Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

5 March 2021

Dear Committee Secretary,

Supplementary submission:
Committee inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

Thank you for the opportunity to provide evidence at the Committee's public hearing on 3 July. Thank you also for providing witnesses with the opportunity to provide extra information to the Committee, in light of the short timeframe provided for making submissions.

During the Committee's hearing on 2 March 2021, there was some discussion of the Parliamentary Joint Committee on Human Rights' report on the Bill. The Chair, Senator Henderson, noted that the PJCHR had considered the impact of the Bill on the right to a fair trial, the prohibition of removing aliens without due process and the principle of equality before the law, and that it had not reached a concluded view on the compatibility of the Bill with international human rights law. These were the only human rights considered by the PJCHR in its preliminary advice.

Attached is a brief memo from the Kaldor Centre's international law experts, Professor Jane McAdam, Professor Guy Goodwin-Gill and Madeline Gleeson. In it, they outline the principle of non-refoulment, which is the cornerstone of the international protection regime, and prohibits States from removing individuals to countries in which they have a well-founded fear of being persecuted or who otherwise face a real risk of serious harm. They explain the ways in which the principle of non-refoulment limits what the Australian government is permitted to do when it comes to cancelling visas or citizenship and removing people from the country.

For the reasons outlined in the attached memo, the Kaldor Centre recommends:

- That the Standing Committee on Legal and Constitutional Affairs give consideration to the principle of non-refoulment when preparing its report on the Bill, and

- That the PJCHR give consideration to the impact that the Bill would have on the principle of non-refoulment before determining its final position on its compatibility with international human rights law.

Yours sincerely,

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Inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

This brief note is provided to clarify that beyond the principle of equality before the law, the right to a fair trial and the prohibition on removing aliens without due process,[1] other international legal obligations also limit what the Australian government is permitted to do when it comes to cancelling visas or citizenship and removing people from the country.

The principle of *non-refoulement* is the cornerstone of the international protection regime, and prohibits States from removing individuals to countries in which they have a well-founded fear of being persecuted or who otherwise face a real risk of serious harm.

1 Refugee law

Under international refugee law, States are prohibited from forcibly removing asylum seekers and refugees to places in which they have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.[2]

The principle of *non-refoulement* is set out in article 33(1) of the Refugee Convention: '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.'[3]

(a) Who is protected?

The protection against *refoulement* set out in article 33(1) extends both to those who have been recognized as meeting the definition of a 'refugee' in article 1 of the Refugee Convention (whether through a domestic refugee status determination (RSD) procedure or by the UN High Commissioner for Refugees (UNHCR)), and also to asylum seekers whose claims for protection have not yet been considered, or whose status has not yet been formally declared. This latter group is protected by the principle of non-return in accordance with the requirement

[1] See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), arts 13, 14, 15, 16.

[2] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2), read in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[3] Ibid.

of good faith, and in order that the State should be assured that it is not removing anyone who is actually a refugee.

The principle of *non-refoulement* is subject to limited exceptions set out in paragraph 2, but it is subject in any event to the overriding protection provided by international human rights law, as shown below.

(b) When does the prohibition on *refoulement* apply?

As the words 'in any manner whatsoever' in article 33(1) indicate, *non-refoulement* applies regardless of how an expulsion or return occurs, or how it is classified under a State's domestic laws. Thus, any type of forcible removal can engage the State's obligations under article 33(1), whether it is classified as a deportation, extradition, rejection at the border, return to the person's country of origin or a transit country, or transfer or return to a regional processing country. The prohibition of *refoulement* applies also when a State seeks to return an individual to a country other than his or her country of origin; and 'wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State'.[4]

Non-refoulement prohibits States from removing individuals not only to the country where they are directly at risk of persecution or serious harm, but also to countries that might subsequently return or send them to face such risks (so-called 'chain *refoulement*').

