



SUBMISSION ON THE IMMIGRATION ACT REVIEW

June 2006

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Executive Summary

RMS Refugee Resettlement is pleased to take this opportunity to make a formal submission on the review of the current Immigration Act. Recognising the many changes that have taken place in the world over the past two decades, the agency believes it is now both timely and appropriate for a review to be undertaken. RMS commends the Minister and staff of the Department of Labour for the significant thinking and research that has obviously been devoted to the preparation of a comprehensive Discussion Document, which:

- Identifies and analyses areas of proposed change
- Provides comparative information about legislation in other countries
- Presents a range of possible and preferred options
- Is inviting comment and input through a process of consultation with ethnic communities, relevant NGOs, the immigration sector and the broader public.

The stated objectives of the Immigration Act Review are to:

- Ensure that New Zealand's interests are protected and advanced
- Ensure compliance with international obligations
- Establish fair, firm and fast decision-making processes
- Modernise and simplify the legislation

RMS supports the objectives of the review. The agency agrees that improvements to the clarity and speed of immigration processes are both desirable and necessary. We note, however, the importance of ensuring that efforts to become “firm and fast” do nothing that might tarnish New Zealand’s excellent international reputation for fairness.

WHAT QUALIFIES RMS TO COMMENT?

RMS Refugee Resettlement has been the government's key NGO partner in the area of refugee resettlement since the Immigration Act was last reviewed and the formal Refugee Quota Programme was first introduced in 1987. The agency has also been a regular and active NGO participant throughout the growth and development of the Annual Tripartite Consultations on Resettlement (ATC) convened by UNHCR in

Geneva since 1993. The ATC consultations - between representatives of States, UNHCR and resettlement NGOs, provide a vital forum for the exchange of views on:

- Refugee resettlement priorities,
- The development and evaluation of international resettlement policies
- The identification of “best practice” principles and models.

During its 29 year history, RMS has worked with many groups of refugees and refugee-related migrants – providing its clients with immigration advice and assistance across a wide variety of areas including:

- The annual Refugee Quota
- General Migration
 - Family,
 - Partnership
 - Former Humanitarian category
- Refugee Family Quota
- Asylum/Refugee Status (from 1989 to 1997)
- Successful appeals to the Residence Appeals Authority, Removal Review Authority and Refugee Status Appeals Authority

While immigration is the *mechanism* through which all refugees and their related family members enter New Zealand, immigration-issues are frequently a *dominating concern* for refugees during their early years of resettlement.¹

Given all of the above, RMS considers itself well-placed to comment and make recommendations on a number of sections within the review, which may impact in either a positive or negative way upon the agency and its clients.

¹ On average, 20% of all RMS contacts with its clients relate to immigration issues. In the year July 2004 to June 2005 RMS responded to 4153 enquiries about immigration - mostly concerning Family Reunion matters.

Short summary of responses

The following section of the Executive Summary provides a brief indication of RMS responses to the questions posed in the Discussion Document. Please also refer to the detailed and important comments contained in relevant sections throughout the remainder of this submission.

SECTION 3 - Purpose and Principles

RMS agrees with the suggested purpose and principles, as outlined in the Discussion Document, and supports their inclusion in legislation.

However, RMS suggests that the highlighted additional bullet point be added to New Zealand's immigration-related interests:

- maintaining the safety and security of New Zealand
- generating sustainable economic growth
- establishing strong communities
- contributing to social cohesion and national identity
- fulfilling New Zealand's role as a good international citizen,
- promoting international cooperation

SECTION 4 – The Visa and Permit System

4.1 Key question: *Should the single term “visa” be used for all travel, entry and stay authorizations granted to non-citizens?*

While RMS holds no particular view on this subject, we note that such a change would have significant implications for other departments including MSD Health and Education – since the current trigger for access to a number of social benefits and/or services is the sighting of a “residence permit”. If the single term “visa” is introduced, it will be important that staff members of such departments are made fully aware of the change, in order that rightful entitlements are not delayed or withheld.

SECTION 6

Exclusion and Expulsion

6.1 Key Question: *Do you agree that health and character grounds for exclusion should be included in legislation?*

RMS believes that the proposed inclusion in legislation of “health” as grounds for exclusion MUST be accompanied by the provision for a waiver and the delegation of discretionary powers to exercise this in respect of refugees and associated family members.

