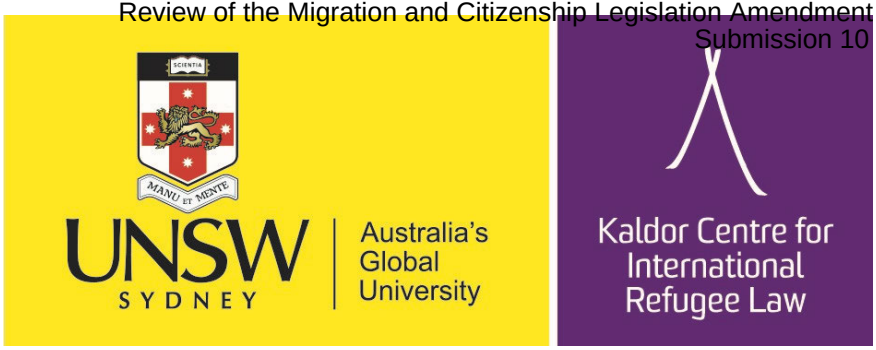

Committee Secretary
Parliamentary Joint Committee on Intelligence & Security
PO Box 6021
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

25 June 2021

Dear Committee Secretary,

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

I welcome the opportunity to make this submission to the Committee's inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 ('the Bill'). I do so in my capacity as a Senior Research Associate at the Andrew & Renata Kaldor Centre for International Refugee Law. The Kaldor Centre is the world's first and only research centre dedicated to the study of international refugee law. It was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

In my view the Bill significantly impairs procedural fairness in a manner that is disproportionate to its stated aims and is likely to have severe consequences for vulnerable individuals. While I accept that in some circumstances it is necessary to protect information from disclosure in the national or public interest, existing mechanisms such as the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSI Act*') and the public interest immunity framework already provide a framework for this. No coherent case has been made for why the measures proposed in the Bill are needed in addition to these mechanisms. Given the lack of a clear justification and the risk of significant harm, my view is that the Bill should not be passed. My reasons are set out in further detail below.

1. Key aspects of the proposed changes

The *Migration Act 1958* (Cth) currently contains a non-disclosure regime that applies to confidential information provided by gazetted intelligence or law enforcement agencies and used in relation to character based visa cancellations and refusals. This regime was

introduced prior to the enactment of the more general *NSI Act*. Whether it is necessary and desirable to maintain a dedicated non-disclosure regime applicable in migration matters in light of the *NSI Act* is a question that has not been explored in depth, and one that it would be prudent to consider before expanding that regime in the manner proposed in the Bill.

In 2017, in *Graham v Minister for Immigration*,[1] the High Court found that aspects of the *Migration Act's* current non-disclosure regime were inconsistent with s 75(v) of the Constitution because they impaired the capacity of the Federal Court and the High Court to conduct judicial review of visa refusal or cancellation decisions that relied on confidential information.

The Bill endeavours to address the decision in *Graham*. If passed, it would repeal the existing character related non-disclosure provisions in the *Migration Act* and replace them with a new framework that would restrict the disclosure of 'confidential information' provided by law enforcement or intelligence agencies and used in relation to character based visa cancellations or refusals. It would also insert a substantially similar framework into the *Australian Citizenship Act 2007* (Cth), which would restrict the disclosure of confidential information that had been used in relation to a range of decisions to deny or strip citizenship.

The framework proposed in the Bill mirrors the existing non-disclosure regime in the *Migration Act* in a number of respects. For example, both the current provisions and the Bill's proposals prevent confidential information from being disclosed to any body or person (including the affected individual and their legal representatives), tribunals (where the affected person might, for example seek merits review), parliament or a parliamentary committee,[2] except where disclosure is within the department and in relation to the exercise of a power,[3] or the Minister has elected to authorise disclosure.[4]

The most significant change in the new framework proposed in the Bill is the way in which access to confidential information in judicial review proceedings is dealt with. It follows from the decision in *Graham* that a federal court undertaking judicial review of a government decision cannot be prevented from accessing information relevant to the decision under review. In response to this, the Bill provides that, where the High Court, the Federal Court or the Federal Circuit Court is undertaking judicial review of a migration or citizenship decision to which confidential information is relevant, the court may order that confidential information must be produced or provided in evidence.[5] However, the Bill considerably limits the ways in which the court can use this information.

