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Inquiry into the *Migration (Complementary Protection) Bill 2009*

September 2009

Submission to the Standing Committee on Legal and Constitutional Affair on its Inquiry into the *Migration (Complementary Protection) Bill 2009*

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1. Executive Summary

1. The Public Interest Law Clearing House (Vic) Inc (**PILCH**) welcomes the opportunity to make a submission to the Standing Committee on Legal and Constitutional Affairs in relation to its inquiry on the *Migration (Complementary Protection) Bill 2009* (**"BILL"**) which proposes to amend the *Migration Act 1958* to better adhere to Australia's obligations under international human rights law, such as the United Nations Convention Against Torture.

2. We commend the Standing Committee on Legal and Constitutional Affairs on the initiative to undertake amend the *Migration Act 1958* to better adhere to Australia's obligations under international human rights laws. However, it is PILCH's submission that while the Bill meets Australia's obligations in some areas, it does not do so in others.

3. PILCH submission deals with three application of the Bill in three parts:

    a. PILCH believes that whilst Bill meets some parts of Australia's treaty obligations pursuant to the Convention against Torture and the International Covenant on Civil and Political Rights. However, the construction of the Bill's test to qualify for a protection visa, and the inclusion of a provision classifying ineligible persons means that the Bill does not fully adhere to these obligations.

    b. The Bill does not apply an absolute prohibition on *non-refoulement* which in PILCH's view is necessary to ensure compliance with its obligations; and

    c. The Bill does not prevent non-citizens seeking asylum from being sent to other States where they may be placed at risk of torture.

2. Recommendations

4. In summary, PILCH makes the following recommendations:

Recommendation No. 1:
That the test in the proposed section 36(2)(aa) be amended to become a single test based on a *real risk* of harm, augmented by other elements determined cumulatively.

Recommendation No. 2:
That proposed section 36(2)(2B) should be omitted.

Recommendation No. 3:
PILCH recommends that the definition of as contained in the Bill be given a wide interpretation to include private torture.

Recommendation No. 4:

PILCH recommends that the *non-refoulement* obligations not be limited in any way.

Recommendation No. 5:
That the Bill be amended to ensure that non-citizens seeking to asylum are not sent to another State where she or she may be subject to torture.

Recommendation No. 6:
That the Bill be amended to include a Ministerial discretion to deem a non-citizen at risk of being subject to torture or other mistreatment as being substantiated where the human rights situation in that non-citizen's home state is particularly grave.

3. About PILCH

5. PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through four pro bono referral schemes (Public Interest Law Scheme, Victorian Bar Legal Assistance Scheme, Law Institute of Victoria Legal Assistance Scheme and PilchConnect) and two pro bono outreach legal clinics (Homeless Persons' Legal Clinic and Seniors Rights Legal Clinic).

6. PILCH's objectives are to:

    - improve access to justice and the legal system for those who are disadvantaged or marginalised;
    - identify and seek to redress matters of public interest requiring legal assistance for those who are disadvantaged or marginalised;
    - refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
    - support community organisations to pursue the interests of the communities they seek to represent; and,
    - encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

    PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.

7. In 2007-2008, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers, not just within private law firms but also those working in government and corporate legal departments. In the last year, PILCH also made numerous law reform submissions on questions of

public interest. Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.

8. PILCH has a particular interest in migration and refugee law as this forms a large volume of the referral and policy work it undertakes. For example, the Victorian Bar Legal Assistance Scheme has run training for members of the Victorian Bar in Refugee and Asylum Seeker Law since 2003. PILCH also recently made a submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Migration Amendment (Immigration Detention Reform) Bill 2009*.

4. Scope and Structure of Submission

9. This submission analyses whether the Bill meets Australia's better adhere to Australia's obligations to prevent *non-refoulement* under international human rights law. This submission begins in Section 5 by identifying Australia's obligations to prevent *non-refoulement* and then whether the Bill addresses adherence to these.

5. Australia's Treaty Obligations

5.1 Australia's Treaty Obligations

10. Australia has non-refoulement obligations under the United Nations ("**UN**") Convention Against Torture ("**CAT**") and the International Covenant on Civil and Political Rights ("**ICCPR**").

11. Article 3 of the CAT provides that:

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.

12. Article 1 of the CAT defines "torture" as meaning any act by which severe pain or suffering (either physical or mental) is intentionally inflicted on a person. The definition is limited to acts of public officials or other persons acting in an official capacity. Further, the definition states that "torture" does not include pain or suffering arising from lawful sanctions.

