Australia's Compliance with the *Convention against Torture*

Report to the UN Committee against Torture

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Table of Contents

1. Introduction

1. This submission to the United Nations Committee against Torture (**Committee**) regarding Australia's compliance with the *Convention against Torture* (***CAT***) has been prepared by the Human Rights Law Resource Centre. It also incorporates information provided by the National Association of Community Legal Centres, the Public Interest Advocacy Centre, Rights Australia and the Australian Muslim Civil Rights Advocacy Network.

2. The Human Rights Law Resource Centre is a national specialist human rights legal service. It aims to promote and protect human rights, particularly the human rights of people who are disadvantaged or living in poverty, through the practice of law. The Centre also aims to support and build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery. The Centre achieves these aims by undertaking and supporting the provision of legal services, litigation, education, training, research, policy analysis and advocacy regarding human rights.

3. The submission considers and makes recommendations regarding the following areas of Australian law, policy and practice which may raise issues of incompatibility with the *CAT*:

   (a) the inadequate protection of human rights, including the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, under Australian domestic law;

   (b) immigration and asylum-seeker law, policy and practice;

   (c) Australia's law and policy in relation to refoulement, extradition and expulsion;

   (d) the impact of the criminal justice system on Indigenous Australians;

   (e) Australia's treatment of prisoners and conditions of detention, including in particular the lack of access to adequate health care;

   (f) Australia's counter-terrorism law and practice, including in relation to incommunicado detention, and the use of preventative detention and control orders;

   (g) the use of evidence obtained under torture or pursuant to other cruel, inhuman or degrading treatment or punishment;

   (h) Australia's failure to investigate and remedy allegations of torture;

   (i) Australia's failure to adequately protect its citizens from the death penalty and other forms of ill-treatment.

4. The submission makes a range of recommendations to ensure that Australian law, policy and practice in each of these areas is consistent with Australia's obligations under the *CAT*.

2. Lack of Legislative Entrenchment of Basic Human Rights

2.1 Inadequate Protection of Human Rights under Law

Articles 2, 4, 13 and 14

5. Article 2 of the *CAT* requires that Australia 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.

6. Australia's domestic law continues to fail to provide effective legislative, administrative, judicial or other protection to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment within its jurisdiction. There is no constitutional prohibition on torture and other cruel, inhuman or degrading treatment or punishment and the *CAT* has only been partially adopted into federal law.[1]

7. Australia remains the only developed nation without comprehensive constitutional or legislative protection of basic human rights at a federal level. Australian governments have failed to provide clear and effective protection of many of the rights contained in the *CAT,* as well as many of the rights contained in the *International Covenant on Economic, Social and Cultural Rights* (***ICESCR***) and the *International Covenant on Civil and Political Rights* (***ICCPR***). In previous Concluding Observations, both the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have commented on the 'lacunae' in the protection of human rights in Australia and strongly recommended that Australia incorporate the Covenants in domestic legislation.[2] Similar concerns have also been recently expressed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism.[3]

8. The Australian Human Rights and Equal Opportunity Commission (**HREOC**) is an independent human rights institution in accord with the Paris Principles, however its remedial powers are horatory only. It cannot make enforceable determinations and there is no requirement on the executive government to even respond to its recommendations.

9. In the absence of a federal Bill or Charter of Rights, the governments of the State of Victoria and the Australian Capital Territory (**ACT**) have recently introduced limited legislative protection of human rights within their jurisdictions incorporating many, but not all, of the rights contained in the *ICCPR*.[4] While a general prohibition on torture and other cruel, inhuman or degrading treatment or punishment is contained in both the Victorian and ACT legislation, both acts permit limitations on this right contrary to the status of the prohibition against torture as

[1] See *Crimes (Torture) Act 1988* (Cth).

[2] See, eg, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [14]–[36]. In 2000, the Human Rights Committee expressed concern that 'there remain lacunae in the protection of Covenant rights in the Australian legal system': *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000).

[3] Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006) [10].

[4] *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

peremptory and non-derogable.[5] Moreover, neither Act provides for an independent right to take legal action to remedy a breach of rights, contrary to articles 13 and 14 of the *CAT*.