SECTION 7 Access to review and appeal

7.1 Key Question: *Which residence applications should have access to independent appeal?*

RMS believes that all “sponsored’ applicants for residence should continue to have the right to appeal residence decisions, whether lodged on-shore or offshore.

(See appropriate section in the body of this document)

SECTION 8 The Independent Appeal Bodies

8.1 *How should the independent appeal bodies be structured?*

RMS is not opposed to the concept of combining the role of the 4 existing appeal authorities under a single authority provided the caliber of membership and decision-making is maintained.

8.2 *Which government department should service the immigration and refugee appeal bodies?*

RMS believes that the servicing of the proposed new authority might be more appropriately placed with the Ministry of Justice. RMS would, however, recommend that any new authority continues to make provision for members from a range of disciplines and experience.

SECTION 11 The use of biometrics

RMS is not opposed to the increased use of biometrics to establish identity and/or verify relationships

However, policies must ensure that safeguards are developed – particularly in relation to the use of DNA. Where DNA testing is offered to refugee applicants as a mechanism to assist in establishing relationships, the costs of such testing must not be applied to the applicant. Adequate protocols must be developed around confidentiality and the consequence of ‘unexpected’ DNA results.

SECTION 13 The role of third parties

13.2 What legislative provisions are required to facilitate sponsor benefits and enforce their responsibilities?

RMS is not opposed to the incorporation of legislation that would explicitly allow for the sponsorship of both *temporary* and *permanent* applicants.

HOWEVER, the agency holds **strong concerns** about some of the suggestions contained in this section of the Discussion Document, as it is presently presented. In particular:

RMS believes that clear distinctions must be made in legislation that recognise justifiable differences in appropriate responsibilities for sponsors of “temporary” and “permanent” entrants.

RMS is strongly opposed to any suggestion that the costs of publicly-funded healthcare be added to the list of sponsorship obligations for permanent residents.

SECTION 12 – Detention

RMS agrees with the Human Rights Commission statement that:

Detention for immigration purposes should only be used in extreme circumstances. Immigration detainees should be dealt with outside the prison system and preferably in non-custodial options. It follows that it is inappropriate to create new facilities. The aim should be to minimise the use of correction facilities, not create more.

RMS was among the founding members of the “International Detention Coalition” - the aims of which are:

- *To prevent and limit the use of detention of refugees, asylum seekers and migrants;*
- *To advocate for alternatives to detention and for the least restrictive forms of detention;*
- *To promote greater protection of and respect for the human rights of those held in detention, and;*
- *To promote the development and adoption of best practices in the use of detention.*

In respect to the detention of refugees and asylum seekers, RMS strongly supports the position of UNHCR, as outlined in its publication: “UNHCR Guidelines on the Detention of Asylum Seekers”.

SECTION 14 - New Zealand's Role as an International Citizen

14.1 Key Question: *Should New Zealand's international commitments to protect persons facing torture; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment be set out in immigration legislation?*

Recommendation: *that obligations under article 3 of the Convention against Torture be incorporated into New Zealand's immigration legislation*

RMS welcomes and supports this recommendation

Recommendation: *that articles 6 & 7 of the International Covenant on Civil and Political Rights be incorporated into New Zealand's immigration legislation*

RMS welcomes and supports this recommendation

4.2 How should refugee/protection status be determined?

14.2.1 Key Question: *Should Refugee, Convention against Torture and articles 6 & 7 of the ICCPR claims be assessed in a single procedure with a single right of appeal?*

In principle, RMS is not opposed to the concept of a single procedure and a single right of appeal. However, there are a number of essential prerequisites that must be addressed before the agency could fully support or endorse this proposal.

(See appropriate section in the body of this document)

14.2.2 Key Question: *Should immigration legislation recognise refugees selected offshore?*

In principle, RMS supports this suggestion, since it will provide a legislative framework for New Zealand's longstanding and internationally respected annual Refugee Quota Programme. However, RMS seeks an assurance that the intended legislation does not seek to empower New Zealand immigration officers to make 'secondary' offshore determinations that bring into question the status of refugees who have already been recognized by UNHCR?