2 Human rights law

Under international human rights law, States are prohibited from removing people to places where they face a real risk of being arbitrarily deprived of life, or subjected to torture or other cruel, inhuman or degrading treatment or punishment. The prohibition is absolute: it is non-derogable and applies irrespective of a person's conduct.[5]

(a) Non-refoulement *to a real risk of torture under the Convention against Torture*

Removal to a real risk of torture is prohibited by article 3 of the Convention against Torture. Torture is defined in article 1 as any act

> by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected

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[4] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (Geneva, 26 January 2007), 12 <https://www.refworld.org/pdfid/45f17a1a4.pdf>.

[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), art 2(2); *Tapia Paez v Sweden*, UN doc CAT/C/18/D/39/1996 (28 April 1997), para 14.5; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 4(2); UN Human Rights Committee, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992), para 3.

> of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

In the view of the UN Committee against Torture, non-removal extends also to the risk of prohibited acts by non-State actors,[6] not just public officials, and States therefore ought to take into account the risk of cruel, inhuman or degrading treatment by both State and non-State actors.[7]

(b) Non-refoulement *to a real risk of torture or cruel, inhuman or degrading treatment or punishment under the ICCPR and the Convention on the Rights of the Child*

The prohibition on removal to a real risk of torture or cruel, inhuman or degrading treatment or punishment is prohibited by the ICCPR,[8] the Convention on the Rights of the Child[9] and a range of regional human rights treaties.[10]

Article 7 of the ICCPR provides: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. The UN Human Rights Committee has concluded that this article precludes removal where an individual would face a 'real risk' of being subjected to such prohibited treatment,[11] a view that is reflected widely in the domestic law of many States (including Australia).[12]

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[6] UN Committee against Torture, 'General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the context of Article 22', UN doc CAT/C/GC/4, para 30.

[7] Ibid, para 28.

[8] ICCPR, art 7.

[9] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art 37(a).

[10] See eg Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) (ECHR), art 3; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR), art 5; African Charter on Human and Peoples' Rights (adopted 17 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 5; Inter-American Convention to Prevent and Punish Torture (adopted 9 February 1985, entered into force 28 February 1987), OASTS 67, art 13(4); Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), art 8.

[11] *GT v Australia*, UN doc CCPR/C/61/0/706/1996 (4 November 1997), para 8.1. See also UN Human Rights Committee, 'General Comment No. 20' (n 5) para 9: 'In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.'

[12] For details, see Jane McAdam, 'Complementary Protection' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021). In domestic law, the incorporation of human rights-based *non-refoulement* obligations is commonly known as 'complementary protection' or 'subsidiary protection'.

Unlike, the Convention against Torture, the ICCPR does not require the ill-treatment to be perpetrated or acquiesced in by the State.[13] Where the risk of harm emanates from a non-State actor, the key question is whether the authorities in the receiving State can provide appropriate protection.[14]

Treatment that is 'cruel', 'inhuman' or 'degrading' falls along a spectrum, with torture the most severe manifestation;[15] it can also be considered collectively, as the 'compendious expression of a norm'[16] that 'proscrib[es] any treatment that is incompatible with humanity'.[17] Accordingly, the UN Human Rights Committee has considered it unnecessary 'to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied'.[18] Nor can the terms be defined exhaustively, since their meaning will evolve over time.[19]

The Committee against Torture's non-exhaustive list of 'human rights situations which may constitute an indication of a risk of torture', should be considered in removal cases.[20] If such acts can amount to torture (depending on their degree), then they can certainly also constitute cruel, inhuman or degrading treatment or punishment. Such situations include, among others, the risk of violence, detention or imprisonment in inhumane conditions, denial of the right to life, and brutality or excessive use of force by public officials.[21]

(c) Non-refoulement *to a real risk of arbitrary deprivation of life*

Article 6 of the ICCPR protects the right to life,[22] which has been described as the 'supreme right'.[23] The principle of *non-refoulement* precludes an individual's removal if there are substantial grounds for believing that he or she faces a real risk of being arbitrarily deprived of

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[13] On that point, the UN Committee against Torture has recently stated that '[e]qually, States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities': UN Committee against Torture, 'General Comment No. 4' (n 6) para 30 (fns omitted).