10. In November 2007 a new Federal Labor Government was elected in Australia. Following his appointment as Commonwealth Attorney-General in December 2007, the Hon Rob McClelland MP confirmed that, during its first term, the current Australian Government intends to conduct a national consultation regarding the need for a federal Charter of Human Rights. This commitment was a key plank of the Australian Labor Party's national policy on 'Respecting Human Rights and a Fair Go for All', which provides that 'Labor will initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians'.[6] It is also consistent with the commitment in the Labor Party's National Platform to 'adhere to Australia's international human rights obligations' and to 'seek to have them incorporated into the domestic law of Australia'.[7] Details of the public consultation have not yet been announced.

11. The new Attorney-General, Mr Robert McClelland, has also affirmed that the federal Government is committed to ratifying the *Optional Protocol to the Convention against Torture*, and that procedures will be adopted soon in consultation with the Australian States and Territories as to how that can be achieved.[8]

2.2 Proposed Recommendations in relation to Protection of Human Rights

THAT Australia enact legislation to comprehensively incorporate the *Convention against Torture* into Australian domestic law.

THAT Australia ratify the *Optional Protocol to the Convention against Torture.*

3. Immigration and Asylum Seeker Policy and Practice

3.1 Mandatory Detention of Asylum Seekers

Articles 2, 11, 16

12. Despite previous recommendations from the Committee against Torture and repeated calls by the Australian Human Rights and Equal Opportunity Commission[9] and other human rights bodies,[10] the Australian Government maintains a policy of indefinite mandatory detention of asylum-seekers. The *Migration Act 1958 (Cth)* provides that a stateless person who has committed no crime, and who has requested removal from Australia and is cooperating with the authorities, may be kept in immigration detention for the rest of their life if unable to be

[5] See, eg, section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[6] Australian Labor Party, *ALP National Platform and Constitution* (2007) chapter 13, [7].

[7] Ibid [4].

[8] Cynthia Banham, 'Australia to Sign Torture Treaty that Howard Spurned', *Sydney Morning Herald* (Sydney), 1 March 2008.

[9] See, eg, Human Rights and Equal Opportunity Commission, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities* (January 2007).

[10] Including the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women.

deported or removed.[11] Between 1999 and 2003, 2184 children were held in immigration detention, of whom 92 per cent were subsequently found to be refugees.[12] While amendments to the *Migration Act* in 2005 require that the detention of children be a 'measure of last resort',[13] unaccompanied minors continue to be detained.[14]

13. In 2007, HREOC reiterated its call for the repeal of Australia's mandatory detention laws.[15] In the absence of repealing mandatory detention, HREOC recommended that there should be greater efforts to promptly release detainees and resolve visa decisions. However, as referred to above, HREOC's authority is limited to recommendations only, with no power to bind the Australian Government.

14. Further, detainees have no method by which to challenge the legality of their detention. Indeed, a recent High Court decision has determined that it is constitutional and lawful under the *Migration Act 1958 (Cth)* to keep a person in immigration detention indefinitely.[16] This results in a situation where someone who has committed no crime, who has requested removal from Australia and who is cooperating with the government could be detained for the rest of their life because they are effectively stateless and cannot be removed.

15. The Federal Labor Government's new Immigration Minister, the Hon Chris Evans MP, has pledged that the Government intends to examine the cases of the 61 long-term detainees by the end of April 2008.

3.2 Conditions in Immigration Detention

Article 2, 11, 16

16. In 2002, the UN Working Group on Arbitrary Detention reported that 'the conditions of [immigration] detention are in many respects similar to prison conditions'.[17] The Working Group was also critical of a number of practices which create stressful conditions for detainees, including constant video surveillance, routinely handcuffing detainees outside the centres and isolation practices. HREOC has expressed significant concern about the incidence and impact of 'prolonged and indeterminate detention', detainees' lack of access to legal advice and information, lack of educational and recreational opportunities in detention, over-crowding and separation of families.[18]

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[11] *Al-Kateb v Godwin* [2004] HCA 37.

[12] Human Rights and Equal Opportunity Commission, *A Last Resort? A Summary Guide to the National Inquiry into Children in Immigration Detention* (2004) 15.

[13] *Migration Amendment (Detention Arrangements) Act 2005* (Cth).