(See appropriate section in the body of this document)

14.2.3 Key Question: *Do you agree that the powers of protection status decision makers and related offence and penalty provisions should be strengthened as outlined?*

RMS has not formulated an opinion on this question

14.2.4 Key Question: *Should subsequent claims be explicitly allowed on the basis of a change in personal circumstances (that is material to refugee status) either in the home country or otherwise?*

RMS endorses and supports the proposal to amend the Act to explicitly allow new claims to be lodged on the basis of a change in personal circumstances (that is material to refugee status) either in the home country or otherwise?

14.2.5 Key Question: *Do you agree that there is no need for legislative change to deal with manifestly unfounded claims, persons coming from or via “safe countries” or mass arrivals?*

RMS agrees that the present system is preferable to the other options discussed and therefore supports the suggestion that no change is required.

14.3 What provisions are required for the expulsion of protected persons?

The issues relating to the expulsion of protected persons are discussed at length in the following sections of this document. RMS believes that adequate provisions and powers already exist to facilitate the expulsion of protected persons in exceptional situations.

14.4 Should New Zealand become party to the 1954 Convention relating to the Status of Stateless Persons?

RMS applauds and strongly supports the proposal that New Zealand becomes party to the 1954 Convention relating to Stateless Persons.

A more comprehensive expression of RMS views and recommendations on several sections is presented in the remainder of this document

RMS SUBMISSION ON THE IMMIGRATION ACT REVIEW

SECTION 6

Exclusion and Expulsion

6.1 Key Question: *Do you agree that health and good character grounds for exclusion should be included in legislation?*

RMS believes that the proposed inclusion in legislation of “health” as grounds for exclusion MUST be accompanied by the provision for a waiver and the delegation of discretionary powers to exercise this in respect of refugees and associated family members.

It is well recognised that those subjected to violence, persecution and displacement are also far more vulnerable to a wide variety of treatable illnesses, injuries or manifestations of post traumatic stress disorders. The Government has long recognised an obligation to respond differently to the needs of refugees by including specific allocation within the Annual Refugee Quota for a certain number medical cases. If the provision to waive certain health requirements is not incorporated in legislation, many refugees and their associated family members may automatically be excluded by the new law.

SECTION 7

Access to Review and Appeal

7.1 Key Question: *Which residence applications should have access to independent appeal?*

RMS believes that all “sponsored” applicants for residence should continue to have the right to appeal residence decisions made either on-shore or offshore.

Whether lodged onshore or offshore, the requirements for residence are identical. Likewise, processing officers of Immigration New Zealand are equally prone to error or misinterpretation of policy, whether they are based in Wellington or Beijing. The right to appeal a negative residence decision should not therefore be a matter of geography – but rather one of equity.

Over the years, RMS has been involved in numerous successful appeals to the various appeal authorities – our evidence suggests that, while mistakes by immigration staff may not be frequent, they occur with a regularity sufficient to demonstrate that to deny applicants the right to an appeal would be both unjust and unfair.

The process of lodging a residence application is a costly and complex exercise – often requiring the additional, and sometimes exorbitant, fees of immigration consultants with varying degrees of competence. Former refugees, who are sponsoring eligible family members under the family or partnership categories, are frequently the ones who are funding such applications – often in addition to providing vital funds to help support their relatives overseas.

Since the removal of the previous Humanitarian Category, the avenues available for refugees to assist family members who remain in a refugee camp (or other refugee-like situation) have been significantly reduced. However, worry and feelings of guilt and responsibility for close family who remain in situations of danger, often present major obstacles to successful resettlement.

Similarly, changes to the partnership requirements and the removal of the fiancé category have made it almost impossible for many former refugees to marry – as they are required to demonstrate a stable relationship of at least 12 months duration before a residence application can be processed.

Many single adult refugees work very hard to settle, educate themselves, find employment and save sufficient resources to enable them to marry and start a family. Cross-cultural marriages within the first generation of migrants and refugees are extremely unusual and in many small ethnic communities there may be no eligible or suitable prospective partners.

