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Senate Legal and Constitutional Affairs Legislation Committee

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Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment Bill 2013 [Provisions]

The Victorian Foundation for Survivors of Torture Inc. or 'Foundation House' as it is also known appreciates the invitation of the Senate Legal and Constitutional Affairs Legislation Committee to provide this submission to its inquiry into the Migration Amendment Bill 2013 [Provisions].

Foundation House was established in 1987 to meet the needs of people in Victoria who were subject to torture or other traumatic events in their country of origin or while fleeing those countries.

The main areas of activity of Foundation House include providing direct services to clients in the form of counselling. Our current clients include 21 individuals who are among the cohort of more than 50 people in Australia referred to in the Explanatory Memorandum as impacted by the Bill, having been refused protection visas because they are subject to adverse security assessments by the Australian Security Intelligence Organisation (ASIO). As a consequence they have been detained for prolonged periods and face ongoing, indefinite detention. The deleterious effects on our clients of their prolonged and unending detention are profound.

In view of our detailed knowledge of the plight of these individuals, our attention was drawn in particular to the Statement of Compatibility with Human Rights for the Bill. It argues *inter alia* that the policy of indefinite detention of people subject to adverse security assessments does not violate the right not to

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be arbitrarily detained provided by the International Covenant on Civil and Political Rights (ICCPR).

We request the Legal and Constitutional Affairs Legislation Committee to critically examine the evidence and analysis upon which this assertion is based. In our view, for the reasons set out below, the Statement of Compatibility is seriously deficient. We contend that if the Committee concurs that the current policy is neither reasonable nor necessary and contrary to Australia's human rights obligations, then it should propose alternative action the Government should take to address these serious concerns.

The Legal and Constitutional Affairs Legislation Committee may be aware that in 2012-13 the United Nations (UN) Human Rights Committee considered complaints by a number of individuals detained on the basis that their detention and treatment violated their rights under the ICCPR. The Australian Government provided detailed arguments to support the legitimacy of the policy. The UN Human Rights Committee found that the detention of the individuals concerned was arbitrary in violation of Article 9 of the ICCPR. [i]

The Statement of Compatibility with Human Rights does not refer to the UN Human Rights Committee's report on the complaints. While the Statement of Compatibility adopts the Human Rights Committee's analysis of the obligations of States Parties under the ICCPR, it does not provide a detailed rebuttal of why the Committee concluded that Australian policy violated the obligations and provides a flawed and incomplete account of the situation. The following illustrate these points.

The UN Human Rights Committee provided this overview of the criteria for detention that conforms with or violates human rights standards and the reasons why Australian policy infringes human rights standards:

> Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualised likelihood of absconding, danger of crimes against others, or risk of acts against national security. ***The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends...and must be subject to periodic re-evaluation and judicial review.*** (emphasis added)
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> ... (In the present cases) the State party has not...demonstrated on an individual basis that their continuous detention is justified. The State Party has not demonstrated that other, less intrusive measures could not have achieved the same end of compliance with the State party's need to respond to the security risk that the adult authors are said to represent. Furthermore, the authors are kept in detention in circumstances where

> they are not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They are also deprived of legal safeguards allowing them to challenge their indefinite detention. (Paragraphs 10.3 – 10.4)

With respect to the criterion that decisions about detention should be made on a case-by-case basis and "not be based on a mandatory rule for a broad category," the Statement of Compatibility indicates that the policy of the Australian Government requires that *all* people subject to adverse security assessments be detained in detention facilities i.e. that Australia applies a mandatory rule for a broad category. As a matter of policy and practice there is not a case-by-case assessment of whether it is reasonably possible to achieve the same ends by less invasive means. Neither ASIO nor any other agency conducts such individualised assessments. The Statement of Compatibility does not reconcile the divergence between the criterion specified by the Human Rights Committee and Australian policy.

With respect to the criterion that the decision to detain "must be subject to periodic re-evaluation and judicial review," the Statement of Compatibility informs that "arrangements are in place for independent review of the initial case and continuing need for an adverse security assessment." This is a reference to the work of the Independent Reviewer of Adverse Security Assessments appointed in 2012. Patently the mandate of the Reviewer is quite different to the review of necessity to detain specified by the UN Human Rights Committee. The Independent Reviewer has confirmed to legal advisers for individuals subject to review that she is not mandated to assess the need for detention.

