be derogated from'. See Department of Immigration and Border Protection, Submission No 3 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*, 3.
[22] See UN Human Rights Committee (HRC), CCPR *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, [9]: 'In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.' See also International Court of Justice, *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)*, Judgment on the Merits of 20 July 2012 [99].