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

Migration Legislation Amendment (Regional Processing Cohort) Bill 2016
Senate Legal and Constitutional Affairs Legislation Committee

Submission by the Office of the United Nations High Commissioner for Refugees
16 November 2016

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 ('Committee') in respect of its inquiry into the *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016* ('Bill'). UNHCR notes the very short timeframe provided to lodge written submissions on this Bill, being three working days in total. UNHCR has not, in that context, been able to present more extensive observations on this significant Bill, and would appreciate the opportunity to do so.

II.   OVERVIEW OF KEY CONCERNS

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 Refugee Convention').[1] UNHCR makes this submission pursuant to its supervisory role with respect to the 1951 Refugee Convention and in particular Article 35 thereof, and its mandate under the *1950 Statute of the Office of the United Nations High Commissioner for Refugees.*[2]

3.   UNHCR's submission focuses on the amendments proposed by the Bill to the *Migration Act 1958* (Cth) ('Migration Act') which (among other things) seek to prevent asylum-seekers and refugees from ever making a valid application for an Australian visa if they arrived, or attempted to arrive but were intercepted, in

---

[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, 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, ATS 37 (entered into force for Australia on 13 December 1973).
[2] UN General Assembly, Resolution 428 (V), *Statute of the Office of the United Nations High Commissioner for Refugees* (1950), Annex.

Australia by sea without valid visas on or after 19 July 2013 and who were 18 years of age or older on the date they were first transferred to Nauru or Papua New Guinea (collectively referred to in the Bill as the 'Designated Regional Processing Cohort').

4. UNHCR will also make observations on the proposed Ministerial discretion to make a valid application to individuals within the 'Designated Regional Processing Cohort' if it is deemed to be in the public interest.

III. UNHCR'S OBSERVATIONS

5. UNHCR observes that the Bill is at variance with Australia's responsibilities to respect the right to seek and enjoy asylum and raises concerns regarding impermissible penalization of refugees who arrive irregularly by sea. Moreover, the proposed Bill is contrary to the principle of international cooperation and global responsibility-sharing for refugees, as expressed not least in the Preamble to the 1951 Refugee Convention and notably in the recently adopted *New York Leaders' Declaration for Refugees and Migrants*.[3]

6. One of the stated purposes of this Bill is 'to reinforce the government's longstanding policy that people who travel here illegally by boat will never be settled in this country'.[4] However, seeking asylum is not illegal. The right of every person to seek asylum[5] is not diminished by their mode of travel. UNHCR wishes to draw the Committee's attention to the fact that asylum-seekers and refugees are often forced to enter safe countries in an irregular or 'illegal' manner due to their experiences of persecution and flight, as recognized by the drafters of the 1951 Refugee Convention and in its subsequent application.

7. While UNHCR fully appreciates the need to combat human trafficking and people-smuggling, this should not be done at the expense of asylum-seekers and refugees. UNHCR considers that a genuinely cooperative approach by Australia

---

[3] UN General Assembly, Resolution 71/1, *New York Declaration for Refugees and Migrants* (19 September 2016).

[4] HOUSE OF REPRESENTATIVES PROOF BILLS *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016*, Second Reading Speech, 8 November 2016, available at http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/35853536-eb47-48bb-9a4e-8044d466345a/0009/hansard_frag.pdf;fileType=application%2Fpdf.

[5] UN General Assembly, Resolution 217 A (III), *Universal Declaration of Human Rights* (10 December 1948), article 14.

in the region, which builds and complements effective national asylum procedures and promotes responsibility-sharing, can and should lead to asylum-seekers and refugees being able to find protection other than through dangerous and exploitative journeys.

8.   In this context, UNHCR observes that asylum-seekers should ordinarily have their claims processed in the territory of the State from which asylum is sought, or which otherwise has jurisdiction over them.[6] Australia retains responsibility for refugees and asylum-seekers seeking its protection and falling under its jurisdiction even where they are transferred to another State under current bilateral arrangements such as those existing between Australia and Nauru and Australia and Papua New Guinea.

9.   Moreover, any effort to permanently prevent settlement in Australia of asylum-seekers who arrived without a valid visa by sea raises concerns as to the compatibility with Article 31(1) of the 1951 Refugee Convention,[7] which prohibits penalization of asylum-seekers and refugees, where relevant conditions are met, on account of their irregular entry or presence in Australia.

10.   The Bill further reinforces the bifurcated and differentiated system of treatment for asylum-seekers arriving by sea that exists in Australia and which accords lower rights and standards of treatment than to those arriving by other means. UNHCR considers that this bifurcated system discriminates unfairly against asylum-seekers on the basis of their manner of arrival and is at variance with international law. Moreover, UNHCR's observation is that such restrictive measures do not prove effective in practice in deterring movement by people fleeing conflict, persecution and serious human rights violations.

---

[6] UNHCR, *Position Paper: Bilateral and/or Multilateral Arrangements for Processing Claims for International Protection and Finding Durable Solutions for Refugees,* 20 April 2016, para. 7, available at http://unhcr.org.au/wp-content/uploads/2015/05/2016-04-20-Position-paper-on-transfer-arrangements.pdf.

[7] See also Executive Committee of the High Commissioner's Programme (ExCom) Conclusions numbers 15, 22, 44 and 58; Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011); Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003).

11. Finally, although UNHCR notes that the Bill provides that the Minister retains a discretionary power to grant visas to individuals with the 'Designated Regional Processing Cohort' if the Minister thinks that it is in the public interest to do so, this power would be non-compellable and non-reviewable. UNHCR considers that this does not provide adequate transparency, predictability or access to due process in relation to asylum-seekers and refugees affected by the Bill.

IV. CONCLUSION

12. Were this Bill to be passed, UNHCR would be deeply concerned that its enactment would not be consistent with implementation in good faith of Australia's obligations under international refugee law, and—more broadly—about the negative precedent this Bill would set in relation to the right to seek asylum and responsibility-sharing for refugee protection globally and in the region.

13. UNHCR stands ready to provide more information and to discuss these matters further.

UNHCR Regional Representation in Canberra
16 November 2016