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

Senate Legal and Constitutional Legislation Committee

Inquiry into the Migration Litigation Reform Bill 2005

Submission by United Nations High Commission for Refugees

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on the issue of the Migration Litigation Reform Bill 2005 insofar as it impacts on Australia's international obligations as they relate to asylum seekers, refugees and stateless persons.

UNHCR Standing to Comment

2. Australia has assumed responsibility to extend protection to asylum seekers and refugees through accession to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the Refugee Convention). [1] UNHCR is regularly requested to comment on national legislation regarding refugees and related issues by States, pursuant to the Preamble and Article 35 of the Refugee Convention as well as the Statute of the Office of the United Nations High Commissioner for Refugees (the Statute).

3. The supervisory role of UNHCR relating to the protection of refugees worldwide is complemented by the Conclusions developed annually by the Executive Committee of the High Commissioner's Programme (EXCOM), comprised of States Party to the Refugee Convention and its Protocol. The EXCOM Conclusions are developed through a consensual process requiring the agreement of States, and set international protection standards. Australia has traditionally taken an active role in the work of EXCOM.

Refugees' Access to the Courts

4. Article 16 of the Refugees' Convention provides that:

   1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

   2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption

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[1] The term '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).

from cautio judicatum solvi.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

5. Access to the Courts is an essential element of the inclusion of refugees in a functioning system of freedom and justice, and Article 16(1) is a provision of the Convention to which no reservations are permitted. The Convention imposes a corresponding obligation on refugees to respect the laws of the country of asylum (Refugee Convention, Article 2).
6. The right of access to courts encompasses matters such as access to legal representation, interpretation and translation facilities, relevant costs and fees, as well as broader concepts of due process and fair trial. Although the Refugee Convention does not expressly mention these aspects of the right, they are inherent to it and exist under general human rights standards (Universal Declaration of Human Rights, Article 10; International Covenant on Civil and Political Rights, Article 14).

Measures to Discourage Cases that have "No Reasonable Prospects of Success"

7. In Conclusion No. 85 (XLIX), EXCOM acknowledged the need for States to address misuse or abuse of national refugee status determination procedures, but urged States to ensure that national law and administrative practices are compatible with the principles and standards of applicable refugee and human rights law, as set out in relevant international instruments.
8. In this context it is important to note that a strength of Australia's administrative processes is the supervision of the courts. Judicial oversight of administrative refugee status determination contributes to compliance with the Convention by establishing, through considered interpretation of the Convention's terms, the parameters of Australia's international obligations. Similarly, procedural safeguards that are from time to time elaborated by the courts enhance relevant administrative procedures. In UNHCR's view, a cautious approach is warranted in seeking to reduce unmeritorious litigation in asylum cases. Measures that may have the unintended affect of discouraging applications that are not certain of success, but are nonetheless not abusive, may detract from what is currently a positive aspect of Australia's system.
9. Australian migration law is complex. There is no "bright line" separating meritorious and unmeritorious court applications. This is particularly so in cases that raise questions of interpretation of the Refugee Convention that may be contested in the Australian domestic environment, or where the interplay between the Convention and domestic legislation is unsettled in the sense that it has not been the subject of judicial consideration.
10. It is also important to recognise that, on occasion, arguments that may appear novel, lacking in merit and/or contrary to settled law, will ultimately be successful. The High Court decision in NAGV and NAGW,[2] which overturned a

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[2] NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 6 (2 March 2005).

line of Federal Court authority dating back to 1997, is a recent and notable illustration of this.

11. In UNHCR's view, it would be unfortunate if asylum seekers and their legal advisers were discouraged from applying to the Court in cases of this nature, particularly where the outcome may have implications not only for the individual, but also for asylum seekers in general, and may also serve to clarify the law. Similarly, summary dismissal of such cases would seem to be inappropriate. This issue could be addressed by amending the items in the bill that rely on the "no reasonable prospects of success" formulation, to make it clear that cases raising significant questions of law are not intended to be subject to those provisions.

Possible Measures to Complement the Bill

12. As is acknowledged in the Explanatory Memorandum, not all unsuccessful cases are unmeritorious. Also, in the context of asylum matters, it cannot necessarily be concluded from a high success rate by the Government in cases that proceed to hearing, that applicants are using judicial review inappropriately to prolong their stay in Australia.

13. It should be noted that not all cases proceed to hearing. In some instances the Government withdraws from litigation beforehand. In cases that do proceed to hearing and are unsuccessful, the applicant may be motivated by a genuine belief that they are a refugee, even though they may not meet the strict Convention definition. This is particularly so in cases where the applicant may not be a refugee so defined, but may nonetheless be a person in need of international protection, or for whom return is not possible or advisable for a variety of reasons.

14. People in this situation may be less likely to pursue court proceedings if a formal system of complementary protection were available to meet their protection needs. UNHCR has previously raised the matter of complementary protection in its submission to the Senate Select Committee on Ministerial Discretion in Migration Matters, Inquiry into Ministerial Discretion in Migration Matters.

15. Another matter which may affect the number of unmeritorious court applications is difficulty in accessing legal advice. Asylum seekers will often not have the financial resources to pay for legal advice and many will find themselves unable to access legal aid. The complexity of Australian migration law is such that asylum seekers cannot reasonably be expected to assess for themselves their prospects of success before the courts. Properly advised, asylum seekers would be less likely to institute unmeritorious court applications. Measures to facilitate greater access for asylum seekers to free legal assistance may therefore assist in achieving the Bill's objective of reducing the number of unmeritorious cases.

16. The Federal Court has over the years developed considerable expertise in migration law as it applies to asylum seekers. The Bill proposes a significant shift of responsibility for asylum cases from the Federal Court to the Federal Magistrates' Court, which will require Federal Magistrates to acquire new expertise in this area. The matter of appropriate training for Federal Magistrates

may therefore require attention. UNHCR has provided relevant training to the judiciary in other countries and stands ready to assist in Australia in this regard.

17. The prospects of achieving the Bill's objective of improving the overall efficiency of migration litigation may be improved if the measures contained in the Bill were complemented by those noted above.

Conclusion

In UNHCR's view the Bill could be improved by amending it to ensure that asylum seekers and their advisers are not discouraged from pursuing cases in circumstances where there is legal uncertainty around an aspect of their case, or where a significant point of legal principle is involved. It should also be recognised that there is no single cause to the high volume of migration litigation in Australia and, in particular, that it is not exclusively a function of abuse of the system. That being the case, UNHCR considers that the Bill's objectives would be more likely to be achieved if complemented by the additional measures noted in paragraphs 14, 15 and 16 of this submission.