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**

***2011 Independent Review of the Intelligence Community***

**1 April 2011**

## I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the *2011 Independent Review of the Intelligence Community*.

## II. UNHCR'S STANDING TO COMMENT

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

3. UNHCR provides comment pursuant to its supervisory mandate established by article 35 of the 1951 Convention, article II of the 1967 Protocol, and the *1950 Statute of the Office of the United Nations High Commissioner for Refugees*. UNHCR also has been given a mandate to contribute to the prevention and reduction of statelessness by the United Nations General Assembly in 1974 and 1976,[2] as well as through subsequent resolutions.

## III. SCOPE OF THE SUBMISSION

4. UNHCR's submission addresses issues specifically relating to the third key issue identified in the Terms of Reference of the Review, notably the working arrangements and relationships between the intelligence agencies – in particular the Australian Intelligence Security Organisation (ASIO) – and policy and operational areas of government,[3] insofar as they affect refugees, asylum-seekers and stateless persons, and focuses specifically on the implications of the activities of the Australian intelligence community upon Australia's international obligations under relevant international law and standards.

## IV. AUSTRALIA'S IMPLEMENTATION OF THE 1951 REFUGEE CONVENTION

5. Australia's international refugee law obligations under the 1951 Refugee Convention are domestically enacted through the *Migration Act 1958* (Cth), which allows for grant of a protection visa where the applicant is 'a non-citizen in Australia to whom the Minister is

[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, Resolutions 3274 (XXIX) of 10 December 1974 and 31/36 of 30 November 1976.
[3] Department of Prime Minister and Cabinet (Cth), '2011 Independent Review of the Intelligence Community' (Media Release, 23 December 2010).

satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.'[4]

6. The *Migration Regulations 1994* (Cth) set out the criteria for grant of a visa to remain lawfully in Australia which extends a range of rights and obligations to refugees as provided by the 1951 Refugee Convention.[5]

7. Schedule 1 of the Migration Regulations describes the particular classes of visas for which a non-citizen may apply, which includes Protection (Class XA) and Refugee and Humanitarian (Class XB) visas. Schedule 2 stipulates the provisions with respect to the grant of subclasses of visas, including the requirement that the applicant satisfies public interest criteria (PIC) 4001, 4002 and 4003/4003A.[6]

8. In accordance with the *Migration Amendment (Excision from Migration Zone) Act 2001*, asylum-seekers who are interdicted attempting to enter Australia's migration zone, or land at an excised offshore place, are termed to be "offshore entry persons" and may only lodge a valid protection visa application if the Minister thinks that it is in the public interest to do so, for instance where they have been found to be owed protection obligations.[7]

## V. 1951 REFUGEE CONVENTION AND ASIO SECURITY ASSESSMENTS

### A. *Impact of ASIO security assessment on refugees*

9. In accordance with the Migration Act and Migration Regulations, PIC 4002 specifies that any protection visa applicant who is assessed by ASIO to be a risk to security, either directly or indirectly, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* ("the ASIO Act"), is not eligible for the grant of a permanent visa to remain in Australia.[8]

10. In practice, this means that a person may be assessed to be a refugee but may not be granted a permanent protection visa if he or she receives an adverse security assessment.

11. UNHCR has a number of concerns about the compatibility of the Australian domestic legal framework with Australia's international obligations; the implications of the security

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[4] *Migration Act 1958* (Cth), s 36(2)(a). Article 1A(2) of the 1951 Convention (as broadened by the 1967 Protocol) provides that the term "refugee" shall apply to any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The refugee definition additionally provides for the cessation of refugee status (article 1C) and exclusion from refugee status (articles 1D, E and F).

[5] 1951 Convention, articles 2-34.

[6] *Migration Regulations 1994* (Cth), Schedule 2, 866.225(a).

[7] *Migration Act 1958* (Cth), s 46A.

[8] *Australian Security Intelligence Organisation Act* 1979 (Cth), s 4; *Migration Regulations 1994* (Cth) reg 1.03; *Migration Regulations 1994* (Cth) reg 200.226, 201.226, 202.227, 203.226, 204.226 and 866.225.

assessment process in domestic law; and, the practical impact of the legal framework and assessment process on the rights and wellbeing of refugees and asylum-seekers.