13. Article 7 of the ICCPR provides that:

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.

5.2 Australia's *non-refoulement* obligations to Refugees

14. The expulsion ("*refoulement*") of a refugee to a country where his or her life or freedom would be threatened on account of their race, religion, nationality or membership of a

social group is recognised in Article 33(1) of the 1951 Convention relating to the Status of Refugees ("**Refugees Convention**") and its 1967 Protocol.[1]

15. A State also violates the prohibition of torture not only if its own authorities subject a person to torture, but also if its authorities send a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[2]

16. However, the protection against *non-refoulement* under the Refugees Convention does not apply where:

    a. there are reasonable grounds for regarding the person 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" (article 33(2)); or

    b. there are serious reasons for considering that the person has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the country of refuge, or acts contrary to the purposes and principles of the United Nations (article 1F).

17. The principle of *non-refoulement* applies more broadly under Article 2 of the CAT and Article 4 of the ICCPR, to prohibit the expulsion, returning, or transferring a person to a country where he or she may face torture.[3] Unlike the Refugees Convention, the principle of *non-refoulement* is absolute where there is a real risk that the individual will be subjected to torture or cruel, inhuman or degrading treatment.[4] This is evidenced by the fact that the prohibition of torture and ill-treatment is specifically excluded from the derogation provisions of Article 4(2) of the ICCPR, and Articles 2(2) and 15 of the CAT.

18. Additionally, many international bodies and tribunals, including European Court of Human Rights ("**European Court**"), the United Nations Human Rights Committee, the CAT Committee, the Special Rapporteur on Torture, and the UN Security Council have affirmed the view that all anti-terrorism and other national security measures that are implemented must be consistent with international human rights and humanitarian law, including the prohibition of torture and other ill-treatment.[5]

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[1] 'Non-refoulement under threat', Proceedings of a seminar held jointly by The Redress Trust (REDRESS) and the Immigration Law Practitioners' Association (ILPA) November 2006, 3 <www.redress.org/publications/Non-refoulementUnderThreat.pdf>.

[2] Nowak & McArthur, The United Nations Convention Against Torture, Oxford University Press, 2008, p.129

[3] Sir Elihu Lauterpacht CBE QC and Daniel Bethlehem, (2001) 'The Scope and Content of the Principle of Non-Refoulement (Opinion)', [132] <http://www.unhcr.org/3b33574d1.html>.

[4] Sir Elihu Lauterpacht CBE QC and Daniel Bethlehem, (2001) 'The Scope and Content of the Principle of Non-Refoulement (Opinion)', [154] <http://www.unhcr.org/3b33574d1.html>.

[5] See the joint third party intervention of Amnesty International Ltd and Others in Ramzy v The Netherlands (Application No. 25424/05), [7] <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/RamzyBriefNov2005.pdf>.

5.3 Concluding Observations of the United Nations Human Rights Committee

19. The United Nations Human Rights Committee ("**UNHRC**") has also recently made numerous observations about Australia's obligation to give effect to the ICCPR.[6]

20. The relevant concluding observations were:

    a. "The State party should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment"; and

    b. "The State party should take the necessary legislative and other steps to ensure that no person is extradited to a State where he or she may face the death penalty…".

6. The Bill

21. If the Bill is passed in its current form, section 36(2)(aa) of the Migration Act 1958 (Cth) will provide:

    A criterion for a protection visa is that the applicant for the visa is:

    ….

    (aa) a non-citizen in Australia … to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will be irreparably harmed because of a matter mentioned in subsection (2A)…

22. Section 36(2A) then sets out the matters in respect of which a protection visa may be issued. These matters are:

    a. that the non-citizen will be arbitrarily deprived of his or her life;

    b. that the non-citizen will have the death penalty imposed on him or her and it will be carried out;

    c. that the non-citizen will be subjected to torture;

    d. that the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

    e. that the non-citizen will be subjected to degrading treatment or punishment.

[6] Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee: Australia, 7 May 2009, CCPR/C/AUS/CO/5.

23. Each of "*torture*", "*cruel or inhumane treatment or punishment*" and "*degrading treatment or punishment*" is defined in the Bill, largely by reference to the definition of "*torture*" in the CAT.