The Statement of Compatibility does not implicitly address the other requirement specified by the Human Rights Committee, that the review should be judicial in character. The position of the Independent Reviewer of Adverse Security Assessments was established by an administrative action of Government, and is not subject to legal and constitutional protection. The Reviewer is an adviser to the executive, not a judicial officer, and can only provide unenforceable recommendations. The future of the position – and therefore of periodic re-evaluations - is uncertain because prior to the 2013 election the then Coalition opposition indicated that it would abolish the review and did not indicate that it would establish an alternative mechanism.[ii]

A number of Australian bodies have expressed support for options to indefinite detentions are considered. They have also supported the establishment of a process to determine on a rigorous, case-by-case basis whether there are appropriate alternatives to detention for certain individuals subject to adverse security assessments. These bodies include the Commonwealth Ombudsman[iii] and the Inspector-General of Intelligence and Security (IGIS).[iv]

In 2011-12 the IGIS conducted an inquiry into ASIO's security assessment for community detention determinations, which allow people to reside in the

community rather than in confined detention facilities. The IGIS noted that in cases where ASIO assessed a person as a risk to national security, it did not provide advice about circumstances or conditions that might mitigate risk such that people could be permitted to live in community detention rather than a detention facility. The IGIS recommended that:

> In cases where ASIO issues an adverse security assessment for community detention but where DIAC has idenitified significant health, welfare or other exceptional issues, ASIO should engage in a dialogue with DIAC so the Minister for Immigration and Citizenship can be advised on possible risk mitigation strategies and conditions with which a person allowed community detention might be required to comply.[v]

The IGIS discussed the proposal with ASIO and the Department of Immigration and Citizenship (DIAC). ASIO indicated that "it was open to dialogue with DIAC should the department wish to pursue this proposal with us. The Acting Secretary of DIAC agreed that the approach suggested might help improve managementr of some sensitive cases."[vi]

The IGIS went on to note that "a similar strategy could be explored more broadly in situations where a visa applicant has received an adverse assessment and is facing an indefinite period in a detention centre" and that it would require only "modest funding" to implement and benefit a significant number of vulnerable individuals.[vii]

The issue was examined by the Joint Select Committee on Australia's Immigration Detention Network in 2012-13 and it recommended that that Australian Government "explore the practicalities of employing....measures (similar to control orders) for refugees and asylum seekers who are in indefinite detention or cannot be repatriated." (Recommendation 10) The Government accepted the recommendation "in principle" while noting that "any options that might involve release of persons with adverse security assessments into the community raise complex issues that would need to be carefully considered."[viii] Our enquiries indicated that despite its acceptance of the recommendation, the Government did not implement a process to examine the feasibility of alternative arrangements to indefinite detention in closed facilities.

We believe that the preceding clearly demonstrates that:

- the arguments presented by the Statement of Compatibility with Human Rights that the current detention policy does not violate Australia's obligations under the ICCPR are seriously flawed; and

  there are compelling human rights and humanitarian grounds for a serious examination of the developent of a system under which the necessity to detain individuals is rigorously assessed on a case-by-case basis.

If the Legal and Constitutional Affairs Legislation Committee concurs with these conclusions, we request that it recommends that the Government initiates such an examination as a matter of priority.

Yours sincerely,

Josef Szwarc

Manager, Research and Policy

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[i] UN Human Rights Committee, Communication No.2136/2012, CCPR/C/108/D/2136/2012.
[ii] D Flitton and M Gordon, "Coalition to axe reviews on refugees," Sydney Morning Herald, August 30, 2013.
[iii] See for example, http://www.ombudsman.gov.au/files/827_Report_to_Parliament.pdf.
[iv] Inspector-General of Intelligence and Security, Annual Report 2011-12, Annex 4.
[v] Inspector-General of Intelligence and Security, Annual Report 2011-12, Annex 4.
[vi] *ibid*
[vii] *ibid*
[viii] *Government Response to Recommendations by the Joint Select Committee on Australia's Immigration Detention Network*, November 2012, page 20.