12. UNHCR has in recent months been concerned by delays in ASIO security assessments for asylum-seekers and refugees who remain in immigration detention while security assessments are undertaken.

13. UNHCR is particularly concerned by the continuing delays in finalizing the assessments of approximately 900 protection visa applicants, who have been recognized as refugees by the Government of Australia, but who remain in immigration detention, pending a security assessment.[9]

14. In this regard, UNHCR welcomes the recent announcement of the Australian Government that new streamlined processes will improve the processing times of ASIO security assessments and that all currently recognized refugees will have their assessments completed by the end of April.[10]

15. While UNHCR appreciates the fact that the Government is prioritizing individuals who have been assessed to be refugees, it nevertheless remains concerned about the fate of thousands of asylum-seekers, many of whom may be found to be refugees, who remain in immigration detention centres for lengthy periods while security assessments are undertaken.

16. UNHCR considers that it may be more desirable, for reasons set out below, for security assessments to be initiated as soon as an "offshore entry person" indicates he or she is claiming asylum in Australia.

17. In the case of asylum-seekers who may only be recognized as refugees following independent merit review and/or a judicial review, the length of time in detention could be protracted. If release is conditional on receiving a security assessment and that security assessment does not even commence before refugee status has been finally determined, then many asylum-seekers face the prospect of long delays in detention while these various assessments run their course.

18. Delays in finalizing security assessments have contributed to the protracted detention of refugees and asylum-seekers in isolated immigration detention facilities, and have contributed to the negative consequences on the welfare and mental health of detained persons, many of whom are survivors of torture and trauma.

19. Whilst UNHCR appreciates that priority has been given to conducting security assessments for persons in immigration detention in Australia, this, in turn, has impacted negatively on Australia's resettlement programme.

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[9] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Estimates (Additional Estimates): Immigration and Citizenship Portfolio* (21 February 2011), Ref No. 13572, L&C 92.

[10] Department of Immigration and Citizenship (Cth), 'Christmas Island: a notice to immigration detention clients from the Australian Government', <http://www.newsroom.immi.gov.au/media_releases/914> at 21 March 2011; Department of Immigration and Citizenship (Cth), 'Mainland detention centres: a notice to immigration detention clients from the Australian Government', <http://www.newsroom.immi.gov.au/media_releases/913> at 21 March 2011; Department of Immigration and Citizenship (Cth), 'Alternative places of detention: a notice to immigration detention clients from the Australian Government', <http://www.newsroom.immi.gov.au/media_releases/912> at 21 March 2011.

20. ASIO's *Report to Parliament 2009-2010* noted that over the financial year 2009-10, 'ASIO diverted resources to undertaking security assessment of Irregular Maritime Arrivals (IMAs) for DIAC. Consequently the resources available to assess protection visa and other refugee referrals were limited and this caseload experienced delays.'[11]

21. While the intention behind prioritizing persons in immigration detention is welcomed, delays in security assessments for refugees awaiting resettlement offshore adversely affect vulnerable refugees who have been assessed to be in need of protection in countries of asylum and, in addition, may impact on Australia's ability to promote regional cooperation in South-east Asia due to the delays in processing for resettlement to Australia. This may, in turn, lead to increased numbers resorting to irregular means of entry to Australia.

22. Consistent with the Government's *New Directions in Detention, Restoring Integrity to Australia's Immigration System* announced in 2008,[12] UNHCR is of the view that it would be preferable for security assessments to commence as soon as a person arrives in Australia and seeks Australia's protection, and should not be dependent on the person first being assessed to be a refugee. In UNHCR's view, the decision to detain "as a last resort" for the purpose of health and security checks places a direct onus on the Government to commence the assessment of security form the moment of detention, not the time at which refugee status is affirmed. The current practice may wrongly conflate the refugee status determination process with the detention regime currently in place.

23. While UNHCR well appreciates the need not to compromise on national security issues, it is nevertheless of the view that greater efficiencies and practical outcomes would be achieved, with increased savings in resources, if all asylum-seekers were immediately referred to ASIO to initiate a security assessment rather than subsequent to their recognition as refugees, which would reduce the time in detention.