6.1 Compatibility with the Concluding Observations

24. It is PILCH's opinion that the Bill generally complies with the Concluding Observations of the UNHRC. It is notable that the Bill introduces a "*substantial grounds*" test that uses the same language as that used by the UNHRC in its concluding observations. This language is also used by the European Union.

25. UN Committees have provided guidance regarding how the phrase "*substantial grounds*" is to be interpreted. In this context, the phrases "necessary and foreseeable consequence", "real risk" and "irreparable harm" have been used to augment the "substantial grounds" test. To this extent, PILCH commends the Bill for dealing with the UN's concluding observations.

6.2 The tests to be met by an applicant

26. Section 36(2)(aa) contains four tests which an applicant must meet in order to qualify for a protection visa. These are:

    a. the "substantial grounds" test;

    b. the "necessary and foreseeable consequence" test;

    c. the "real risk" test; and

    d. the "irreparable harm" test.

27. It is PILCH's submission that section 36(2)(aa) seeks to reproduce all these standards in the one test. Consequently, this test also creates a higher threshold than what is required by international human rights law. Such a test may also create considerable confusion for decision-makers and could lead to a decision-maker having too much discretion.

28. PILCH believes that these tests should properly be used as cumulative tests to augment a single test. Whilst adopting a "*substantial grounds*" test, which derives from the CAT, would create consistency with Australia's treaty obligations, PILCH believes that the using a "*real risk*" test in isolation involves less ambiguity.

29. While the European Court has not explicitly addressed the issue of standard and burden of proof in transfer cases, it has held that in view of the fundamental character of the prohibition under Article 3, the examination of risk "must necessarily be a thorough one".[7] This Court has also imposed on States a positive obligation to conduct a 'meaningful assessment' of any claim of a risk of torture and other ill-treatment.[8] This approach is supported by the CAT Committee,[9] and reflects a general recognition by international

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[7] *Said v. the Netherlands* (2005, § 49) loc cit, *N. v Finland* (2005) loc cit; *Jabari v. Turkey* (2000, § 39) loc cit.

[8] See *Jabari v. Turkey* (2000), no. 40035/98, 11 July 2000.

[9] E.g. CAT General Comment 1 (1997, § 9(b)) supra.

tribunals that, because of the specific nature of torture and other ill-treatment, the burden of proof cannot rest alone with the person alleging it, particularly in the view of the fact that the person and the State do not always have equal access to the evidence.[10]

30. The word "real" has a more certain meaning than "substantial". Further, a "*real risk*" test would allow for consistency with General Comment No 1 on Article 3 of the CAT. In that Comment, the CAT Committee suggested that the required standard of proof should not be as strong as "highly probable", but should be stronger than a mere theoretical risk or suspicion.

31. PILCH believes also that the "*irreparable harm*" test is particularly inappropriate. Given the nature of the matters set out in section 36(2A) of the Bill, there will be no situation in which a person who faces those matters will not suffer irreparable harm. For example, every person who faces "degrading treatment or punishment", will clearly suffer irreparable harm.

32. PILCH also submits that other aspects of this Bill dilute the effect of proposed section 36(2A). These include:

    a. the Minister's ability to reject an application on the basis that he / she can relocate an applicant to another part of the applicant's country of origin where the applicant does not face a "real risk" of "irreparable harm" (section 36(2B)(a));

    b. the Minister's ability to reject an application on the basis that the applicant could obtain protection in the applicant's country of origin meaning that the applicant does not face a "real risk" of "irreparable harm" (section 36(2B)(b)); and

    c. the Minister's ability to reject an application on the basis that the risk faced by the applicant is a risk faced by the population of the country of origin generally (section 36(2B)(c)).

33. PILCH believes that inclusion of such elements does not meet Australia's *non-refoulement* obligations and should be omitted.

6.3 Conclusion

34. The wording of proposed section 36(2)(aa) of the Bill undermines what should be straightforward test to determine whom Australia owes protection obligations to. PILCH believes that the Bill should provide that once the applicant has raised an arguable case that they face a real risk of ill-treatment, the criterion for a Protection Visa be met, unless the Minister is satisfied that there is not a real risk of ill-treatment if they are returned to their country of origin.

35. PILCH believes that this test should be amended so that its elements are considered by a decision maker cumulatively to augment a this single test. Those elements of the Bill that dilute the application of the principle of non-refoulement should be omitted.