If the court orders that information be produced before it, it is required to hold a preliminary hearing to determine whether it can disclose this information to the person who is seeking

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[1] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33.
[2] Proposed ss 52A(2)-(3) of the *Australian Citizenship Act*; proposed s 503A(2)-(3) of the *Migration Act*.
[3] Proposed s 52A(2) of the *Australian Citizenship Act 2007* (Cth); proposed s 503A(2) of the *Migration Act 1958* (Cth).
[4] Proposed s 52B of the *Australian Citizenship Act*; proposed s 503B of the *Migration Act*.
[5] Proposed s 52C of the *Australian Citizenship Act*; proposed s 503C of the *Migration Act*.

judicial review, their legal representatives or any other person.[6] Only parties to the proceedings that already have access to the confidential information are permitted to make submissions at this preliminary hearing.[7] Other parties – including the applicant and their legal representatives – must be excluded from the hearing.[8] The Bill does not provide any mechanism whereby confidential information may be disclosed to an applicant or their legal representatives in advance of a judicial review hearing.[9] Effectively this means that at the preliminary hearing the Minister will be able to put forward arguments for non-disclosure of the information, while nobody will be able to present counterarguments weighing in favour of disclosure.

After considering the information presented at the preliminary hearing, the court must decide whether it is able to disclose the confidential information to the applicant, their legal representatives or any other party.[10] The Bill precludes the court from disclosing the information if it determines that disclosure would 'create a real risk of damage to the public interest'.[11] It also heavily curtails the factors that the court is allowed to take into account when determining whether there is a real risk of damage to the public interest. The court is only permitted to look at 7 factors, including things such as 'the risk that the disclosure of information may discourage gazetted agencies and informants from giving information in the future',[12] and 'the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation and security intelligence'.[13] All 7 factors are skewed in favour of non-disclosure. The court has no capacity to take into account factors relevant to the public interest that may weigh in favour of disclosure, such as the risk that non-disclosure may interfere with the administration of justice.

The Bill allows for regulations to specify additional factors that the court may take into account when determining whether disclosure would create a real risk of damage to the public interest.[14] This is undesirable. As the Scrutiny of Bills Committee has noted,[15] regulations and other legislative instruments are not subject to the full range of parliamentary scrutiny that a bill is subject to. If the matters that a court can have regard to when determining whether disclosing information is in the public interest is to be curtailed, this should be done in primary legislation and not by regulation.

When determining the outcome of judicial review proceedings involving confidential information, the court may give confidential information such weight as it considers

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[6] Proposed s 52C(2)-(4) of the *Australian Citizenship Act*; proposed s 503C(2)-(4) of the *Migration Act*.
[7] Proposed s 52C(2) of the *Australian Citizenship Act*; proposed s 503C(2) of the *Migration Act*.
[8] Proposed s 52C(3) of the *Australian Citizenship Act*; proposed s 503C(3) of the *Migration Act*.
[9] The Minister has a power to permit the disclosure of confidential information to specified persons and bodies, but these do not include individuals in respect of whom decisions have been made, or their legal representatives.
[10] Proposed s 52C(5) of the *Australian Citizenship Act*; proposed s 503C(5) of the *Migration Act*.
[11] Proposed s 52C(6) of the *Australian Citizenship Act*; proposed s 503C(6) of the *Migration Act*.
[12] Proposed s 52C(5)(b) of the *Australian Citizenship Act*; proposed s 503C(5)(b) of the *Migration Act*.
[13] Proposed s 52C(5)(d) of the *Australian Citizenship Act*; proposed s 503C(5)(d) of the *Migration Act*.
[14] Proposed s 52C(5)(h) of the *Australian Citizenship Act*; proposed s 503C(5)(h) of the *Migration Act*.
[15] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 1 of 2021 (Commonwealth of Australia, 29 January 2021), 21-22.

appropriate, taking into account any submissions that have been made by the parties. Where the court determined that disclosure would create a real risk of damage to the public interest, the outcome is that the Minister will have had the opportunity to make submissions about how this information should be used, and the applicant will not.

