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Committee Secretary
Senate Legal and Constitutional Committee
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Parliament House
Canberra ACT 2600

Migration Amendment (Complementary Protection) Bill 2009

The Victorian Foundation for Survivors of Torture (Foundation House) welcomes the opportunity to provide this submission to the inquiry into the Migration Amendment (Complementary Protection) Bill 2009.

Foundation House was established in 1987 to assist survivors of torture and trauma, of refugee backgrounds, who have settled in Victoria.

We have also worked with numerous asylum seekers and prepared many expert assessments to support applications by individuals to the Minister for Immigration to grant them a visa under the Minister's personal intervention powers. The claims of the applicants with whom we work commonly relate to the risk of torture they would face if they return to their country of origin.

The serious flaws in the Ministerial Intervention system as a means of ensuring that people are not required to return to countries where there is a substantial risk they will be subjected to serious human rights violations have been well documented over an extended period. In particular, the assessment of evidence about the risks people may face if required to leave Australia is completely secret and not subject to independent scrutiny.

In view of what is at stake for the individuals affected, it is critical that the decision-making system commands public confidence. That is presently lacking.

On a number of occasions, individuals on whose behalf Foundation House made representations were denied requests for a visa in the face of what appeared to be compelling evidence and we have been left with very strong concerns about the rigour, care and competence with which the applications were assessed. Our concerns are shared by many others who have had direct involvement in the Ministerial Intervention process.

Foundation House considers that the complementary protection arrangements proposed in the bill will achieve the stated aims of providing greater fairness, integrity and efficiency.

However some amendments are desirable and we are aware that a number of expert individuals and organizations will be drawing the Committee's attention to these. They include the Refugee Council of Australia of which we are a member.

In this submission we wish to focus on one amendment of particular significance to the work that Foundation House does.

An essential amendment

The Migration Amendment (Complementary Protection) Bill 2009 is intended to provide an improved procedure for the consideration of claims that may engage Australia's *non-refoulement* obligations under a number of treaties.

However Clause 11 apparently establishes a significantly stricter threshold than that with which states are obliged to comply and unless amended will mean that Australia may well deny protection to people to whom it is owed.

Clause 11 provides that the criterion for a protection visa on complementary protection grounds is that the Minister believes that there is a real risk that a non-citizen will be 'irreparably harmed' because they will be subjected to torture or other specified human rights violation.

The language therefore suggests that the Minister must believe not only that the person may be subjected to torture (or other harm) but that the consequence of that torture (etc) will be irreparable harm.

Such a requirement is significantly higher than the criteria for engaging Australia's *non-refoulement* obligations under the UN Convention against Torture (CAT) (on which we will focus for illustrative purposes) which is one of the treaties pertinent to the Bill.

Article 3 provides:

> "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."

The Article plainly stipulates an evidentiary threshold with respect to the risk of torture occurring but not an additional requirement that the torture must inflict irreversible damage.

The Committee against Torture monitors compliance with the CAT and issues guidance to States Parties as to its application. The Committee has published detailed guidance on the implementation of article 3: General Comment No.1 (A/53/544, 21/1197). This guidance elaborates evidentiary considerations relating to the assessment of risk of torture and does not stipulate that the State's obligation not to *refoule* is engaged only where there is evidence that the torture will cause irreparable harm.

The jurisprudence on the application of Article 3 does not provide any basis for imposing the additional threshold of 'irreparable harm.'[1]

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[1] See Association for the Prevention of Torture and Center for Justice and International Law, *Torture in International Law – A guide to jurisprudence*, 2008.

The Explanatory Memorandum states that the test proposed in the Bill

> is reflected in the views of the United Nations Human Rights Committee in its General Comment 31 in assessing the non-refoulement obligation under the Covenant (International Covenant on Civil and Political Rights - ICCPR). Australia's non-refoulement obligations under the Covenant and the CAT require that a non-citizen not be removed to a country where there is a real risk they will irreparably harmed. (paragraph 51)

That is incorrect. As detailed above, the CAT quite plainly does not impose a test of irreparable harm.

With respect to the ICCPR, it is instructive to examine the text of General Comment 31 that the Explanatory Memorandum relies upon. The UN Human Rights Committee advises that States Parties are obliged

> not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 (arbitrary deprivation of life) and 7 (torture and cruel, inhuman or degrading treatment or punishment)." (paragraph 12).

It is apparent the Human Rights Committee uses the phrase 'irreparable harm' as shorthand for the harm caused by violations of articles 6 and 7, not as an additional threshold before the obligation not to remove a person from their territory is engaged. That is the opinion of a number of international law experts including Professor Sir Nigel Rodley, former UN Special Rapporteur on Torture and presently a member of the Human Rights Committee.

> I think it should be self-evident that paragraph 12 of General Comment 31 (for which I was the Committee's Rapporteur during its consideration of the text) speaks of irreparable harm to indicate that not all human rights violations will necessarily entail an obligation not to expose a person to them by returning them to the country in question. Thus, the articles referred to in GC 31 are those, violations

of which automatically involve irreparable harm, namely, arts 6 and 7.[2]

In conclusion, Foundation House requests the Senate Legal and Constitutional Committee to strongly recommend that 'irreparable harm' be removed from the Bill as a test for Australia's *non-refoulement* obligations.

Retention of the test would be inconsistent with the international human rights obligations which the Bill is intended to promote. An applicant might well be able to provide compelling evidence that s/he faces a substantial risk of being tortured if returned to country X but not that the torture commonly used there results in permanent impairment. That would leave a decision-maker in an invidious position of having to deny the applicant protection despite the manifest engagement of Australia's obligations under the CAT. If well advised, a rejected applicant could then make representations to the UN mechanisms to request the Australian Government to grant the person the protection that we are obliged to provide. That would be an extraordinary but conceivable eventuality unless the defect in the Bill is remedied. A rejected applicant who is not well advised may be expelled and become the victim of appalling treatment.

[2] Communication to John Gibson, President Refugee Council of Australia, 22 September 2009, cited with permission.