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Senate Standing Committee on Legal and Constitutional Affairs
By online submission

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Dear Committee Secretary

RE: Inquiry into the Migration Amendment (Complementary Protection) Bill 2009

Please accept this short submission to the above inquiry. This Bill is a welcome supplement to Australia's long humanitarian tradition of protecting non-citizens from serious harm abroad, whether under the 1951 Refugee Convention or other humanitarian categories, and demonstrates Australia's renewed global leadership on human rights. I make three short points: one technical and two substantive.

My technical submission is simply that the criteria for complementary protection are poorly drafted as a result of the inclusion of unnecessary qualifying phrases. Far from creating certainty, the current language would invite needless litigation. The enumerated grounds of protection in the Bill will *always* involve "irreparable harm" to the affected person; the qualifying language is redundant. The only material effect of the "irreparable harm" phrase would be to invite decision-makers to find, for instance, that some torture does not constitute "irreparable harm", such as by drawing distinctions between types of torture on that basis of its severity or the permanence (versus temporariness) of its effects. International protection obligations do not vary according to whether harm is "irreparable". The phrase should be removed. Other verbose or otiose language, and unnecessary clauses (such as sub-section 2B), could also be simplified and combined as follows, such that Australia would grant complementary protection where:

> **... the Minister is satisfied** [**that, if removed from Australia**] ~~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).~~
>
> **(a)** ~~the non-citizen will~~ **be arbitrarily deprived of his or her life; or**
>
> **(b)** ~~the non-citizen will~~ **have the death penalty imposed on him or her** ~~and it will be carried out~~; **or**
>
> **(c)** ~~the non-citizen will~~ **be subjected to torture; or**
>
> **(d)** ~~the non-citizen will~~ **be subjected to cruel or inhuman treatment or punishment; or**
>
> **(e)** ~~the non-citizen will~~ **be subjected to degrading treatment or punishment.**

My substantive submissions are four-fold. First, the grounds of protection properly implement the duty of *non-refoulement* in international law, as it arises under custom, the Convention against Torture 1984, the ICCPR 1996, and the Second Optional Protocol to the ICCPR. This Bill brings Australia into conformity with its human rights obligations.

Second, the grounds of complementary protection should be naturally extended to protect against other serious harms, in particular:

(a) *Arbitrary deprivation of liberty*: which is recognised by international law and the common law as one of the most fundamental of rights violations, particularly in cases of protracted or incommunicado detention, or enforced disappearances;

(b) *Persecution on any ground whatsoever*. The five limited grounds of protection in the 1951 Refugee Convention have produced an often unhealthy and inefficient "line drawing" between groups regarded as deserving and not deserving protection. In my view, *any* person faced with persecution of *any* kind – even if outside the Convention – deserves protection, and should not be excluded merely because they are not mentioned in a treaty which preserves anachronistic post-war political compromises.

(c) *An unfair or discriminatory criminal trial, amounting to a denial of justice*: bilateral extradition agreements often already include a "non-discrimination" clause which precludes return to a discriminatory or otherwise manifestly unfair trial. Such persons could benefit from complementary protection, particularly where the discrimination or unfair trial at issue would not constitute persecution under refugee law.

Third, some of the exceptions in sub-section 2B require further consideration or limitation. In respect of exception (b) – that the person could obtain protection from an authority of the country – it must be clearly understood that "diplomatic assurances" from a State that a person will not be harmed may not be a sufficient safeguard against such harm, in circumstances where the risk of (for instance) torture is notorious: *Agiza v Sweden*, UNCAT Communication No. 233/2003, CAT/C/34/D/233/2003 (2005), para 13.4.

Exception (c), requiring that the risk faced must be personal not general, is a blunt and arbitrary restriction on protection and should be deleted. Under international law, if a person faces a "real risk" of being subjected to an enumerated harm, they are entitled to protection. Whether they are part of a broader class of similarly situated person is irrelevant to the determination of the risk faced by the person individually. In that sense, a risk to the *general* population may still be a risk simultaneously faced *personally* by each individual.

If the exception aims to limit access to complementary protection in potential mass influx situations – for example, where there is ethnic cleansing or large scale rights abuses against a whole population – then it is accepted there may be legitimate resource constraints on Australia's capacity to permanently protect to large populations. However, in practice, "floodgates" risks rarely materialise; principled legal regimes should not exclude protection *ab initio*, but should respond to the exceptional case if and when it ever arises. If large scale displacement occurs and many people reach Australia, the proper framework then shifts to an emergency model, including temporary protection pending resolution of foreign violence, and international burden sharing to equitably assist Australia in dealing with the mass influx.

Fourth, in relation to the exclusion clauses in s 36(2)(c), the Bill is silent on what happens to a person who is a security risk but who cannot be returned to torture. Australia needs to clarify the legal status of such persons and not leave them in perpetual limbo or uncertainty; if they cannot be returned, prosecuted or lawfully detained, they require permanent status.

Yours sincerely

Ben Saul