2. Procedural fairness and human rights concerns

The framework proposed in the Bill is heavily unbalanced and would deprive a large number of individuals who are denied or stripped of an Australian visa or Australian citizenship of the chance to respond to key information relied upon to reach a decision against them. These individuals would be unable to provide evidence to correct any errors in the information relied upon, or provide reasonable explanations where these exist.[16] Their access to meaningful merits review would be significantly impaired by the fact that tribunals cannot access confidential information except when the Minister has exercised a discretionary power to allow this. While they may theoretically still access judicial review, the fairness and efficacy of such review would be significantly impaired by a framework that is heavily skewed towards excluding them or their legal representatives from knowing or being able to respond to key aspects of the case against them.

These things are particularly dangerous given that the consequences of losing a visa or citizenship for an individual are dire. They face expulsion from Australia – in some cases to a country where they do not speak the language, have no connections or have never lived. In circumstances where removal is not possible, they face indefinite immigration detention. For refugees and others who have fled harm or persecution the consequences are more severe still – they potentially face being returned, or 'refouled' to a country where they may face serious harm or death.

As the Scrutiny of Bills Committee and Parliamentary Joint Committee of Human Rights have noted,[17] the Bill proposes a framework that would erode procedural fairness and the right to a fair hearing,[18] and that would impinge on the prohibition against expulsion of aliens without due process.[19] The PJCHR, in its final report, also noted that the Bill may have implications for other human rights, including the non-derogable requirement under international human rights law for independent, effective and impartial review of non-refoulement decisions.[20] Annexed to this submission is an overview of the principle of non-refoulement, and the ways in which it limits what the Australian government is permitted to do when it comes to cancelling visas or citizenship and removing people from the country.

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[16] This is exacerbated by the fact that the Bill expands the definition of non-disclosable information in s 5(1) of the *Migration Act*: see cl 6.
[17] See Senate Standing Committee for the Scrutiny of Bills, above n 15, 17; Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report: Report 1 of 2021 (Commonwealth of Australia, 3 February 2021), 9-13; Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report: Report 3 of 2021 (Commonwealth of Australia, 17 March 2021), 40-62.
[18] International Covenant on Civil and Political Rights (ICCPR), Article 14(1).
[19] ICCPR, Article 13.
[20] Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report: Report 3 of 2021 (Commonwealth of Australia, 17 March 2021), 59-60.

It is relevant to note that the Bill imposes these human rights limitations when the Commonwealth already has access to other mechanisms via which information can be protected from disclosure when it might injure the public interest or national security – such as the capacity to claim public interest immunity or the non-disclosure regime provided for in the *NSI Act*.

No clear and coherent justification has been provided for why the specific measures proposed in the Bill are needed. To the extent that a rationale for the Bill has been offered, it is inadequate. The Bill's Explanatory Memorandum and Second Reading Speech state that the thresholds for public interest immunity and under the *NSI* do not adequately protect the kind of confidential information that may be provided by law enforcement and intelligence agencies to support character decisions,[21] but this is effectively a bald assertion – no explanation of how these existing mechanisms fall short has been offered.

Moreover, as the PJCHR and Scrutiny of Bills Committee have both identified, there are a range of measures that could have been adopted to reduce the impact that the Bill has on fundamental rights without detracting in any obvious way from its purpose. For example:

- The factors which the court can take into account when determining whether disclosure of confidential information would 'create a real risk of damage to the public interest' could be made non-exhaustive,[22] or could be amended to include factors that weigh in favour of disclosure, such as procedural fairness to the applicant.[23]
- Disclosing of part of the confidential information to the applicant could be allowed where this could be achieved without creating a real risk of damage to the public interest.[24]
- Allowing confidential information relevant to judicial review hearings to be disclosed to a special advocate who could represent the applicant's interests in circumstances where it is determined that this information cannot be disclosed to the applicant.[25]
- Requiring the Minister to consider exercising the power in proposed s 52B(8) of the *Australian Citizenship Act* and proposed s 503B(8) of the *Migration Act* to authorise the disclosure of confidential information to tribunals undertaking merits review or other bodies.[26]

