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4 August 2014

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014

The Association for the Prevention of Torture and the Victorian Foundation for Survivors of Torture appreciate the opportunity to provide this submission in relation to the Migration Amendment (Protection and Other Measures) Bill 2014 (the Bill).

The submission is concerned with one element of the Bill, the proposal to significantly raise the risk threshold for assessing complementary protection claims under section 36 of the *Migration Act 1958* (Cth) (the Act) (subsection 6A(2) of the Bill). This includes the risk that a person would be in danger of being subjected to torture, subjected to cruel or inhuman treatment or punishment, or subjected to degrading treatment or punishment if removed to a receiving country.

The authors of the submission have very substantial knowledge about the incidence and impact of torture, and international and comparative jurisprudence on torture and cruel, inhuman and degrading treatment or punishment. The work of each organisation is described at the end of the document.

In summary, we submit that:

- Torture and cruel, inhuman or degrading treatment or punishment may cause serious and prolonged physical and mental suffering for the victim, their family and community.

- In view of the potentially catastrophic consequences of torture, Parliament should maintain the current risk threshold for granting protection, that Australia will not expel a person to a country if the evidence indicates a *real risk* that she or he will be

subjected to such harm there. This threshold is consistent with Australia's obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the International Covenant on Civil and Political Rights (ICCPR).

- Changing the risk threshold to 'more likely than not' as proposed in this Bill would bring Australia into conflict with international law and would be antithetical to the statement in the Bill's Second Reading Speech that the Government 'remains committed to ensuring it abides by the non-refoulement obligations under the UNCAT and ICCPR'[1].

- The authors therefore urge the Committee to recommend that the current risk threshold be retained.

The following sections elaborate each of these points.

The impact of torture

> Torture seeks to annihilate the victim's personality and denies the inherent dignity of the human being. The United Nations has condemned torture from the outset as one of the vilest acts perpetrated by human beings on their fellow human beings.[2]

'Torture' is defined in the Act as an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for a specified purpose.[3] The definition of torture in Australian law is adapted from the definition in the UNCAT.

Torture impacts on the minds, bodies and spirits of those on whom it is inflicted. They may be harmed physically, psychologically, spiritually, socially and economically. The effects may be both short and long term, immediate and consequential. Torture may profoundly affect not only those subjected to it but also those to whom they are connected – their family and friends, fellow members of the ethnic and religious groups with which they are affiliated.

Through their work, the authors of this submission are very aware of the awful impact that torture has on survivors, their families and communities. We are confident that the members of the Senate Legal and Constitutional Affairs Legislation Committee appreciate the intrinsically abhorrent nature of a phenomenon which continues to be used by both governments and others actors in many countries and therefore do not propose to provide detailed evidence here. Of course we would do so if the Committee would find that helpful to its consideration of this aspect of the Bill.

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[1] Scott Morrison MP, *Migration Amendment (Protection and Other Measures) Bill 2014,* Second Reading Speech, House of Representatives Hansard, 25 June 2014, 9.
[2] United Nations, International Day in Support of Victims of Torture, <http://www.un.org/en/events/torturevictimsday/>, viewed 17 July 2014.
[3] Section 5 of the *Migration Act 1958* (Cth). See also Division 274, *Criminal Code Act 1995* (Cth).

The acceptable threshold of risk that a person will be subjected to torture

The issue for the Parliament that is posed by the Bill can be stated as follows: what is the acceptable risk threshold for denying or granting protection to a person when there is evidence that she or he may be tortured if they are involuntarily returned to a particular country?

The Act as it currently stands provides that the Minister should grant a protection visa to a person (or 'non-citizen' in the language of the statute) if there is a 'real risk' they will be subjected to torture or other specified significant harm if they are removed to a particular country. The Full Federal Court interpreted this statutory threshold as meaning that there is a 'real chance' the harm will occur[4], the same threshold of risk the High Court decided was appropriate for people claiming protection as refugees. The High Court judges explained that the term meant that the chance of persecution occurring had to be 'substantial', not 'remote' or 'far fetched'.[5]

The Government is asking the Parliament to raise the risk threshold so that a person will not receive protection unless the decision-maker – the Minister – determines that it is 'more likely than not' that the persons will be subjected to torture. According to the Minister this means 'there would be a greater than fifty percent chance that a person would suffer significant harm in the country they are returned to.'[6]

In our view, the proposed new risk threshold is inappropriate and unacceptable in circumstances where there may be catastrophic consequences if a person who is denied Australian protection is expelled to a country where the serious harm from which they ask to be safeguarded is inflicted on them.