[14] See, eg, Human Rights and Equal Opportunity Commission, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities* (January 2007) Part 6.1.

[15] Human Rights and Equal Opportunity Commission, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities* (January 2007).

[16] *Al-Kateb v Godwin* [2004] HCA 37

[17] Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Visit to Australia* (24 October 2002) UN Doc. E/CN.4/2003/8/Add.2, [14].

[18] Human Rights and Equal Opportunity Commission, *A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner* (2001).

3.3 Access to Health Care

Article 2, 11, 16

17. The mental health care provided to people in immigration detention is severely inadequate.

18. In most cases it is not possible to properly treat the mental health problems suffered by detainees because the main way to treat a mental health concern is to remove the primary cause of the problem; namely, detention itself. Indeed, a recent report of the Commonwealth Ombudsman is very critical of the health care treatment provided to detainees.[19] Among other issues, the report identified that:

    (a) detention is often the first response when a person is identified as suffering from a mental illness;

    (b) immigration officials often fail to recognise that mentally ill people may lack the capacity to consent to actions or sign documentation; and

    (c) there is inadequate documentation of medical treatment provided to people in immigration detention, which often leads to issues with assessment, management and review of a person's condition.

3.4 Effect of Immigration Detention on Mental Health

Article 2, 11, 16

19. The effects of arbitrary, indefinite and prolonged immigration detention raise serious concerns in relation to the *CAT*, with the Australian Human Rights Commissioner reporting a very high prevalence of 'mental distress' among detainees, especially long-term detainees.[20]

20. Indefinite detention, by its nature, has a seriously debilitating effect on the mental health of detainees. According to the Royal Australian College of General Practitioners, while many refugees are in good health, some specific health problems facing refugees include: psychological disorders such as post traumatic stress disorder, anxiety, depression and psychosomatic disorders; poor oral health; delayed growth of children; or under recognised and under managed hypertension, diabetes and chronic pain.[21] Indeed, the stresses of migration and settlement generally experienced by migrants may affect mental well-being.[22] For refugees and humanitarian visa holders, these mental health issues may actually be compounded by experiences of immigration detention and uncertainty over their future in Australia.

21. A recent HREOC report demonstrates that the mental health of detainees deteriorates significantly during immigration detention. Numerous instances of self-harming behaviour

[19] Commonwealth Ombudsman, *Mental Health and Incapacity* (Report No 07-2006), December 2006.

[20] Human Rights and Equal Opportunity Commission, *A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner* (2001), [3.9].

[21] The Royal Australian College of General Practitioners, *Refugee and Asylum Seeker Resources: Health Care For Refugees And Asylum Seekers* (2002).

[22] Mental Health Council of Australia, *The National Action Plan for Promotion, Prevention and Early Intervention for Mental Health*, *2000* (2003).

have been documented, including among children.[23] Detainees must receive an adequate standard of psychiatric care given the compounded risks of distress and increased vulnerability to mental illness in detention.[24] In 2008, HREOC renewed its call to repeal Australia's mandatory detention laws in order to get people out of detention faster in order to reduce the risk of causing long-term mental health damage. There is a range of alternatives to holding people in detention centres, including the issuing of bridging visas or residence determinations more readily so that people can live in the community.[25]

22. Over half of the asylum seekers in one study experienced major stress related to either the fear of being sent home or of being unable to return home in an emergency.[26] Separation from family, unemployment, a lack of access to health and welfare services, and bureaucratic difficulties were other factors cited.[27]

23. In addition to general concerns about mandatory immigration detention, HREOC has also labelled the conditions of suicide and self-harm observation rooms in Villawood Immigration Detention Centre, where individuals requiring mental health treatment are effectively placed in solitary confinement, as a 'disgrace'.[28]

3.5 Education and Training of Immigration Officers

Articles 10, 11

24. In July 2005, the then Minister for Immigration commissioned an inquiry into the circumstances of the mistaken immigration detention of two Australian citizens.[29] The main findings of the inquiry, published in the 'Palmer Report',[30] included the following:

(a) there were 'serious problems with the handling of immigration detention cases [that] stem from deep-seated cultural and attitudinal problems' within the Department's immigration compliance and detention areas;[31]

(b) immigration officials were exercising extraordinary powers 'without adequate training, without proper management and oversight, with poor information systems, and with no genuine quality assurance and constraints on the exercise of these powers';[32]

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[23] Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004).