[14] *HLR v France*, App No. 24573/94 (European Court of Human Rights, Grand Chamber, 29 April 1997), para 40; UN Human Rights Committee, 'General Comment No. 20' (n 11) para 2.

[15] Eg *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para 167.

[16] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429, para 82 (Elias CJ), referring to *Miller v R* [1977] 2 SCR 680, 690 (Laskin CJ). In Elias CJ's summation at para 83: 'In most cases treatment which is incompatible with the dignity and worth of the human person will be all three. And, even if separately classified, I think they are properly regarded as equally serious.'

[17] *Taunoa v Attorney-General* (n 16) para 82.

[18] UN Human Rights Committee, 'General Comment No. 20' (n 11) para 4.

[19] Ibid; *Selmouni v France* (1999) 29 EHRR 403, para 101.

[20] Committee against Torture, 'General Comment No. 4' (n 6) para 29.

[21] Ibid.

[22] See also Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217A (III) (UDHR), art 3; ICCPR, art 6; CRC, art 6; ECHR, art 2; ACHR, art 4; African Charter on Human and Peoples' Rights, art 4; Arab Charter on Human Rights, art 5.

[23] UN Human Rights Committee, 'General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life', UN doc CCPR/C/GC/36 (30 October 2018), para 2.

his or her life.[24] Deprivation of life can arise as a direct or indirect consequence of actions or omissions. The right to life is inextricably connected to other human rights, including socio-economic rights such as the right to an adequate standard of living. The UN Human Rights Committee has recognized that 'the conditions of life in … a country may become incompatible with the right to life with dignity before the risk is realized', implying that protection should be forthcoming before there is an immediate risk to life.[25] Just as in refugee law, when determining whether a real risk exists, it is appropriate to consider the conditions cumulatively, in light of the particular attributes or vulnerabilities of the individual concerned.[26] Indeed, the UN Human Rights Committee has noted that the risk 'must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases.'[27]

(d) *Other rights giving rise to a* non-refoulement *obligation*

The list of human rights prohibiting *refoulement* is not closed. In addition to the above, international human rights law at a minimum prohibits the removal of an individual who faces a real risk of being subjected to the death penalty,[28] an enforced disappearance,[29] or an unfair trial. The European Court of Human Rights has also recognized that removal may be prohibited where there is evidence of a flagrant denial of other rights, such as the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, and the right to freedom of thought, conscience and religion. Indeed, the UN Human Rights Committee and the UN Committee on the Rights of the Child have stated that a *non-refoulement* obligation pertains in *any* case where there are substantial grounds for believing that there is a real risk of 'irreparable harm' ('such as that contemplated by articles 6 and 7' of the ICCPR[30]) if a person is removed.[31] While 'irreparable harm' has not

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[24] UN Human Rights Committee, 'General Comment No. 36' (n 23) para 30; *Ahani v Canada*, UN doc CCPR/C/80/D/1051/2002 (29 March 2004); *Warsame v Canada*, UN doc CCPR/C/102/D/1959/2010 (21 July 2011); UN Human Rights Committee, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004)', UN doc CCPR/C/21/Rev.1/Add. 13 (29 March 2004), para 12; UN Human Rights Committee, 'General Comment No. 36' (n 23) paras 30–31. See also UN Committee on the Rights of the Child, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside Their Country of Origin', UN doc CRC/GC/2005/6 (1 September 2005), para 27; *Teitiota v New Zealand*, UN doc CCPR/C/127/D/2728/2016 (24 October 2019).

[25] *Teitiota v New Zealand* (n 24) para 9.11.

[26] *RAA and ZM v Denmark*, UN doc CCPR/C/118/D/2608/2015 (28 October 2016), para 7.8; *YAA and FHM v Denmark*, UN doc CCPR/C/119/D/2681/2015 (10 March 2017), para 7.9.