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[21] Explanatory Memorandum for the Migration and Citizenship Amendment (Strengthening Information Provisions) Bill 2020 (Cth), Statement of Compatibility with Human Rights, 48; Commonwealth, Parliamentary Debates, House of Representatives, 10 December 2020, 11266 (Peter Dutton, Minister for Home Affairs).
[22] Parliamentary Joint Committee for Human Rights: Report 1 of 2021, above n 17, 18; Parliamentary Joint Committee for Human Rights: Report 3 of 2021, above n 17, 61; Senate Standing Committee for the Scrutiny of Bills, above n 15, 17.
[23] Parliamentary Joint Committee for Human Rights: Report 1 of 2021, above n 17, 18; Parliamentary Joint Committee for Human Rights: Report 3 of 2021, above n 17, 61.
[24] Parliamentary Joint Committee for Human Rights: Report 1 of 2021, above n 17, 18; Parliamentary Joint Committee for Human Rights: Report 3 of 2021, above n 17, 61-62; Senate Standing Committee for the Scrutiny of Bills, above n 15, 17.
[25] Parliamentary Joint Committee for Human Rights: Report 1 of 2021, above n 17, 18; Parliamentary Joint Committee for Human Rights: Report 3 of 2021, above n 17, 62.
[26] Senate Standing Committee for the Scrutiny of Bills, above n 15, 17.

The fact that none of these safeguards have been built into the Bill nor afforded any consideration in the Explanatory Memorandum or Second Reading Speech underlines that the framework proposed in the Bill pursues its stated aims in a manner that disproportionately burdens fundamental rights, with grave consequences for individuals.

3. Constitutional issues

Finally, while the framework proposed in the Bill is designed to address the constitutional problems with the current *Migration Act* regime identified in *Graham*, it is by no means clear that they actually do so. *Graham* confirms that legislation will be inconsistent with s 75(v) of the Constitution if it purports to deprive federal courts charged with conducting judicial review of access to relevant information. It does not automatically follow that allowing courts access to such information in the most restrictive of ways is constitutionally permissible. While the case law in this area leaves much to be defined, the majority in *Graham* noted that whether a statutory provision that affects the exercise of a court's jurisdiction under s 75(v) is constitutionally valid turns on whether the court retains the ability to 'enforce the legislated limits of an officer's power'.[27] Whether a statutory provision infringes this limitation is a matter of 'substance and degree', that requires both an examination of the legal operation of the provision in question, as well as an examination of its practical impact on the court's ability to determine and declare whether the power under review has been exercised in accordance with its limits.[28] The majority went on to note that it might, in the future, be necessary to determine whether other statutory provisions that affect the exercise of a court's jurisdiction are invalid as a matter of substance and degree.[29]

While the framework proposed in the Bill allows courts access to relevant confidential information, it does so in an extremely restrictive manner that will in many cases deny applicants the opportunity to make any submissions in relation to the use of the confidential information in relation to their case. It is arguable that, in at least some circumstances, this framework burdens a court's ability to determine whether a power under review was exercised within its limits.

This is not to say that the Bill is definitely unconstitutional, merely that it is not clear that it succeeds in avoiding the constitutional problems that it seeks to circumvent. Given that 'responding to the decision in *Graham*' is a primary purpose underpinning the proposed reforms to the *Migration Act*, it seems unwise to enact a framework that may not achieve this purpose, and then expand that framework to apply to citizenship decisions. In the event of constitutional challenge, this is likely to lead to uncertainty and inconvenience for the Department of Home Affairs as well as law enforcement and intelligence agencies that may provide information relevant to visa and citizenship refusals and cancellations.

For all the above reasons, I recommend that the Bill should not be passed.

4. Note on amendments recommended by the Australian Labor Party

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[27] *Graham v Minister for Immigration and Border Protection*, above n 1 [48].
[28] Ibid, [48].
[29] Ibid, [65].