[24] Ibid, 260.

[25] See generally, Human Rights and Equal Opportunity Commission, Summary of Observations following the Inspection of Mainland Immigration Detention Facilities 2007 (2008).

[26] Derek Silove and Zachary Steel, *The Mental Health and Well-being of On-Shore Asylum Seekers in Australia,* (1998) 34.

[27] R Schweitzer L Buckley and D Rossi, 'The Psychological Treatment of Refugees and Asylum Seekers: What does the Literature Tell Us?' (2002) 21 *Mot Pluriels.*

[28] Human Rights and Equal Opportunity Commission, Media Release, 'Immigration Detention Centres: Improvements, but Still More Work to Do', 9 January 2008.

[29] Cornelia Rau was suspected of being an 'unlawful non-citizen' in Australia and was kept in detention unidentified for 10 months. Vivian Alvarez was deported from Australia in July 2001. It became public knowledge in 2005, however the Department of Immigration and Multicultural Affairs (as it then was) was aware of her wrongful deportation in 2003 and 2004.

[30] Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (July 2005).

[31] Ibid [17]. Ms Rau 'was not a prisoner, had done nothing wrong, and was put there simply for administrative convenience': Ibid [12].

(c) many immigration officials have received 'little or no relevant formal training and seem to have a poor understanding of the legislation they are responsible for enforcing, the powers they are authorised to exercise, and the implications of the exercise of those powers';[33] and

(d) officers responsible for detaining people suspected of being unlawful non-citizens 'often lack even basic investigative and management skills'.[34]

25. In addition to the Palmer Report, in 2006 the Commonwealth and Immigration Ombudsman released three reports in relation to the immigration detention of 20 people between 2000 and 2005.[35] As stated by the Ombudsman, Prof John McMillan:

> The reports highlight serious administrative deficiencies that existed in [the Department] during the period under investigation. The main areas of concern were poor understanding of law and policy relating to immigration and citizenship, inadequate staff training, deficient record keeping, wrongful exercise of the power to detain, failure of internal monitoring and review, and delay in resolving the immigration status of those in detention.[36]

3.6 Proposed Recommendations in relation to Immigration Law and Policy

THAT Australia immediately repeal section 189 of the *Migration Act* and abolish its policy of mandatory immigration detention. Immigration detention should only be used as a last resort and persons should be held for no longer than is strictly necessary for the purposes of carrying out health and identity checks. Children should not be held in immigration detention in any circumstances.

THAT Australia ensure that all asylum-seekers in detention have adequate access to health care consistent with the human right to the highest attainable standard of physical and mental health.

THAT all persons involved in the management and administration of the immigration system receive comprehensive human rights training and that all immigration laws, policies and practices be comprehensively reviewed to ensure that they are compatible with human rights.

4. Refoulement, Expulsion and Extradition

4.1 Refoulement

Article 3

26. In 2000, a Senate Legal and Constitutional References Committee tabled its report on Australia's refugee and humanitarian determination processes.[37] The Senate Committee

[32] Ibid [9].

[33] Ibid [14].

[34] Ibid [15].

[35] Commonwealth Ombudsman, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (July 2005); *Mr G* (Report No 06–2006), *Mental Health and Incapacity* (Report No 07–2006) and *Children in Detention* (Report No 08–2006).

[36] Commonwealth Ombudsman, 'Ombudsman Releases Three Reports on Immigration Detention', Media release, 6 December 2006.

[37] Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (June 2000),

recommended that Australia 'explicitly incorporate' the non-refoulement obligations of the *CAT* and *ICCPR* into domestic law'.[38]

27. The UN Special Rapporteur on Human Rights and Counter-Terrorism has similarly noted 'with grave concern that the *Migration Act 1958* does not prohibit the return of an alien to a place where they would be at risk of torture or ill-treatment'.[39]

28. Despite, the fundamental principle of non-return to face torture or death has not yet been enacted in Australian domestic law. This is of particular concern given that the Australian Government has repeatedly disclaimed any responsibility for the subsequent torture or cruel treatment of persons who are removed.[40]

29. There is substantial evidence that asylum-seekers who have been returned by Australia to their country of origin have been tortured and even killed.[41] Australia regularly deports asylum-seekers to countries which are not signatories to the *Refugee Convention* (such as Malaysia and Thailand) and to so called 'safe third countries' (such as China) in which the use of torture and other cruel or degrading treatment remains widespread.