24. Although beyond the remit of this submission, UNHCR also considers that there are viable and practical alternatives to Australia's immigration detention regime which are able to satisfy the legitimate security concerns of the Government, but which, nevertheless, allow for an asylum-seeker or refugee to be released, on appropriate conditions, into the wider community.

25. Clearly, adequate resources to undertake security assessments for refugees in Australia and awaiting resettlement elsewhere is key to ensuring the integrity and efficiency not only of Australia's asylum system, but also to the overall management of the Humanitarian Program.

**B.** ***Security considerations within the 1951 Refugee Convention***

26. UNHCR notes that a small but increasing number of refugees have been assessed by ASIO to be a risk to security and are, therefore, not eligible to the grant of a permanent visa to remain in Australia.

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[11] ASIO, *Report to Parliament 2009-10* (2010), 21.

[12] Senator Chris Evans, Minister for Immigration and Citizenship, *New Directions in Detention, Restoring Integrity to Australia's Immigration System*, Seminar – Centre for International and Public Law, The Australian National University, 29 July 2008.

27. In UNHCR's view, the 1951 Refugee Convention provides an appropriate legal framework through which these security-related matters may be considered by the country of asylum. The 1951 Refugee Convention does not provide a safe haven to terrorists or war criminals, and does not protect them from criminal prosecution. On the contrary, it renders the identification of persons engaged in terrorist activities possible and necessary, foresees their exclusion from refugee status and does not shield them against either criminal prosecution or expulsion.[13]

28. Article 1F of the 1951 Convention sets out, exhaustively, the grounds on which an asylum-seeker may be excluded from international refugee protection due to an association with serious criminal activities. This should form part of an assessment for eligibility for refugee status. Indeed, it is arguable that should a security assessment uncover activities which would exclude the individual from receiving protection under the 1951 Refugee Convention it would be desirable for such information to be considered as part of the refugee status determination process as well as in any removal or indeed prosecution proceedings.

29. In addition, article 33(2) of the 1951 Convention addresses the situation where a refugee constitutes a 'danger to the security of the country' or 'danger to the community of that country'; and article 32 requires that States shall not expel a refugee except on grounds of national security or public order and 'shall only be in pursuance of a decision reached in accordance with due process of law.'

30. UNHCR understands that refugees in Australia who have received adverse security assessments have not been excluded from refugee protection by virtue of article 1F, nor have they been determined to fall within the category of refugees to whom article 33(2) or article 32 of the 1951 Convention applies, and expulsion is not being contemplated. However, ASIO's adverse security assessment effectively prevents these refugees from receiving the other main rights provided to them by the 1951 Convention.[14]

31. In UNHCR's respectful view, these three articles in the Convention, properly applied, provide States with adequate "Convention-based" opportunities to assess the impact of legitimate national security consideration on the rights of refugees and asylum-seekers.

## VI. ASIO SECURITY ASSESSMENT PROCEDURES

### A. *Absence of procedural safeguards*

32. UNHCR is concerned that the confidential nature of the procedure by which ASIO assesses a person to be a risk to security is unclear and does not provide a basis on which an affected person is able to assess and, if necessary, contest a negative assessment. In view of the very serious consequences flowing from such negative assessments (i.e. protracted or even indefinite detention and deprivation of asylum rights), UNHCR believes that some adjustment to the procedures in such cases should be considered.

33. Section 36(b) of the ASIO Act provides that "Part IV – Security Assessments" (other than subsections 37(1), (3) and (4)) does not apply to or in relation to a person who is not an

[13] UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective*, 29 November 2001, Rev.1 <http://www.unhcr.org/refworld/docid/3c0b880e0.html> at 22 March 2011, [3].
[14] 1951 Convention, articles 3, 4, 13, 16(1), 18, 20, 22, 26, 27, 29, 31, 32, 33, and 34, respectively.

Australian citizen, the holder of a valid permanent visa, or a person who holds a special category visa.