In its minority report for the Senate Standing Committee on Legal and Constitutional Affairs Committee inquiry into this Bill, the ALP recommended against passage of the Bill, but also listed a number of amendments which it said it would recommend if the Bill secured enough votes for a second reading.

My view on these proposed amendments is that, while they would certainly improve upon the Bill in its present form, they do not provide an answer to the fundamental question of why this legislation of this nature is needed, and what specific gap it fills.

Moreover, the ALP's suggested amendments are so comprehensive, that, if they are all incorporated, the Bill would be manifestly different than it is in its present form. If this occurs, my view is that further review or opportunity for stakeholder feedback on what would effectively be a new Bill would be warranted.

If I can be of further assistance to the Committee, please do not hesitate to contact me at [redacted]

Yours sincerely,

Dr Sangeetha Pillai
Senior Research Associate
Andrew & Renata Kaldor Centre for International Refugee Law, UNSW
[redacted]

Annexure A: Memo from Professor Jane McAdam, Professor Guy Goodwin-Gill and Madeline Gleeson on the principle of non-refoulement and its implications for Australian law

In its interim report on this Bill, the Parliamentary Joint Committee on Human Rights set out preliminary legal advice which examined the impact that the Bill may have on the right to a fair trial, the prohibition of removing aliens without due process and the principle of equality before the law.

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,[30] 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.[31]

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.'[32]

(a) Who is protected?

[30] 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.

[31] 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.

[32] Ibid.

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 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'.[33]

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.[34]

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

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[33] 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>.

[34] 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.

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 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,[35] 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.[36]

(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,[37] the Convention on the Rights of the Child[38] and a range of regional human rights treaties.[39]

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

[35] 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.

[36] Ibid, para 28.

[37] ICCPR, art 7.

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

[39] 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.

to such prohibited treatment,[40] a view that is reflected widely in the domestic law of many States (including Australia).[41]

Unlike, the Convention against Torture, the ICCPR does not require the ill-treatment to be perpetrated or acquiesced in by the State.[42] 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.[43]

Treatment that is 'cruel', 'inhuman' or 'degrading' falls along a spectrum, with torture the most severe manifestation;[44] it can also be considered collectively, as the 'compendious expression of a norm'[45] that 'proscrib[es] any treatment that is incompatible with humanity'.[46] 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'.[47] Nor can the terms be defined exhaustively, since their meaning will evolve over time.[48]

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.[49] 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.[50]

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[40] *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 34) 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.'

[41] 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'.

[42] 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 35) para 30 (fns omitted).

[43] *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 40) para 2.

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

[45] *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.'

[46] *Taunoa v Attorney-General* (n 45) para 82.

[47] UN Human Rights Committee, 'General Comment No. 20' (n 40) para 4.

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

[49] Committee against Torture, 'General Comment No. 4' (n 35) para 29.

[50] Ibid.

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

Article 6 of the ICCPR protects the right to life,[51] which has been described as the 'supreme right'.[52] 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 his or her life.[53] 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.[54] 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.[55] 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.'[56]

(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,[57] an enforced disappearance,[58] 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

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[51] 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.

[52] 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.

[53] UN Human Rights Committee, 'General Comment No. 36' (n 52) 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 52) 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).

[54] *Teitiota v New Zealand* (n 53) para 9.11.

[55] *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.

[56] UN Human Rights Committee, 'General Comment No. 31' (n 53) para 30 (fns omitted).

[57] 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.

[58] 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.

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[59]) if a person is removed.[60] While 'irreparable harm' has not been defined, arbitrary deprivation of life, torture, and cruel, inhuman or degrading treatment or punishment are examples of such harm.[61]

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'.[62] 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'[63] 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.'[64]

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[59] UN Human Rights Committee, 'General Comment No. 31' (n 53) para 12.

[60] Ibid; UN Committee on the Rights of the Child, 'General Comment No. 6' (n 53) 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 57).

[61] UN Human Rights Committee, 'General Comment No. 31' (n 53) para 12; UN Committee on the Rights of the Child (n 53) para 27.

[62] *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.

[63] *Paposhvili* (n 62) para 205.

[64] 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 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

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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