4.2 Extradition

Article 3

30. Australian extradition law and policy does not absolutely prohibit the extradition of a person to a country where a person may be subject to torture or other cruel, inhuman or degrading treatment or punishment.

31. The *Extradition Act* (Cth) does contain a presumption against extradition to such a situation,[42] however, the Minister retains an overriding discretion to extradite a person notwithstanding that this may expose them to a real risk of torture.[43]

4.3 Proposed Recommendations in relation to Refoulement, Extradition and Expulsion

THAT Australia amend both the *Migration Act* and the *Extradition Act* to comprehensively prohibit the refoulement, extradition or expulsion of a person from Australia in circumstances where they may be exposed to a risk of torture or other cruel, inhuman or degrading treatment of punishment.

[38] Ibid [60].

[39] Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006), [62], [72].

[40] A Chinese man deported from Australia earlier this year has claimed that he was interrogated and tortured immediately on his return to China. See ABC, 'Chinese Deportee Claims Torture', *AM*, 29 June 2007.

[41] See, eg, *Deportations to China: Australian RSD Processes that Return People to Persecution* (2007); Edmund Rice Centre for Justice and Community Education, *Deported to Danger II* (2006); and Refugee Health Research Centre, *Removing Seriously Ill Asylum Seekers from Australia* (2007).

[42] Section 22(3)(b).

[43] Section 22(3)(f).

5. Indigenous Australians and the Criminal Justice System

5.1 Incarceration Rates of Indigenous Australians

Article 11, 16

32. Indigenous peoples in Australia are among the most highly incarcerated peoples in the world. Despite Indigenous Australians representing approximately 2 per cent of the Australian population, around 24 per cent of the prison population is Indigenous.[44]

33. Over the last six years, the rate of Indigenous imprisonment in Australia has risen by 23 per cent.[45] The incarceration rate for Indigenous Australians is more than 16 times higher than for non-Indigenous Australians and, in 2003, Indigenous women were incarcerated at a rate 19.3 times that of non-Indigenous women.[46]

34. The Human Rights Committee and Committee on the Rights of the Child have both expressed concern about the over-representation of Indigenous Australians in prison, as well as the number of Indigenous deaths in custody and the lack of fair treatment of Indigenous Australians within the criminal justice system.[47]

35. The treatment of many Indigenous Australians in the criminal justice system, particularly in relation to the disproportionate impact of certain criminal laws and the incidence and impacts of incarceration, in many situations may amount to torture or other cruel, inhuman or degrading treatment or punishment.

5.2 Mandatory Sentencing Laws

Article 11

36. While mandatory sentencing provisions for minor property offences in the Northern Territory were repealed in 2001, mandatory sentencing laws for many offences remain in the Northern Territory as well as in the *Criminal Code* in Western Australia. Indigenous Australians continue to be disproportionately affected by that legislation. Young Indigenous people, who are a small fraction of the youth population of Western Australia, comprise three quarters of mandatory sentencing cases.[48]

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[44] See generally, Australian Bureau of Statistics, *Prisoners in Australia 2006* (2006) which reveals that prison numbers across Australia increased by 42% between 1996 and 2006 and that Indigenous people constitute 24% of the prison population compared with approximately 2% of the general population (the highest proportion since 1996). See also Australian Bureau of Statistics, *Prisoners in Australia 2005* (2005), 5.

[45] Australian Bureau of Statistics, *Prisoners in Australia 2005* (2005), 5.

[46] Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2004).

[47] *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000); *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.268 (2005), [73-74].

[48] The UN Committee on the Rights of the Child expressed its concern about the over-representation of Indigenous children in the juvenile justice system. See UN Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005), [73-74].