[27] UN Human Rights Committee, 'General Comment No. 31' (n 24) para 30 (fns omitted).

[28] Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, UNGA res 44/128 (15 December 1989); *Judge v Canada*, UN doc CCPR/C/78/D/829/1998 (5 August 2002), para 10.4.

[29] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 16.

[30] UN Human Rights Committee, 'General Comment No. 31' (n 24) para 12.

[31] Ibid; UN Committee on the Rights of the Child, 'General Comment No. 6' (n 24) para 27; Inter-American Court of Human Rights, Advisory Opinion on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (2014) Series A, No. 21, para 231; *Judge v Canada* (n 28).

been defined, arbitrary deprivation of life, torture, and cruel, inhuman or degrading treatment or punishment are examples of such harm.[32]

4 *Non-refoulement* during the COVID-19 pandemic or similar events

The principle of *non-refoulement* under international human rights law prohibits the removal of people to places where they face a real risk of being arbitrarily deprived of life or subjected to cruel, inhuman or degrading treatment. This principle warrants special consideration in the context of the current COVID-19 pandemic and any future situation of risk. Thus, *non-refoulement* may preclude the removal of a person to a place where he or she would face a real risk of contracting (and potentially dying from) COVID-19, given inadequate healthcare facilities, as well as any particular individual vulnerabilities (eg age, pre-existing medical condition, etc).

While the principle of *non-refoulement* does not automatically prohibit the removal of a person to a place where he or she might contract COVID-19, it may preclude States from removing people to places where it is known that necessary and appropriate healthcare will not be available in the event that they do contract the virus.

The test in European jurisprudence, which is the most developed on non-removal to lack of healthcare facilities, is whether such removal would give rise to 'a real risk … of being exposed to a serious, rapid and irreversible decline in [the applicant's] state of health resulting in intense suffering or to a significant reduction in life expectancy'.[33] The applicant does not need to be 'at imminent risk of dying', but his or her removal must nevertheless result in 'a real and concrete risk'[34] of ill-treatment, assessed 'by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State.'[35]

In all cases, the principle of *non-refoulement* requires an assessment of individual circumstances. If a person has particular vulnerabilities or co-morbidities that are likely to increase their risk of contracting COVID-19 and/or their risk of death in the event of illness, those factors must be taken into account – in line with appropriate health advice – to determine whether sending the person to the nominated place would expose him or her to a real risk of being arbitrarily deprived of life, or otherwise subjected to cruel, inhuman or degrading treatment.

5 *Non-refoulement* in procedure and substance

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[32] UN Human Rights Committee, 'General Comment No. 31' (n 24) para 12; UN Committee on the Rights of the Child (n 24) para 27.

[33] *Paposhvili v Belgium*, App No. 41738/10 (European Court of Human Rights, Grand Chamber, 13 December 2016), para 183. Previously, the test required the person's health to be so impaired that removal would lead to early death: *D v United Kingdom* (1997) 24 EHRR 423; *N v United Kingdom* [2008] ECHR 453; *Yoh-Ekale Mwanje v Belgium* (2013) 56 EHRR 35.

[34] *Paposhvili* (n 33) para 205.

[35] Ibid, para 188. See also *MP v Secretary of State for the Home Department*, C-353/16 (24 April 2018), paras 40–41; *AM (Zimbabwe) v Secretary of State for the Home Department* (2020) UKSC 17, para 32.

In any case involving character-based visa or citizenship cancellation and the possible removal of an individual to face the risks outlined above, it is critically important that the relevant international law provisions be factored into the assessment. This means that the individual should be advised of the case he or she must meet or, at the very least, must be provided with the gist of the information that needs to be countered.

This basic procedural requirement is central to the rule of law and is essential if the hearing is to meet the international legal requirement of proportionality. That is not the end of the matter, however, and the principle of *non-refoulement* will be breached if Australia nonetheless elects to remove or return the person to face the risks described.

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