Under such circumstances it is common for family or friends in the country of origin to “suggest” or “introduce” suitable partners. These are not “culturally arranged” marriages in the presently defined interpretation of the term. The prospective partners usually get to know each other first by phone and/or correspondence and, if they find each other compatible, an agreement may be reached to marry.

Under previous policies, such people would then take time off work and travel to their home country to marry. On return they would subsequently lodge a residence application for their spouse. The new requirements have made many such 'genuine' marriages effectively impossible. No refugee sponsor can afford to return to their homeland and remain for 12 months – even assuming that return to the country is indeed possible. To do so would inevitably mean the loss of one's job and the erosion of any savings.

It is equally difficult to seek a successful temporary visa/permit to facilitate the couple's ability to establish the credibility of their marriage or partnership onshore. In the rare instances where this can be achieved, successful residence will often revolve around a judgement decision about whether a genuine and stable relationship can be shown to exist.

The types of evidence sought for this judgement are often things like: Joint bank accounts; joint tenancy agreements; joint household accounts etc. In some societies such things are not normal practice. Additionally, where a spouse is joining an *already established* sponsor, tenancy, phone and utility accounts will already be established in the name of the sponsor.

Unless they receive advice on these matters, many refugee clients may simply omit to change these things as they are unaware of their future importance. Observation over many years suggests that it has often been the "non-genuine" marriages applicants who have been successful – as less scrupulous immigration consultants have been very quick to advise their clients about the "tricks of the trade".

The some *genuine* cases, the importance of public acclamation or community confirmation of a relationship may often receive inadequately weighting – resulting in a decision to decline residence.

An error made in determining a refugee-related residence application can have profound and devastating consequences. The consequence of a negative decision, where refugee sponsors (or associated migrants) are concerned, are likely to far exceed the natural disappointment faced by an *'unrelated'* potential migrant.

It is also worthy of note that, for most refugee-related applicants, the additional cost of lodging an appeal against a negative residence decision already acts as a disincentive against frivolous appeals.

SECTION 13: The role of third parties

13.2 What legislative provisions are required to facilitate sponsor benefits and enforce their responsibilities?

*1001 The types of responsibilities set out in legislation are likely to include the matters already covered in the Immigration Act, such as accommodation, maintenance and removal. **They could also include the costs of publicly-funded healthcare;** given this is clearly an area where New Zealand may incur a significant expense.*

RMS is strongly opposed to any suggestion that the costs of publicly-funded healthcare be added to the list of sponsorship obligations for permanent residents.

Sponsorship of *temporary* and *permanent* residents is fundamentally different in nature, circumstance, scale of anticipated commitment. For example:

- A “temporary” resident (whether a visitor, student or employee) is by definition in New Zealand for only *a prescribed period of time*. No long-term or significant commitments have been entered into - either the temporary entrant or the State.
- It could be argued therefore that it is entirely reasonable that sponsors of *temporary entrants* be held accountable for any sponsorship guarantees they have made regarding accommodation, financial support or employment during the duration of the sponsored person’s stay in New Zealand. It may also be reasonable to expect visitors, students or temporary employees (or their sponsors) to ensure that they have obtained medical insurance before arriving New Zealand. In fact, many education providers now include this as a requirement of registration.
- Unlike “temporary entrants”, however, permanent residents have made a *serious long-term commitment* to New Zealand and the immigration service has rigorously examined each application to ensure that the applicant meets established criteria before approval. The process of assessment already includes comprehensive health screening to ensure that permanent residents meet an acceptable standard of health before residency is granted.

- Unfortunately, illness or disease can strike anyone at anytime. Nobody wishes to become sick or to suffer ill health and frequently such events cannot be predicted or foreseen. Therefore, any suggestion that a *family sponsor* should be held responsible for *unforeseeable and unquantifiable* costs of medical treatment for a sponsored family member is entirely unacceptable. Whether cancer or diabetes strikes within 24 months of arrival or 20 years after arrival, it brings with it same devastating impact and serious challenges for every affected family. Those who have been granted permanent residence have demonstrated a commitment to their new country that has seen them leave behind their past life to establish a new future in New Zealand. Any suggestion that the cost of medical treatment should now be added to the burdens and worries of a family sponsor – simply because the diagnosis was made on the 729th day of residence rather than the 731st, is considered both callous and inappropriate.

