



16 October 2014

Information for consideration by the Committee against Torture at its 53rd Session with respect to Australia's report on its compliance with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The Victorian Foundation for Survivors of Torture (Foundation House) appreciates the opportunity to provide information for consideration by the Committee against Torture for its examination of Australia's compliance with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Foundation House has since its establishment in 1987 assisted thousands of survivors of torture and other traumatic experiences, of refugee backgrounds, who have settled in the Australian state of Victoria. We provide counselling and other services to individuals and families; train and support service providers in the health, education and welfare sectors; and conduct and commission research to improve policies, programs and services affecting the health and wellbeing of people of refugee backgrounds.

The submission focuses on a number of issues that are of particular pertinence to the work and mission of Foundation House. They are:

- the increased risk of refoulement;
- immigration detention;
- the transfer of asylum seekers by Australian authorities to Nauru and Papua New Guinea without effective protection of their rights; and
- uncertainty about whether or when Australia will ratify the Optional Protocol to the CAT.

Foundation House is aware of other submissions being provided by agencies with detailed knowledge across a broader range of issues affecting asylum seekers and people of refugee backgrounds, and issues affecting other groups. We are also aware of domestic legislative proposals introduced into the Australian Parliament subsequent to the drafting of this submission¹ which give rise to additional concerns regarding the treatment of asylum seekers and refugees.

Increased risk of refoulement

The possibility that Australia will forcibly return people to countries where they face a real risk of being subjected to serious human rights abuses has been increased by the use of “enhanced screening” to assess potential claims for protection. The risk will be increased further if legislative proposals relating to “complementary protection” that the Government has introduced for consideration by the Parliament are enacted. These two developments are detailed below.

i) Enhanced screening

In 2012, the Australian Government introduced the so-called “enhanced screening” policy to assess whether people from Sri Lanka arriving by boat without visas were claiming protection under the Refugee Convention or other human rights treaties. The policy has been endorsed by the current government.ⁱⁱ Under the policy, if a person does not raise claims seen to engage Australia’s non-refoulement obligations in an initial interview with departmental officers, they are “screened out” of the refugee status determination process and removed to their country of origin. The Australian Human Rights Commission has identified a number of concerns about the enhanced screening process, including that “screening interviews may be brief and not sufficiently probing to ensure that all relevant protection claims are raised”.ⁱⁱⁱ

The limited information that is available about enhanced screening gives strong grounds for concern that the nature and circumstances of the assessments, such as the absence of effective access to legal advice for individuals affected, preclude the proper examination on a case by case basis of whether Australia’s protection obligations should be engaged. UNHCR has concluded that enhanced screening arrangements are “unfair and unreliable.”^{iv}

ii) Complementary protection

The Australian government has proposed legislation that would:

- significantly raise the risk threshold for assessing complementary protection claims (Migration Amendment (Protection and Other Measures) Bill 2014); and
- abolish the current independent statutory system for assessing whether complementary protection should be provided and reinstate the Minister for Immigration as the decision-maker (Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013).

Each of these will significantly weaken the framework for providing complementary protection, as described below.

The risk threshold

The current standard is that protection should be afforded to people 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. This threshold has been judicially interpreted as meaning that there is a “real chance” the harm will occur^v, which is consistent with international standards.

The Government is asking the Parliament to raise the risk threshold so that a person will not receive protection unless the decision-maker determines that it is “more likely than not” that the person will be subjected to torture.^{vi} According to the Minister for Immigration, 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.”^{vii}

Foundation House and others consider that the proposed new risk threshold is inappropriate and unacceptable given that 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.^{viii} The legislative proposal was scrutinised by the Parliament’s Joint Committee on Human Rights which concluded that it may be inconsistent with Australia’s international human rights obligations:

Noting the seriousness of the threats faced by both categories of individuals, the Minister has not explained the basis for adopting a stricter test for assessing complementary protection claims than is applied for refugee protection assessments...the adoption of a stricter test than that which is applied by the Australian courts (which is consistent with the test applied by the HRC and the UN Committee against Torture under the ICCPR and the CAT) would appear to be incompatible with Australia’s obligations under those conventions.^{ix}

Proposed reversion to Ministerial decision-making

Prior to 2012, the Minister for Immigration determined whether to grant visas on complementary protection grounds and the exercise of this personal power was not transparent and not subject to independent scrutiny and review. The authority to determine whether a person should be granted complementary protection was then transferred to an independent tribunal; the Government proposes to restore the previous system.^x