34. This provision means that ASIO is not required to disclose to unlawful non-citizens or non-permanent visa holders, including refugees and asylum-seekers, the statement of grounds supporting an adverse security assessment.[15] Furthermore, the ASIO Act removes the right of "unlawful" non-citizens and non-permanent visa holders to apply to the Security Appeals Division of the Administrative Appeals Tribunal (AAT) for a review of the assessment.[16] Notwithstanding, judicial review of the procedural, rather than substantive, matters relating to the ASIO Security Assessment remains possible by application to the Federal and/or High Court of Australia.[17]

35. UNHCR supports the views of two former Inspector-Generals of Intelligence and Security (IGIS) who recommended amendment of the ASIO Act to provide the AAT with jurisdiction to review the adverse security assessments of visa applicants who had been recognized as refugees in Australia.[18] It is UNHCR's view that this amendment would significantly improve procedural fairness, with limited cost implications, for the small number of refugees who fall within this category.

36. An adverse security assessment, in practical effect, restricts the release of refugees from immigration detention in Australia. In this regard, UNHCR considers that section 36 of the ASIO Act may be inconsistent with Article 9 (1) and (4) of the 1966 International Covenant on Civil and Political Rights, [19] which provides that:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
> …
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

37. It is the position of the United Nations Human Rights Committee that

> court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.[20]

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[15] *Australian Security Intelligence Organisation Act 1979* (Cth), s 37(2).
[16] Ibid s 38(1).
[17] ASIO, *ASIO's Security Assessment Function* (1 October 2010), 7.
[18] IGIS, *Annual Report 2006-2007* (2007), 12; IGIS, *Annual Report 1998-1999* (2000), [90].
[19] UNGA Resolution 2200 A (XXI) of 16 December 1966.
[20] *A v Australia*, CCPR Communication No 560/1993, [9.5.], UN Doc CCPR/C/59/D/560/1993 (1997).

38. Furthermore, UNHCR considers the current Australian practice runs contrary to the *New Directions in Detention* introduced in July 2008,[21] which committed the Australian Government, inter alia, to 'create a presumption against detention and introduce an individualized assessment, where the onus rests on the detaining authority to detain only on specific and limited grounds'.[22]

39. UNHCR acknowledges that the use of classified information is a complex area of law where an appropriate balance between national security and international protection must be found. UNHCR understands that in matters of national security, the preservation of sources of information and methods of intelligence gathering may need to be protected from public scrutiny. Nevertheless, drawing from practical experience in other jurisdictions, UNHCR believes it is possible to have a process that protects the interests of the State but which also offers an affected individual access to a limited, perhaps redacted, summary of the evidence against him or her, and which would allow some meaningful opportunity to challenge the assessment in appropriately compelling cases.

40. UNHCR is of the view that an appropriate point of departure is that open disclosure of all prejudicial information should be encouraged and the use of classified information in determinations which affect refugee status or associated rights should only be maintained on an exceptional basis where, for example, disclosure would pose a threat to national security, serious criminal conduct or would have serious consequences to civil society in Australia. However, even in such circumstances, the person affected by the classified information should be provided as much information as possible to ensure a fair determination process in accordance with natural justice.

**B.** ***Considerations of security assessment***

41. Section 37(3) of the ASIO Act provides that the *Australian Security Intelligence Organisation Regulations 1980* 'may prescribe matters that are to be taken into account, the manner in which those matters are to be taken into account, and matters that are not to be taken into account, in the making of assessments, or of assessments of a particular class, and any such regulations are binding on the Organisation and on the Tribunal.'

42. ASIO has declared that 'they only consider factors related to 'security', which in practice is usually terrorism, other forms of politically motivated violence, espionage and foreign interference, and threats to Australia's territorial and border integrity.'[23] However, UNHCR understands that there are not, at present, any matters or assessments of a particular class prescribed in the regulations for this purpose. UNHCR considers it would be desirable to provide greater clarity in the legal assessment by prescribing the specific matters considered relevant (and irrelevant) in the making of security assessments in respect of refugees to ensure that the ASIO Act does not impose additional requirements upon refugees to those specified in the 1951 Refugee Convention.