5.3 1991 Royal Commission into Aboriginal Deaths in Custody

Article 11

37. The deaths of Indigenous Australians in custody continues to be a matter of serious concern, despite the recommendations of the *Royal Commission into Aboriginal Deaths in Custody* over 15 years ago.[49] Many of these recommendations still have not been implemented by the Australian Government or state and territory governments. More than half of the Aboriginal deaths in custody are of individuals detained for no more than public order offences.[50] The striking over-representation of Indigenous Australians in prison, as well as the percentage of Indigenous deaths in custody and the lack of fair treatment under the criminal justice system, all raise serious concerns in relation to the *CAT*.

5.4 Proposed Recommendations in relation to Indigenous People and the Criminal Justice System

THAT Australia continue its efforts to address the socio-economic disadvantage that, inter alia, leads to a disproportionate number of Indigenous Australians coming into contact with the criminal justice system.

THAT Australia review all mandatory sentencing legislation and take all necessary steps and measures to ensure that such legislation does not adversely impact on disadvantaged groups, particularly Indigenous people, in a manner that is disproportionate or discriminatory.

THAT Australia review, update and implement recommendations from the *1991 Royal Commission into Aboriginal Deaths in Custody*.

6. Australia's Treatment of Prisoners and Conditions of Detention

6.1 Conditions in Prison

Articles 2, 11, 16

38. Unacceptable conditions in Australian prisons, including overcrowding and lack of access to adequate health care treatment, raise issues in relation to the prohibition against torture and may constitute cruel, inhuman or degrading treatment or punishment.

39. In Western Australia, an Ombudsman's report released in 2000 cited the existence of chronic over-crowding, a lack of basic medical supplies and substandard physical and psychological health care existing in the Western Australian prison system.[51] In South Australia, prisons are operating at more than 20 per cent above capacity, resulting in significant overcrowding and inappropriate placement of prisoners,[52] including the placement of adults in juvenile detention centres.[53] In New South Wales, prison overcrowding is resulting in juvenile prisoners sharing

[49] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

[50] Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice: Deaths in Custody in Australia 1990-2004*, April 2006.

[51] Ombudsman Western Australia, *Report on Deaths in Prisons* (2000).

[52] ABC, 'Claims of Overcrowding in SA Prisons', *ABC Online,* 10 March 2008.

[53] Greg Skelton, 'Overcrowding Pressures Prisons', *Adelaide Advertiser* (Adelaide), 17 February 2008.

one-person cells.[54] Overcrowding in Australian prisons will not end until alternatives to detention, such as restorative justice and therapeutic jurisprudence, are more fully introduced.

40. In Victoria, the Ombudsman has described some prisons as 'not fit for human habitation due to the age, condition, lack of basic facilities or a combination of all these factors'.[55] Much criticism has also been made of the lack of access to health care in prisons, such as the imprisonment in Victoria of an individual who had been found not guilty on the ground of mental impairment due to a lack of access to a bed in a mental health facility.[56]

41. A 'snapshot' of prisoners in Victoria indicates that approximately half of all prisoners in custody have two or more characteristics of serious disadvantage. Characteristics of severe disadvantage include being of Aboriginal or Torres Strait Islander descent, being unemployed, having an intellectual disability, having drug or alcohol issues, having previously been admitted to a psychiatric institution, or being homeless.[57]

42. Prisoners as a group are characterised by social and psychological disadvantage. They face major health issues, including high rates of injecting drug use and high rates of sexually transmitted diseases.[58]

6.2 Inadequate Mental Health Care in Prisons

Articles 2, 11 and 16

43. Recent research indicates that, of a total Australian prison population of around 25,000 people, approximately 5000 inmates suffer serious mental illness.[59] Rates of major mental illnesses are between three and five times higher in the prison population than in the general Australian community.[60] There is both a causal and consequential link between imprisonment and mental illness. People with mental illness are more likely to be incarcerated, particularly having regard to the lack of support provided by the poorly resourced community mental health sector, and people in prison are more likely to develop mental health problems, with prisons not being conducive to good mental health.

44. The European Court of Human Rights has consistently held that a failure to provide adequate facilities so as to ensure that prisoners are not subject to degrading conditions, including particularly the failure to provide adequate health care to mentally ill prisoners, may amount to a violation of the prohibition against torture.[61] According to the European Court, and other bodies such as the Human Rights Committee, it is incumbent on the State to 'organise system

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[54] ABC, 'Juvenile Prisoners Sharing One-Person Cells', *ABC Online,* 7 April 2008.