SECTION 14

New Zealand’s Role as an International Citizen

14.1

Which of New Zealand’s immigration-related international obligations should be incorporated into immigration legislation?

RMS welcomes and endorses the proposal to incorporate into immigration legislation, New Zealand’s obligations under article 3 of the Convention against Torture and articles 6 & 7 of the International Covenant on Civil and Political Rights. (1107).

RMS shares the view expressed that “clear guidelines” need to be set out to aid in the interpretation of the articles within these international instruments.

With particular reference to existing international instruments, RMS wishes to seek further clarification, with regard to Section 14.1 (paragraph 1108). For instance:

- In what way would the proposed legislation seek to establish, change or clarify existing mechanisms for dealing with persons who have committed very serious crimes, but who cannot be expelled?
- What measure will be used to determine “very serious crimes”?
- Who will assess the relative severity of these crimes, and the proportionality of consequent punishment, in any country to which such a person might subsequently be extradited to face prosecution, or surrendered to face an international tribunal?
- What rights will such people have to challenge or appeal against the decision that has placed them in such a category?

With regard to people who have been granted refugee status, it is noted that appropriate mechanisms exist, within current interpretation of the 1951 Convention on the Status of Refugees, to permit the cancellation or revocation of refugee status in the case of persons who have committed crimes of torture, genocide or other crimes against humanity. (See Section 14.3)

4.2 How should refugee/protection status be determined?

14.2.1 *Should Refugee, Convention against Torture and articles 6 & 7 of the ICCPR claims be assessed in a single procedure with a single right of appeal?*

In principle, RMS is not opposed to the concept of a single procedure and a single right of appeal. However, there are a number of essential prerequisites that must be addressed before RMS can fully endorse and support this proposal.

1. The training of officers, employed in first level assessment/determination in the proposed system, must be augmented to ensure that they are well-versed with regard to New Zealand’s obligations under ALL the relevant international instruments – as opposed to just the 1951 Convention.
2. The calibre of the new Appeals Body must be maintained. The present RSAA is highly respected and has helped add much to international juris prudens in the interpretation of international refugee law. The Residence Review Authority and Removal Review Authority have also established reputation for excellence – which has drawn on the experience of members from a range of

disciplines. It is recommended that membership of any new ‘combined appeal’ authority should also allow for the appointment of experienced people from a range of appropriate backgrounds and that it not be exclusively the preserve of lawyers.

3. The right to a “de novo” appeal must be retained.

Section 14.2.2

Should immigration legislation recognise refugees selected offshore?

Option B in the Discussion Document would retain the current provisions that require decision-makers to determine whether a person is a refugee *within the meaning of the Refugee Convention*, and to act *in a manner consistent with the Refugee Convention* in carrying out all their functions.

In addition, the legislation would:

- enable the selection of UNHCR-referred refugees by New Zealand refugee status officers offshore (with no appeal rights)
- clarify that refugees selected offshore have the same status as persons found to be refugees onshore, where they have been assessed according to the Refugee Convention, and
- clarify that no refugee may be expelled, except in accordance with the Refugee Convention.

In principle, RMS supports this suggestion, since it will provide a legislative framework for New Zealand’s longstanding and internationally respected annual Refugee Quota Programme.

However, RMS seeks an assurance that the intended legislation does not seek to empower New Zealand immigration officers to make ‘secondary’ offshore determinations that bring into question the status of refugees who have already been recognized by UNHCR?

UNHCR is the competent and internationally mandated UN agency responsible for the recognition and protection of refugees – and the search for durable solutions to their situation of displacement.

Both historically and presently, many “Quota” refugees have been mandated on the basis of “group determination” as opposed to “individual determination”. All persons

submitted by UNHCR for possible resettlement in New Zealand, have *already* been accorded refugee status - prior to their referral for consideration. RMS is therefore keen to explore the purpose of including Refugee Status Branch officers on all Quota Selection Missions. This would appear to be an unnecessary use of a valuable resource that might better be utilized in onshore determination activities.