The granting of Refugee and other Humanitarian visas is a mechanism designed to protect people from the danger of serious harm. In this area of public policy as in others concerned to protect people from specific harms, the severity of the consequences if the protective mechanism fails is a critical factor in determining what should be the evidentiary threshold or acceptable risk.

It should be recalled that a high standard of proof attaches to criminal proceedings precisely to protect innocent people from the risk of penal sanctions. How then should the risk of torture be understood if a person is to be forcibly removed? The absolute nature of the prohibition against torture which Australia has accepted means that it is not possible to balance policy considerations against a real risk that persons will be tortured if forcibly removed.

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[4] *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [246].
[5] *Chan v MIEA* (1989) 169 CLR 379 per Mason CJ at 389, McHugh J at 429.
[6] Scott Morrison MP, *Migration Amendment (Protection and Other Measures) Bill 2014,* Second Reading Speech, House of Representatives Hansard, 25 June 2014, 9.

We believe it is inconceivable that Australian authorities would consider it acceptable to have a failure rate of forty nine percent with respect to, for example, equipment that sterilises surgical equipment or the functioning of seat belts, bicycle helmets and enclosures to stop children falling off their trampolines.

The Government has stated that its proposal to significantly increase the risk threshold is its 'position'. However, it has not explained why it considers it necessary and appropriate to greatly increase the level of acceptable risk for visas to be granted to protect people from the danger of being tortured.

Nor has the Government provided an explanation for its position that while the 'real chance' of persecution is the acceptable threshold for granting protection to people who are refugees, a higher threshold should be applied in determining whether people should be protected from the risk of torture and other serious human rights abuses. In the view of the authors, applying different risk thresholds depending on whether the applicant's protection claims are made under the Refugee Convention provisions or complementary protection provisions will be confusing and an additional administrative burden for operational officers who are not likely to be lawyers familiar with standards of proof.

International standards

Article 3 of the UNCAT describes the international obligation binding on Australia to determine whether a person must be protected from removal.[7] The rule is examined in some detail by human rights bodies at international, regional, and national levels, and is aptly summarised by Bethlehem and Lauterpacht:

> "No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory *where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment* [emphasis added]."[8]

As guardian of the Convention, the UN Committee against Torture consistently reminds States parties that pursuant to their obligations, they must examine whether complainants would face "a foreseeable, real and personal risk" of torture upon return. The risk needs not to be highly probable, but it must be personal and present.

In its authoritative General Comment on article 3, the Committee against Torture offers States parties some further guidance:

[7] Article 3 of the UN Convention against Torture provides: 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.
[8] Sir Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of Non-refoulement: Opinion" in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (New York: Cambridge University Press, 2003) ch.2.1 at 252.

> "[T]he risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.
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> "The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present."[9]

The reference to 'substantial grounds' therefore "does not qualify the ultimate question which is whether a real risk of relevant ill-treatment has been established." [10] It merely requires there to be a good evidential basis for concluding that a risk exists.

In *E.A. v. Switzerland*,[12] the Committee against Torture examined the threshold for the non-refoulement obligation to be engaged. Switzerland had argued that article 3 implies that the risk of danger "must be concrete, that is directly affecting the applicant, and serious, that is highly likely to occur."[13] In their examination, the Committee rejected the Swiss interpretation, ruling: "The Committee has noted the State party's argument that the danger to an individual must be serious ("substantial") in the sense of being highly likely to occur. The Committee does not accept this interpretation and is of the view that 'substantial grounds' in article 3 require more than a mere possibility of torture but do not need to be highly likely to occur to satisfy that provision's conditions."[14] This formulation is recalled consistently in jurisprudence of the Committee, and stands as the threshold required from States in their implementation of article 3 (non-refoulement) obligations.[15]

The UN Human Rights Committee has also elaborated on the standard of risk applicable to the non-refoulement obligation under articles 6 (right to life) and 7 (freedom from torture and ill-treatment) of the ICCPR.[16] Significantly, in its General Comment No. 31, the Human Rights Committee stated that the Covenant "entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a *real risk* of irreparable harm [emphasis added]."[17]