Recommendation No. 1:

[10] See e.g. HRC, Albert Womah Mukong v. Cameroon (1994), Communication No. 458/1991, CCPR/C/51/D/458/1991, 10 August 1994; I-ACHR, Velasquez Rodriguez v. Hondouras (1988, § 134 et seq), Series C, No. 4, judgment of 29 July 1988.

That the test in the proposed section 36(2)(aa) be amended to become a single test based on a *real risk* of harm, augmented by other elements determined cumulatively.

Recommendation No. 2:
That proposed section 36(2)(2B) should be omitted.

7. Other Considerations

7.1 Torture by Private Persons

36. The CAT definition of "torture" is limited to acts of public officials or other persons acting in an official capacity. The definitions in the Bill, however, do not contain this limitation and section 36(2)(aa) may be engaged where the applicant faces torture from private persons.

37. On this interpretation, the Bill goes beyond Australia's obligations under the CAT as there are many instances in which private persons may subject others to torture. For example, some types of female genital mutilation may be carried out by religious groups in private, or a person may be subject to domestic violence so grave that it would meet the proposed definition of cruel, inhumane or degrading treatment.

38. However, neither scenario of privately administered torture would be enough to enable the grant of a protection visa under the current regime as it is generally held that such torture will not be considered to be officially tolerated or uncontrollable by the Government of the country of origin.

Recommendation No. 3:
PILCH recommends that the definition of as contained in the Bill be given a wide interpretation to include private torture.

7.2 Capital punishment

39. The Bill provides protection against capital punishment through section 36(2A), which sets out the death penalty as a matter in respect of which a protection visa may be issued.

40. PILCH welcomes this as this again goes beyond Australia's obligations under the CAT. Whilst a detailed discussion of capital punishment (and corporal punishment) is beyond the scope of this submission, the protection against capital punishment which arises under section 36(2A) appears consistent with Australia's general stance on capital punishment as covered by the *Death Penalty Abolition Act 1973* (Cth).

7.3 Exclusion of war crimes

41. It is a fundamental principle that *non-refoulement* under the CAT and ICCPR applies to all persons without exception under any circumstances.[11]

[11] Joint third party intervention of Amnesty International Ltd and Others in Ramzy v The Netherlands (Application No. 25424/05), [18] <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/RamzyBriefNov2005.pdf>.

42. In PILCH's view, the Explanatory Memorandum to the Bill ("**EM**") comes close to admitting that the proposed section 36(2C) is not consistent with Australia's international obligations. Unlike Article 1F of the Refugees Convention, "*non-refoulement* obligations under the [ICCPR] and the CAT are absolute and cannot be derogated from".[12] The EM then goes on, despite this recognition that Australia's obligations are "absolute", to propose "balancing" Australia's obligations against other factors. This balancing exercise is directly inconsistent with Article 2(2) of the CAT, which provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture."

43. In recent years, the principle of *non-refoulement* has been progressively modified under the auspices of protecting "national security" and the "prevention of terrorism". However, in the landmark European Court case, *Chahal v UK*,[13] the European Court reaffirmed that the application of the principle of *non-refoulement* to torture or cruel, inhuman or degrading treatment or punishment is absolute. In particular, the Court held that a non-citizen's claim must be examined without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the state exercising refoulement.

44. *Chalal* has been followed extensively by other international courts and bodies including CAT Committee decisions.[14] A recent example of the application of the non-refoulement principle can be found in *N v. Finland* (2005) where the European Court emphasised that the "activities of the individual in question, however undesirable or dangerous, cannot be a material consideration".

45. Therefore, any limitation on the *non-refoulement* obligations will result in Australia not meeting its treaty obligations. It is unclear why the removal of proposed s 36(2C) would, as the EM implies, result in Australia becoming a "safe haven for war criminals". Australia only has obligations to individuals with character concerns who face a real risk of torture, and Australia's accession to the CAT reflects an absolute moral prohibition on the use of torture or complicity in that use. Australia's international obligations in this respect cannot be satisfied if proposed section 36(2C) remains in the Bill.

Recommendation No. 4:
PILCH recommends that the *non-refoulement* obligations not be limited in any way.

[12] Migration Amendment (Complementary Protection) Bill 2009 Explanatory Memorandum, [64].

[13] (1996) 23 EHRR 413.