RMS considers that the primary purposes of “Selection Missions” should be to:

- Verify identity and confirm bio-data
- Complete immigration interviews and relevant immigration documentation
- Identify and assess any special needs or circumstances that will have an influence settlement planning

To this end RMS wishes to highlight the benefits to the Government of including staff from RMS Refugee Resettlement on all future Selection Missions. In the past, RMS staff members have been included on selected missions to Kenya, Afghanistan, Iran and Pakistan. Reports received from NZIS have indicated that RMS staff members have made an outstanding contribution to each of these missions – bringing valuable insights and knowledge that has enhanced the mission’s ability to make appropriate selection decisions.

Section 14.3

What provisions are required for the expulsion of protected persons?

As stated by UNHCR, “. . . *the denial of protection against refoulement to a Convention refugee on grounds of national security or public order must be approached with caution, using a balancing approach weighing risk and criminality*”.

RMS considers that the issue of “expulsion” of protected persons cannot be viewed in isolation. The 1951 Convention deals with the issues of cessation, cancellation, and revocation of refugee status and with the exceptional expulsion of refugees. These areas of the Convention need to be considered *in concert* in order to assess whether any additional provisions are required for the expulsion of protected persons.

The questions that must be asked first are:

- Do the Exclusion clauses (within the 1951 Convention) adequately provide for the appropriate exclusion of persons who are undeserving of international protection?
- Are the provisions for cancellation and revocation adequate to ensure that the protection of the Convention can be withdrawn from undeserving persons?
- Does the Convention permit the exceptional use of expulsion of refugees – and under what circumstances?

Section 14.1 (1108) of the Discussion Document indicates that the proposal will “clarify (in appropriate legislation) mechanisms to deal with persons who have committed very serious crimes including , for example, **torture or genocide**, or are security threats but who but cannot be expelled”.

The purpose of this phrase appears to be closely linked to **Section 14.3** - dealing with powers of expulsion.

1951 Convention on the Status of Refugees

Refugees who have been granted New Zealand Citizenship

Article 1 E of the 1951 Convention states:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

RMS Conclusion

Former refugees who have been granted New Zealand citizenship can no longer claim the protection of the Convention relating to the Status of Refugees.

Article 1F (a) of the Convention deals with the exclusion on the basis of:

“Crimes against peace, crimes against humanity, war crimes”

While the 1951 Convention itself contains no specific reference to the cancellation of refugee status, the UNHCR Handbook offers the following examples of situations in which cancellation of status would be appropriate:²

- When refugee status was obtained by misrepresentation of material facts;
- When the refugee possesses another nationality; or
- When the exclusion clauses would have applied had all the relevant facts been known.

It may be assumed that people guilty of torture, genocide or crimes against humanity would certainly have been subject to exclusion under Article 1 F(a) of the

UNHCR Handbook on the Determination of Refugees: Par 117

Convention³ had the relevant facts been known at the time refugee status was granted. Provision, therefore exists for the legitimate cancellation of such a person's refugee status.

Likewise, the power to *revoke* refugee status exists where such crimes are committed by a person *after* refugee status has been granted.

RMS Conclusion

There are existing mechanisms, established in Article 1F (a) of the 1951 Convention, which permit the cancellation or revocation of refugee status in cases where refugees have been found guilty of "*Crimes against peace, crimes against humanity, war crimes*".

Refugees who have committed "serious non-political crimes"

Article 1F (b) of the 1951 Convention deals with the exclusion of those who have committed "*serious non-political crimes*".

This article has engendered far more discussion, debate and disagreement over what should be considered "non-political" - with context, motivation, methods and proportionality of the crime to its objectives seen as important to this definition. This debate has intensified in recent years, in concert with the increase in acts of terrorism around the world. Many extradition treaties now specify that certain crimes (most notably, acts of terrorism) are to be regarded as "non-political". While it is acknowledged that there is no internationally accepted definition of "terrorism", it is increasingly accepted that those who have committed acts of terrorism fear prosecution rather than persecution. The provisions of Article 1F (b) therefore appear to provide for such a person's exclusion or the subsequent cancellation or revocation of refugee status.