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[9] Committee against Torture ("CAT"), General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (refoulement and Communications), UN Doc. A/53/44, annex IX, 21 November 1997, at 6-7. See also CAT, *Mukerrem Guclu v. Sweden*, Communication No. 349/2008, 16 December 2010, at para. 6.4.
[10] *See Secretary of State for the Home Department v. Kacaj* [2001] UKIAT 00018, Date of Determination 19 July 2001, at 12.
[12] CAT, *E.A. v. Switzerland*, Communication No.28/1995, 10 November 1997.
[13] *Ibid*. at 7.7.
[14] *Ibid*. at 11.3.
[15] CAT, *Ke Chun Rong v. Australia*, Communication No. 416/2010, 7 February 2013, at 7.3; *Dadar v. Canada*, Communication No.258/2004, 23 November 2005; *T.A. v. Sweden*, Communication No.226/2003, 8 May 1996, at 11.3; *Abdussamatov et al. v. Kazakhstan*, Communication No.444/2010, 7 June 2012, at 13.7; *Eveline Njamba v. Sweden*, Communication No.322/2007, 3 June 2010, at 9.3; *S.T. and K.M. v. Sweden*, Communication No. 279/2005, 17 November 2006, at 7.3; *Balabou Mutombo v. Switzerland*, Communication No. 13/1993, 27 April 1994, at 9.3.
[16] Human Rights Committee, General Comment No 7, para. 9 (30 May 1982) UN Doc HRI/GEN/1/Rev.6. See also Human Rights Committee, *Kindler v. Canada*, Communication No. 470/1991, 30 July 1993, at 13.2.
[17] Human Rights Committee, General Comment No 31, adopted 29 March 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at para.12; See also General Comment No 20, adopted 10 March 1992, UN Doc. HRI/Gen/Rev.1, at para.9.

The standard of risk applied by the European Court of Human Rights is strikingly similar to that adopted by the UN Human Rights Committee.[18] The Court has required applicants to the Court to demonstrate a 'real risk' of torture or other ill-treatment for the obligation of non-refoulement to be engaged.[19]

It is important to recall that European jurisprudence provided some inspiration for UNCAT. Its caselaw may therefore offer States some instruction on how they should understand their international obligations.[20] This is certainly the approach of the UN Special Rapporteur on torture, who has restated jurisprudence of the European Court in his recommendations to all States on standards applicable to non-refoulement.[21]

In *Saadi v. Italy*,[22] the Grand Chamber of the European Court of Human Rights rejected outright the attempt to alter the 'real risk' standard with a more demanding 'more likely than not' test. In the case, the UK had argued that, in cases concerning the threat caused by international terrorism, the 'real risk' approach of the Court needed to be altered and clarified. The court ruled that such a move would place a higher burden of proof on the applicant than that which is required under the European Convention's established jurisprudence, which speaks of a real risk of prohibited treatment.

The Senate Legal and Constitutional Affairs Legislation Committee will be aware of the inconsistent national practices of Canada and the USA. Both States apply a higher threshold of 'more likely than not' for non-refoulement assessments, and have consequently created some confusion as to which standard of proof should be applied. However, as described below, such contrary standards should be treated with extreme caution.

The United States entered an 'understanding' on ratification of the UNCAT which declared that the article 3 obligation would apply only where torture was found to be 'more likely than not'.[23] The significance of the understanding attached to the instrument of ratification is that, as a matter of public international law, it modifies the effect of the obligation between it and all States that did not object.

Significantly, in its subsequent examination of the US, the Committee against Torture noted that the US test requires a threshold which is higher than that reflected in the consistent jurisprudence of the Committee.[24]

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[18] European Court of Human Rights, *Soering v. UK* (Judgment) paras. 87-88 (7 July 1989) Appl. No. 10126/82; *Chahal v. UK* (Judgment) paras. 73-74 (15 November 1996) Appl. No. 22414/93.
[19] See ECtHR, *Soering v. UK*, 7 July 1989, at 90-91; and *Saadi v. Italy*, *sub.*, at 125.
[20] See ECtHR, *Saadi v. Italy*, Application No. 37201/06, judgment of the Grand Chamber, 28 February 2008, at 122.
[21] See Report of Special Rapporteur on Torture to the GA (2004), A/60/316, 30 August 2005. See also A/57/173 and A/59/324.
[22] ECtHR, *Saadi v. Italy*, Application No. 37201/06, judgment of the Grand Chamber, 28 February 2008.
[23] The US understanding states: "The United States understands the phrase, `where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean `if it is more likely than not that he would be tortured'." See status of reservations at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec>
[24] CAT, Summary record of the first part (public) of the 424th Meeting, 10 May 2000, 24th Session, UN Doc.CAT/C/SR.424, 9 February 2001, at 17. Available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=CAT/C/SR.424> [last accessed 24 July 2014].

Australia did not enter any reservations on ratification of the Convention, and therefore may not take advantage of the US interpretation that is not consistent with the obligation provided in the Convention.

