

**SENATE LEGAL AND CONSTITUTIONAL
REFERENCES COMMITTEE**

**INQUIRY INTO THE MIGRATION LEGISLATION AMENDMENT
BILL (NO.6) 2001**

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ORGANISATION: UNITED NATIONS HIGH
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Subject: UNHCR Submission - Migration Legislation Amendment Bill (No.6) 2001



AMEND6

To: The Senate Legal and Constitutional References Committee

Please find attached a copy of the submission of the United Nations High Commissioner for Refugees (UNHCR) on the inquiry into the Migration Legislation Amendment Bill (No.6) 2001. UNHCR hopes that this will assist in the deliberations on the bill.

UNHCR can be contacted in the following address and telephone number:

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Sincerely yours,

Thamrongsak Meechubot
Acting Regional Representative
UNHCR



**Submission of the
United Nations High Commissioner for Refugees
to the Senate Legal and Constitutional References Committee**

Inquiry into the Migration Legislation Amendment Bill (NO.6) 2001

I. INTRODUCTION:

In accordance with its mandate responsibilities and Article 35 of the *1951 Convention relating to the Status of Refugees* (hereinafter to be referred as the 1951 Convention), the United Nations High Commissioner for Refugees (UNHCR) welcomes this opportunity to provide observations on the text of the Migration Legislation Amendment Bill (No.6) 2001, insofar as it impacts on asylum seekers and refugees.

UNHCR wishes to note its appreciation of its consultations with the Department of Immigration and Multicultural Affairs (DIMA) at the conceptual stage of this legislative amendment.

II. COMMENTS ON THE AMENDMENTS:

1. Repeal and Substitution of Subsection 36 (2)

UNHCR welcomes this amendment, which provides that family members of persons who are owed protection obligations by Australia would also be eligible for a protection visa, since it is in line with the principle of family unity.

2. Insertion after Subsection 48A(1A)

This amendment extends the existing bar on repeat protection visa applications to persons whose protection visas were cancelled. It is noted that this provision is subject to the Minister's discretion to lift the bar, under section 48B. However, in view of the fact that the Minister's authority is discretionary, non-compellable and non-reviewable, the Office is concerned that this may not provide an adequate safeguard against the possible *refoulement* of asylum applicants. UNHCR would like to further explore means by which this concern could be addressed in the proposed amendment.

3. Insertion of Subsection 48A (2)

This subsection, which extends the bar on repeat applications to family members of dependants of the primary applicant, is of concern to UNHCR. The Office notes that this provision is also subject to the discretionary authority of the Minister, but reiterates the same reservations cited in regard to the preceding amendment, notably where a family member does have a valid claim, but has not submitted an application in the circumstances provided for in the proposed legislation. This concern is especially relevant in instances where conditions in the country of origin have changed or where female dependants have not initially presented their own claims for a variety of reasons, including cultural ones.

In UNHCR's view, this legislation should include, at a minimum, the obligation to provide appropriate counselling of family members on the importance of submitting individual and/or combined claims in the first instance. Furthermore, it should clarify that a gender-sensitive approach is ensured, in case the application is lodged at a later stage.

4. Insertion of Subdivision AL - Other Provisions about Protection Visas

Section 91R - Persecution

UNHCR takes the view that this amendment should be worded in such a way as to allow sufficient flexibility in this respect, more by way of guidance than by way of actual definition. Moreover, it should not introduce new restrictions on the refugee definition of the 1951 Convention.

In UNHCR's understanding, persecution, in essence, comprises "human rights abuses or other serious harm." The notion of persecution in the refugee definition was designed to allow for a sufficient degree of flexibility in order to ensure that all future forms of persecution are encompassed. Therefore, while broad guiding parameters and enumerating non-exhaustive and non-exclusive elements may be helpful in determining whether harm amounts to persecution, too narrow a definition of this term would not be appropriate since it would preclude the recognition of any emerging forms of persecution.

In addition, this provision restricts the notion of persecution by requiring it, for instance, to involve systematic and discriminatory conduct. While persecution may indeed often have a systematic or repetitive element, this may not always be the case. The current formulation would, therefore, narrow the notion of persecution by adding an element that may not necessarily be determinative.

In addition, the Office also provides concrete comments on specific aspects of this amendment, as follows:

Subsection 91R (1) - In UNHCR's view, the Convention grounds must be a relevant contributing factor, although it need not be the sole or dominant cause. The amendment [viz., **1a**] is at variance with this position and could have the effect of restricting the refugee definition, thereby having adverse consequences for refugees.

Further, as outlined above, the amendment [viz., 1c] adds the element of systematic and discriminatory conduct, to the notion of persecution. This would introduce an inappropriate restriction of the definition.

Subsection 91R (2) – In UNHCR's view, the amendment should clearly specify that the list of "serious harm" provided in the legislation is not exhaustive. The Office notes that this clarification is provided in the Explanatory Memorandum, but considers that it would be more appropriate to include this reference in the legislative text itself. UNHCR is also of the opinion that the amendment should specifically recognize that various measures, not amounting to persecution in themselves, may, in some cases, amount to persecution if they occur in a cumulative manner. Similarly, a reference should be included to the effect that measures of discrimination leading to consequences of a substantially prejudicial nature, including loss of livelihood, could also amount to persecution.