Foundation House and others who had clients seeking protection had strong concerns about the rigour and competence with which some applications were assessed under the system of Ministerial discretion. The current system involving an independent review body is demonstrably fairer and the Government has not

provided substantive reasons for the reinstatement of the previous, patently flawed system.^{xi} As observed by the Parliamentary Joint Committee on Human Rights:

Human rights law requires provision of an independent and effective hearing to evaluate the merits of a particular case of non-refoulement. Equally, the provision of ‘independent, effective and impartial’ review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.^{xii}

Immigration detention

Australian immigration law permits indefinite detention of people who do not have visas without judicial scrutiny and other procedural safeguards that ensure that individuals are detained only “when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose”, as stipulated in international standards.^{xiii}

There is a substantial body of evidence that the prolonged detention in immigration facilities to which many people have been subject is harmful to mental health and well-being.^{xiv}

Foundation House has recently made submissions to inquiries expressing its concerns with respect to two cohorts affected by the policy of immigration detention who are among our clients: children in immigration detention and people who are subject to adverse security assessments by the Australian Security Intelligence Organisation.

i) Children in immigration detention

The Australian Human Rights Commission is currently undertaking an inquiry into children in immigration detention.^{xv} Foundation House has contributed evidence through a submission of the Forum of Australian Services for Survivors of Torture and Trauma, a national network of agencies that provide specialist torture and trauma rehabilitation services to people from refugee backgrounds.^{xvi}

The submission affirmed that evidence from the work of the agencies “highlights that...immigration detention exacerbates the effects of previous traumatic experiences, hinders the capacity to effectively manage those effects and can create new difficulties. This is the case for both adults and children, and for family units.” It describes in detail elements of the detention environment and regime that the agencies have observed as having the greatest adverse impact on the psychosocial functioning of children. They are:

- Deprivation of freedom
- Fear for personal safety
- Witnessing of violence and self-harm by others in detention
- Adverse effects on family functioning
- Lack of meaningful and developmentally suitable activities
- Institutionalisation and
- Length and uncertainty of detention.

ii) *People who are subject to adverse security assessments by the Australian Security Intelligence Organisation*

Foundation House has had as clients more than 20 individuals who have been in indefinite detention because they were or remain subject to adverse security assessments by the Australian Security Intelligence Organisation. We pointed out to a recent Parliamentary committee inquiry that “the deleterious effects on our clients of their prolonged and unending detention are profound”.^{xvii}

Foundation House and others have advocated to successive governments that the system of security assessment should be reformed – for example, to permit judicial scrutiny – and alternatives to detention developed. The Inspector-General of Intelligence and Security has suggested that risk mitigation strategies and conditions similar to those applied to community detention could be explored for “situations where a visa applicant has received an adverse security assessment and is facing an indefinite period in a detention centre”.^{xviii} Participants at a UNHCR convened Expert Roundtable on National Security Assessments canvassed options for such alternatives over two years ago, including “case specific or ‘tailor-made’ reporting arrangements to match the risk.”^{xix}

The UN Human Rights Committee has considered a complaint by 37 of the people affected. The Committee found that their detention is arbitrary contrary to Article 9 of the International Covenant on Civil and Political Rights and considered “that the combination of the arbitrary character of the authors’ detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant”^{xx} i.e. cruel, inhuman or degrading treatment or punishment.

Transfer of asylum seekers to Nauru and Papua New Guinea without effective protection of their rights

The Australian Government has since late 2012 transferred to Nauru and Papua New Guinea more than 2300 asylum seekers for the determination of their protection claims.^{xxi} It is apparent from a range of sources that the transfers have occurred

without the Australian Government ensuring that the people who are transferred are treated in accordance with international human rights standards. For example, a UNHCR monitoring visit to Nauru in October 2013 found that:

the current policies, conditions and operational approaches...do not comply with international standards and in particular... constitute arbitrary and mandatory detention under international law...(and)...do not provide safe and humane conditions of treatment in detention.^{xxii}

The UNHCR reached similar conclusions about Papua New Guinea when it visited that country shortly afterwards.^{xxiii}

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

At national, state and territory levels there are a number of bodies with a range of powers and systems of accountability and transparency that monitor places of detention. It is our understanding that no jurisdiction has a comprehensive monitoring system which would meet the requirements of a compliant party to the Optional Protocol to the CAT. Overall, the mandates and capacities of the agencies involved are seriously deficient:

Although there have been some minor improvements at the margins in terms of the accountabilities of various tiers of Australian governments for regime standards in places of detention, essentially the need for a national network of effective NPMs (national preventative mechanisms) has increased rather than diminished. Moreover, the other mechanisms typically available for securing human rights standards are not particularly robust in Australia, emphasising the need for a coherent and comprehensive system of NPMs.^{xxiv}

Ratification would therefore provide a powerful and essential catalyst to strengthen the protection of people in varied places of detention.