43. Similarly, UNHCR is of the view that it is incumbent upon both ASIO and DIAC that a clear distinction is made between the assessment of risk to the community for the purposes of

[21] Senator Chris Evans, Minister for Immigration and Citizenship, above n 12.
[22] Ibid, key immigration value (iv).
[23] ASIO, *Report to Parliament 2009-10* (2010), 20.

detention placement decisions,[24] with the more formal and legislatively defined risk to security within the meaning of section 4 of the ASIO Act, which may impact on the decision to grant a permanent visa to Australia.

44. UNHCR is not aware of any promulgation of criteria by DIAC to determine whether an asylum-seeker is a risk to the community for the purposes of release from immigration detention. Therefore, the Office is concerned that there may have been some conflation of the applicable legal tests such that release from immigration detention is not practically possible until the ASIO security assessment is finalized, even though the grant of a positive security assessment and a permanent visa does not appear to be required by Australian legislation.

## VII. SPECIAL ADVOCATE MECHANISM

45. UNHCR notes, consistent with the minimum procedural standards required of the exclusions clauses, as well as articles 33(2) and 32(1), that 'there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information, and yet accord the individual a substantial measure of procedural justice'.[25]

44. UNHCR draws to the attention of the reviewers to the experience in a number of jurisdictions, notably New Zealand, Canada and the United Kingdom,[26] which provide for the role of a special advocate (a security-cleared person who is able to view both an original and redacted summary of the assessment to ensure, insofar as possible, unclassified material and reasons are disclosed) to represent the interests of an applicant in any proceedings involving classified information. The special advocate provides a suitable mechanism through which to ensure that broad reasons for decisions using classified information (and a non-classified summary of the information to be disclosed where possible) may be provided to the affected person and thereby ensure adequate safeguards against the potential abuse of the use of classified information. Such and advocate could possibly be established in the context of the Administrative Appeals Tribunal.

46. UNHCR considers these models could be explored to provide a greater degree of procedural fairness with regard to negative ASIO security assessments based on the use of classified information.

## VIII. CONDITIONAL RELEASE FROM IMMIGRATION DETENTION

47. UNHCR is of the view that recognized refugees, who have received adverse security assessment, have been formally assessed by the Government of Australia to be entitled to the rights and obligations contained in the 1951 Convention and their ongoing detention restrict the enjoyment, directly and indirectly, and may be inconsistent with Australia's international commitments.

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[24] Senator Chris Evans, Minister for Immigration and Citizenship, above n 12.

[25] *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996 <http://www.unhcr.org/refworld/docid/3ae6b69920.html> at 22 March 2011, [131].

[26] *Immigration Act 2009* (NZ), ss 263-271; *Immigration and Refugee Protection Act*, SC 2001, c. 27 I-2.5, ss 83-87; *Special Immigration Appeals Commission Act 1997* (UK).

48. UNHCR considers that alternatives to detention, especially the grant of non-permanent visas and conditional release (on appropriate reporting, surety or other terms), should be considered during the processing of ASIO security assessments of recognized refugees.

## IX. CONCLUSION

49. UNHCR welcomes the *Independent Review of the Intelligence Community* and has highlighted some negative implications of the current security assessment process for Australia's international legal obligations to protect refugees.

50. In conclusion, UNHCR would like to note that:

(i) while security assessments are a necessary right and responsibility of the State, they can be streamlined to reduce the harmful impact of protracted detention on those affected;

(ii) security assessments for persons in detention should be commenced at the earliest possible time to reduce time in detention, rather than commenced only once a final determination of refugee status has taken place and, in UNHCR's view, the security assessment should be linked to the imperative to release individuals from detention, wherever possible, rather than be conditional on the prior grant of refugee status;

(iii) alternatives to detention should be considered for those individuals who, following an appropriate assessment, are not likely to pose a risk to the community, and conditional release to the community explored, wherever possible;

(iv) it would be desirable for the AAT to have jurisdiction to review the adverse security assessments of visa applicants who had been recognized as refugees in Australia; and

(v) a procedure should be considered that would allow "security-cleared" special advocates to ensure that disclosable information and reasons can be shared with affected persons, whilst retaining the integrity of the Australian intelligence community and its important work.

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

*UNHCR Regional Representation for Australia,*
*New Zealand, Papua New Guinea and the Pacific*
*Canberra, 1 April 2011*