Subsection 91R (3) – UNHCR appreciates the desire to ensure that asylum procedures are not abused by persons not in need of international protection who may contrive claims. The Office also recognizes that claims based on activities of the claimant after arrival in an asylum country are likely to raise issues of credibility, where it may be useful to provide guidance to decision-makers. Notwithstanding the foregoing, UNHCR is concerned by the wording of the amendment, which appears to exclude all "sur place" claims based on the activities of the person in the asylum country (except at the discretion of the Minister).

The application of the refugee definition of the 1951 Convention is based on a determination of the well-foundedness of the feared persecution, for a Convention reason. Important factors, therefore, include the likelihood of the feared harm occurring, which will, in part, be determined by the likelihood of the claimant's activity having come to the attention of the authorities of the country of origin, how they view that activity, the severity of the harm likely to be suffered and whether it is related to a Convention ground. It is therefore essential that activities undertaken by the applicant in the country of asylum be routinely examined in the course of the normal status determination process. The issue of credibility and the assessment thereof, would arise/be dealt with, in the context of such a procedure.

Section - 91S - Membership of a Particular Social Group

UNHCR queries the need for this amendment, since it is of the opinion that the examination of this type of claim could take place within the regular refugee status determination framework. Where there is truly no link to the 1951 Convention, the claim may be denied on that basis, without the need to have recourse to a specific legislative provision. The Office is also concerned that amendments seeking to restrict the application of the "membership of a social group" Convention ground, would not be consistent with the meaning of this criterion as it has evolved.

Section 91T - Non-Political Crime

In UNHCR's view the non-political element implies that the other motives – such as personal reasons or gain – predominate. The amendment appears to be consistent with this. Obviously, the application of Article 1F(b) requires a full

examination of the claim, and of the elements of Article 1F(b), including an assessment of the nature of the crime, taking all factors into account.

Subsection 91T (3) - With specific reference to this provision, the Office would like to underline that extradition treaties specify that certain crimes, notably acts of terrorism, are to be regarded as non-political for the purpose of applying the extradition treaties, although such treaties typically also contain protective clauses in respect of refugees. For the purpose of the refugee definition, the nature of the crime should be assessed in each case, taking all elements into account. The Office, therefore, hopes that this concern could be reflected adequately in the proposed amendment.

Section 91U - Particularly Serious Crime:

In view of the fact that Article 33 (2) of the 1951 Convention is an exception to the cardinal refugee protection principle of *non-refoulement*, UNHCR underlines the need for this provision, like all exceptions to general human rights protection principles, to be interpreted and implemented in a restrictive manner. The Office is, therefore, concerned by the inclusion of offences relating to immigration detention under this category, since the risks for the person who could be refouled as a result, would be greatly disproportionate to the offence committed in this instance.

Similarly, it is UNHCR's view that defining the crime by the penalty imposed would be overly rigid and risk inconsistency with the 1951 Convention. This would notably be the case in regard to offences that are punishable by imprisonment for a fixed term of not less than 3 years or maximum term of not less than 3 years, as provided in the amendment.

The Office is also concerned by the inclusion of "foreign offences" in an amendment that relates to the application of Article 33 (2). It is considered that the commission of crimes outside the country of asylum would be adequately covered by Article 1F of the 1951 Convention.

Finally, the Office notes that the Explanatory Memorandum specifies that for a person to be ineligible for protection, the existing requirements of Article 33 (2) of the 1951 Convention (i.e., that the person must be convicted by a final judgement of a "particularly serious crime" and must be assessed as constituting a danger to the community), should continue to be considered. In UNHCR's view, it would be important to include these elements in the legislative text itself, given the fact that they form an inherent part of Article 33 (2).

Section 91V - Verification of Information

The Office notes that the drawing of adverse inferences will be discretionary and the failure to take an oath will not be determinative in the assessment of a refugee claim. It is recommended, however, that the amendment incorporate a procedural safeguard requiring appropriate counselling of the applicant on the importance of this requirement, and the possible consequences of non-compliance. It is also advisable that the provision includes a reference to the need to take into account the cultural and religious sensitivities that may exist in certain communities in regard to such an act.

Section 91W - Documentary Evidence of Identity, Nationality or Citizenship

UNHCR deems it more appropriate to characterise lack of documentation without reasonable explanation as an element that may be considered by decision-makers in assessing the credibility of the applicant. The provision, as it is currently formulated, could have the effect of excluding refugees from protection by applying overly-stringent criteria, which asylum applicants may not always be able to meet.

Section 91X - Names of Applicants for Protection Visas not to be Published by the High Court of the Federal Court

UNHCR welcomes this provision insofar as it protects the confidentiality of asylum-seekers.

5. Insertion of Section 501J - Refusal or Cancellation of Protection Visa - Minister may Substitute More Favourable Decision

UNHCR welcomes this provision since it is beneficial to refugees.

6. Insertion of Section 501K - Identity of Applicants for Protection Visas not to be published by the Administrative Appeals Tribunal

UNHCR welcomes this provision insofar as it protects the confidentiality of asylum-seekers.

III. CONCLUDING OBSERVATIONS

UNHCR hopes that the above observations will assist in the deliberations on the Migration Legislative Amendment Bill (No. 6) 2001. The Office stands ready to participate in further constructive dialogue on the various provisions, insofar as they relate to the protection of asylum applicants and refugees.

UNHCR
13 September 2001