[14] See T.P.S. (name withheld) v. Canada, Communication No. 99/1997, U.N. Doc. CAT/C/24/D/99/1997 (2000), Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System* (2000);

7.4 Exclusion of protection where internal relocation or state protection options arise, or the risk is "general"

46. Furthermore, the EM's vague reference to "alternative case resolution solutions" in respect of citizens who are excluded from obtaining a protection visa under section 36(2C) is concerning. It is unclear as to whether these "solutions" refer to allowing the individual to remain in Australia (for example, through Ministerial Intervention), deportation to a third country, or "diplomatic assurances" to enable the individual's return to the country where the person faces a real risk of ill-treatment. In any case, administrative procedures reliant on the discretion of the Executive are not capable of fulfilling Australia's international obligations. If there is a real risk that the non-citizen will be irreparably harmed because of a matter listed in section 36(2)(2A), it is PILCH's submission that Australia has an absolute obligation which should be satisfied without resort to uncertain administrative procedures determined on a case-by-case basis.

47. As mentioned previously, a State violates the absolute prohibition of torture not only if its own authorities subject a person to torture, but also if its authorities send a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[15]

48. Significant concerns arise if the Government proposes relying on "diplomatic assurances" that the individual will not be tortured. Requesting diplomatic assurances from governments with a known record of torture, as practised by the United States, Sweden and other States, is nothing but an attempt to circumvent the absolute prohibition of *refoulement* and, therefore, does not relieve the respective governments from their obligations under Article 3 of CAT.[16]

49. Many commentators have highlighted the inherent problems of States seeking to rely on "diplomatic assurances" or "memoranda of understandings", and have argued that the fact that the expelling State seeks such assurances amounts to an "admission that the person would be at risk of torture or ill-treatment" upon the noncitizen's return.[17] Additionally, the European Court in *Chahal* and the CAT in *Agiza v Sweden*[18] have held that State assurances are not sufficient to ameliorate the risk of torture. This view is supported by the UN Special Rapporteur on Torture, the CAT Committee and the Council of Europe Commissioner on Human Rights.[19]

50. When considering whether *non-refoulement* obligations arise, a State must take into account "all relevant considerations" including the human rights situation in the non-

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[15] Nowak & McArthur, supra. p.129

[16] ibid p.129

[17] Joint third party intervention of Amnesty International Ltd and Others in Ramzy v The Netherlands (Application No. 25424/05), [39] <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/RamzyBriefNov2005.pdf>.

[18] Communication No. 233/2003 [Submitted by Mr. Ahmed Hussein Mustafa Kamil Agiza].

[19] As cited in the joint third party intervention of Amnesty International Ltd and Others in Ramzy v The Netherlands (Application No. 25424/05), [39] <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/RamzyBriefNov2005.pdf>.

citizen's home country in addition to the circumstances specific to the individual.[20] PILCH believes that the exclusion of protection where the risk is a general risk to the population, and not faced by the non-citizen personally, as proposed by section 36(2B)(c), is potentially incompatible with Article 3(2) of the CAT.

51. Article 3(2) provides that, in determining whether there are "substantial grounds for believing [an individual] would be in danger of being subjected to torture", authorities shall consider "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights". This provision anticipates that there is a proximate relationship between a country with a history or pattern of mass violations of human rights and an individual citizen's risk of being subject to torture. Therefore, where the human rights situation of a country is extremely grave and ill-treatment of individuals is so generalised that a general risk of torture or ill-treatment is exceptionally high, arguably little is required to demonstrate that there is a personal risk to an individual returning to the State.

52. The requirement that an applicant have "taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia" is not consistent with the CAT. The CAT provides no such qualification to its general statement that "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

53. Therefore, PILCH believes that section 36(2B)(c) potentially removes claims where an individual's personal risk is self-evident from the human rights situation of their home state. PILCH submits that the Bill should instead include a provision giving the Minister discretion to "deem" a non-citizen's risk of being subjected to torture or other mistreatment as being substantiated where the human rights situation in that non-citizen's home state is particularly grave.

Recommendation No. 5:
That the Bill be amended to ensure that non-citizens seeking to asylum are not sent to another State where she or she may be subject to torture.

Recommendation No. 6:
That the Bill be amended to include a Ministerial discretion to deem a non-citizen at risk of being subject to torture or other mistreatment as being substantiated where the human rights situation in that non-citizen's home state is particularly grave.

[20] CAT Article 3(2). See also *Vilvarajah and Others v UK* (1991) 45/1990/236/302-306, 108.