Significant progress was made in the years immediately after Australia signed the treaty in 2009. That has stalled. The Committee should encourage the Australian Government to resume the process and ratify the treaty as soon as reasonably possible.

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Endnotes

ⁱ Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

ⁱⁱ Scott Morrison MP, Minister for Immigration and Border Protection, “Australian Government returns Sri Lankan people smuggling venture”, 7 July 2014, <<http://www.minister.immi.gov.au/media/sm/2014/sm216152.htm>>.

ⁱⁱⁱ Australian Human Rights Commission, “Tell Me About: The ‘Enhanced Screening Process’”, June 2013, 2, <<https://www.humanrights.gov.au/sites/default/files/document/publication/enhanced-screening.pdf>>.

^{iv} UNHCR, “Humanitarian response to asylum-seekers needed: UNHCR”, 17 June 2013, <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=322:humanitarian-response-to-asylum-seekers-needed-unhcr&catid=35:news-a-media&Itemid=63>.

^v *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [246].

^{vi} Migration Amendment (Protection and Other Measures) Bill 2014.

^{vii} Scott Morrison MP, Migration Amendment (Protection and Other Measures) Bill 2014, Second Reading Speech, House of Representatives Hansard, 25 June 2014, 9.

^{viii} Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, Submission 4, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Protection_and_other_measures_bill/Submissions>.

^{ix} Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011*, Fourth Report of the 44th Parliament, March 2014, para 3.47.

^x Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013.

^{xi} Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment Bill 2013, Submission 6, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Migration_Amendment_Bill_2013/Submissions>.

^{xii} Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011*, Ninth Report of the 44th Parliament, July 2014, para 1.169.

^{xiii} UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4.2, 11.

^{xiv} See for example: Keller, A et al, “The mental health of detained asylum seekers” (2003) 362 *The Lancet*, 1721-1723; Steel, Z, Silove, D, Brooks, R, Momartin, S, Alzuhairi, B and Susljik, I, “Impact of immigration detention and temporary protection on the mental health of refugees” (2006) 188 *British Journal of Psychiatry*, 58-64; Coffey, G, Kaplan, I, Sampson, R and Tucci, M, “The meaning and mental health consequences of immigration detention for people seeking asylum” (2010) *Social Science and Medicine*, 2070-2079; UNSW Social Policy Research Centre, *The experiences of Irregular Maritime Arrivals detained in immigration detention facilities: Final Report*, July 2013.

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- ^{xv} AHRC, National Inquiry into Children in Immigration Detention 2014, <<https://www.humanrights.gov.au/national-inquiry-children-immigration-detention-index>>.
- ^{xvi} FASSTT, *Submission from the Forum of Australian Services for Survivors of Torture and Trauma to the Australian Human Rights Commission National Inquiry Into Children in Immigration Detention*, 13 June 2014, <<https://www.humanrights.gov.au/sites/default/files/Submission%20No%2010%20-%20Forum%20of%20Australian%20Services%20for%20Survivors%20of%20Torture%20and%20Trauma.docx>>.
- ^{xvii} Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment Bill 2013, Submission 8, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Migration_Amendment_Bill_2013/Submissions>.
- ^{xviii} Inspector-General of Intelligence and Security, “Annex 4: Inquiry into ASIO’s security assessments for community detention determinations”, *Annual Report 2011-12*, 76.
- ^{xix} UNHCR, “Expert Roundtable on National Security Assessments for Refugees, Asylum-Seekers and Stateless Persons in Australia: Chair’s Summary”, 3 May 2012, para 37.
- ^{xx} Human Rights Committee, Communication No. 2094/2011, Views adopted by the Committee at its 108th session (8–26 July 2013), CCPR/C/108/D/2094/2011, para 9.8.
- ^{xxi} The Department of Immigration and Border Protection has indicated that as at 31 August 2014, there were 2317 asylum seekers in offshore processing centres in Nauru and Papua New Guinea; <http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-august2014.pdf>.
- ^{xxii} UNHCR monitoring visit to the Republic of Nauru, 7-9 October 2013, 1, <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>>.
- ^{xxiii} UNHCR monitoring visit to Manus Island, Papua New Guinea, 23-25 October 2013, <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>>.
- ^{xxiv} Richard Harding, “Why Australia Must Ratify and Implement OPCAT,” abstract of presentation to conference “Implementing Human Rights in Closed Environments,” Melbourne, 20-21 February 2012, in conference *Program and Abstracts*, 10.