Canada also applies a 'more likely than not' standard of proof,[25] as interpreted from the neutral wording of the Canadian Immigration and Refugee Protection Act 2001.[26] However, the Human Rights Committee have again expressed their concern at the inconsistent standard. In *Pillai v. Canada*, the Committee ruled that "Article 7 [prohibition against torture] requires attention to the real risk that the situation presents, and not only to what is certain to happen or what will most probably happen. General Comment No. 31, […] demonstrates this focus. So do the Committee's Views and Decisions of the past decade."[27]

Two further national examples further demonstrate the incompatibility of a 'more likely than not' risk threshold with international standards. In the United Kingdom, the Asylum and Immigration Tribunal has interpreted the test for the non-refoulement obligation to be engaged under both the Refugee Convention and the UNCAT as a 'real risk' standard:

> "The use of the words 'real risk' […] has the advantage of making clear that there must be more than a mere possibility. The adjective 'real' must be given its proper weight. Anxious though the scrutiny must be and serious though the effect of a wrongful return may be, the applicant must establish that the risk of persecution or other violation of his human rights is real. The standard may be a relatively low one, but it is for the applicant to establish his claim to that standard."[28]

Finally, in 2004, Switzerland submitted a report to the Committee against Torture noting that a high degree of proof must be shown to engage the obligation not to remove a person. It stated: "the mere possibility of being subjected to ill-treatment is not sufficient. On the contrary, anyone invoking this provision [UNCAT article 3] must satisfactorily demonstrate that there is, beyond all reasonable doubt, a genuine, specific, and serious risk that they would be subjected to torture or inhuman or degrading treatment if returned to their country."[29] In response, the Committee noted that "the standards of proof required by the State party exceed the standards required by the Convention. The Committee wishes to draw the attention of the State party to its General Comment No.1 (1996) stating that the risk of torture 'must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable'."[30]

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[25] Canada Federal Court of Appeal, *Li v. Canada (Minister of Citizenship and Immigration)* [2005] FCJ No.1, 2005 FCA 1, at 18-28.
[26] Immigration and Refugee Protection Act 2001, s97(1): "A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture;"
[27] Human Rights Committee, *Pillai v. Canada*, Communication No.1763/2008, 9 May 2011.
[28] *Secretary of State for the Home Department v. Kacaj* [2001] UKIAT 00018, Date of Determination 19 July 2001. See also England and Wales Court of Appeal, *AS & DD (Libya) v. Secretary of State for the Home Department* [2008] EWCA Civ 289, para. 60.
[29] CAT, Addendum to Fourth Periodic Report of Switzerland, CAT/C/55/Add.9, 2 July 2004, at 38.
[30] CAT, Concluding Observations on Switzerland, CAT/C/CR/34/CHE, 21 June 2005, at 4(d).

Following the established approach of the Committee against Torture, the level of risk required to engage the non-refoulement obligation is that the risk must 'go beyond mere theory or suspicion', i.e. the risk must be real. The 'real risk' standard of proof is applied consistently at the international level, by both the Committee against Torture and the Human Rights Committee. The 'more likely than not' standard proposed in the draft law finds no support in the wording of any of the treaties to which Australia is bound, and it is striking that whenever a State has applied any standard higher than that required by either human rights treaty, the respective Committee has been very clear to reject it outright.

Conclusion

The government claims it 'remains committed to ensuring it abides by the non-refoulement obligations under the UNCAT and ICCPR'[31]. Further, it argues that the proposed changes that raise the risk threshold from applicants having to show a 'real risk' of harm to having to show that harm is 'more likely than not' to occur are 'an acceptable position which is open to Australia under international law'[32].

The authors of this submission strongly disagree with this assessment. The proposed changes would put Australia in contradiction with international law on this issue. The Committee against Torture is due to review Australia in November 2014, and based on its practice vis-à-vis other states that have higher thresholds than the 'real risk' standard, the Committee against Torture is likely to be highly critical of these proposed amendments.

The authors therefore strongly urge the Committee to recommend that the current standard for non refoulement of 'real risk' be retained.

[31] Op Cit, n 6.
[32] Ibid.

About the authors of this submission

The Association for the Prevention of Torture (APT) is an independent NGO based in Geneva, working for a world free from torture, where the rights and dignity of all persons deprived of liberty are respected.

To achieve this vision we:

- Promote transparency and monitoring of places of detention
- Advocate for legal and policy frameworks
- Strengthen capacities of torture prevention actors and facilitate exchanges
- Contribute to informed public policy debates

The Victorian Foundation for Survivors of Torture (Foundation House) is contracted by the Commonwealth Government to provide specialist torture and trauma rehabilitation services to people of refugee backgrounds who live in Australia. Since its establishment in 1987, Foundation House has provided counselling and other forms of assistance to thousands of people from diverse origins who were subjected to torture or other traumatic events in their countries of origin or while fleeing those countries.

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