RMS Conclusion

There are existing mechanisms, in Article 1F (b) of the 1951 Convention, which permit the cancellation or revocation of refugee status in cases where refugees have been found guilty of committing "*Serious non-political crimes*" – including acts of terrorism.

³ Convention relating to the Status of Refugees (1951) 1F (a) and (b)

Expulsion of refugees

This discussion necessarily relates to those whose refugee status has not been cancelled, revoked or relinquished through the adoption of a new nationality.

The Discussion Document - Section 12.1 (1108)

“. . . those who are “**security threats** but who cannot be expelled”

With regard to the expulsion of refugees, the 1951 Convention is emphatic.

Article 32 states:

1. The Contracting States shall not expel a refugee lawfully in their territory, *save on grounds of national security or public order.*
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law.

Article 33 (of the same Convention) states:

1. No Contracting State shall expel or return ("refoule") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. . . . *(A corollary to this clause exists in 33.2)*
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a *danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

RMS Conclusion

Articles 32 and 33 of the 1951 Convention further allow the expulsion of Convention refugees on grounds of national security or public order, and where there are reasonable grounds for regarding such individuals as a danger to the security of the country in which they are, or when such individuals have been convicted, by a final judgment, of a particularly serious crime and constitute a danger to the community of that country. However, Article 32 requires that expulsion shall only be pursuant to a

decision reached in accordance with due process of law. A refugee shall be allowed to submit evidence and to appeal to the competent authority, except where there are compelling reasons of national security.

While provision for the expulsion of protected persons (under very specific circumstances) exists, there is little guidance in 1951 Convention on how States might develop a common interpretation of the exclusion and expulsion clauses. However, UNHCR Guidelines on International Protection⁴ provide a more comprehensive guide to the use of these mechanisms.

RMS is not convinced therefore that there is a need for *additional* provisions to facilitate the expulsion of protected persons, but believes that the review of the Immigration Act Review offers an opportunity for the Government to harmonize the language relating to the standard of proof set out in the exclusion and removal provisions of New Zealand legislation with the language of the 1951 Convention, in order to avoid any perception that under New Zealand Law exclusion and removal are governed by a lower or different standard of proof.

Limitations on expulsion, deportation, extradition and surrender

Once a person's refugee status has been cancelled or revoked, or ceased to exist because they have adopted a new nationality, the protections of the 1951 Convention no longer apply. However, limitations on such a person's prosecution, deportation, extradition or surrender may still be governed by obligations under The Convention on Torture or the International Covenant on Civil and Political Rights.

Revocation of New Zealand Citizenship and subsequent deportation as a result of crimes committed in New Zealand

Whether people are granted residence in New Zealand as a result of refugee status or through another category of the normal migration programme, they currently have the right to apply for citizenship after 5 years of permanent residence - during which time they must demonstrate that they meet the criteria established by Government to merit a grant of New Zealand citizenship. Applicants who are convicted of serious crimes during this period will not be granted citizenship.

⁴ *UNHCR Guidelines: Application of the Exclusion Clauses*. HCR/GIP/03/05

Where a person has been granted permanent residence as a consequence of their refugee status, a subsequent grant of New Zealand citizenship automatically excludes them from further protection under the Convention - since they have now acquired a new nationality and are entitled to the rights, protections and privileges enjoyed by all other New Zealand citizens.

If *any* New Zealand citizen is convicted of a crime (of whatever magnitude) he/she is subject to the penalties prescribed by law. The application of further punishment by the subsequent revocation of citizenship and/or deportation seems contrary to the principals of natural justice, fairness and equity – no matter how serious the crime.

Recommendation

It is recommended, therefore, that current legislation (*which permits the revocation of citizenship and subsequent deportation of anyone committing a serious crime within 10 years of gaining residence*) be amended to exempt anyone who has already been granted New Zealand citizenship – with the exception of those who have falsely obtained their citizenship by withholding, or failing to disclose, information that would have been prejudicial to their application – or persons who may be subject to lawful extradition or surrender to an international tribunal.

Convention relating to the Status of Refugees (excerpts)

Article 1F (Exclusions)

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 32. Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory, save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33. Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Convention against Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment (excerpts)

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Appendix C

International Covenant on Civil and Political Rights (extracts)

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.