[55] Ombudsman Victoria, *Conditions for Persons in Custody* (2006).

[56] *R v White* [2007] VSC 142 (7 May 2007).

[57] Department of Premier and Cabinet, State of Victoria, *Growing Victoria Together Progress Report* (2005-06), Appendix B – Service Delivery, 358.

[58] Australian Institute of Health and Welfare, *Australia's Health 2006*, (2006), 249.

[59] J P R Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (Australian Institute of Criminology, March 2007).

[60] J P R Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (Australian Institute of Criminology, March 2007).

[61] See especially, *Keenan v United Kingdom* (2001) 33 EHRR 913. See also *Price v United Kingdom* (2001) 34 EHRR 1285; *McGlinchey v United Kingdom* (2003) 37 EHRR 821; *Holomiov v Moldova* [2006] ECHR 30649/05; *Istratii and others v Moldova* [2007] ECHR 8721/05.

in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties'.[62]

45. There is significant evidence that mental health care in Australian prisons is manifestly inadequate and may amount to a level of neglect that constitutes degrading treatment or punishment.

46. According to evidence given by Forensicare (the Victorian Institute of Forensic Mental Health) to a recent Senate Select its penitentiary Committee on Mental Health:

(a) adequate mental health services are very rare in prisons;

(b) the seriously mentally ill are often poorly managed in prisons and regularly wait in prison for admission under conditions which are not conducive to well being and recovery and may cause 'enormous destruction to the psychological and human aspects' of the individual concerned; and

(c) there is a pressing and increasing requirement for additional in-patient beds to meet the needs of the criminal justice system.[63]

47. Forensicare concluded that:

> Currently in Australia the provision of care to mentally ill prisoners is rudimentary at best. Rarely are proper provisions made.[64]

6.3 Solitary Confinement of Persons with Mental Illness

Articles 2, 11 and 16

48. It is well established that prolonged solitary confinement may amount to torture or other cruel, inhuman or degrading treatment.[65]

49. The widespread use of solitary confinement (or 'segregation' as it is also known) as a management tool for people incarcerated in Australian prisons is an issue of significant concern, particularly in regard to those incarcerated who are also suffering from a mental illness. Research suggests that solitary confinement can cause and significantly exacerbate symptoms of mental illness, such as paranoia.[66]

50. At present, Australian law, in general terms, allows the governor of a correctional centre to direct that an inmate be held in segregated custody in circumstances where they consider that their association with other inmates may constitute a threat to the security of a correctional

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[62] *Mamedova v Russia* [2007] ECHR 7064/05, [63]. See also *Mukong v Cameroon*, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994) [9.93], in which the Human Rights Committee rejected an attempt by the state party to justify appalling prison conditions on the basis of economic and budgetary problems. The UK Court of Appeal made a similar finding in *R (Noorkoiv) v Secretary of State for the Home Department* [2002] EWCA Civ 770, [31] (Buxton LJ) where it held that the Government could not be excused from what were otherwise breaches of the right to liberty and freedom from cruel treatment in the prison context 'simply by pointing to a lack of resources that are provided by other arms of government'.

[63] Forensicare, *Submission to Senate Select Committee on Mental Health* (May 2005) 4, 5, 19 and 20.

[64] Ibid.

[65] See, eg, Human Rights Committee, General Comment 20: *Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)* (1992), para 6; *Larossa v Uruguay*, HRC Communication No 88/1981, para 10.3.

[66] NSW Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson* (17 July 2006).

centre, or good order and discipline within the centre. The security of the facility is given greater priority than the mental health condition of the inmate.

51. According to Forensicare, the high incidence of mental illness in prison, in combination with the lack of adequate mental health care, means that it is very common for mentally ill prisoners displaying acute and disturbing psychiatric symptoms to be placed in a 'management and observation cell' (also known as a 'Muirhead cell'). This placement is often not a mental health decision, but one made by correctional administrators where there is no other accommodation available to guarantee the safety of a prisoner displaying disturbing psychiatric symptoms. Forensicare noted that solitary confinement and strict observation and control in these cells may prevent suicide, but may also cause 'enormous destruction to the psychological and human aspects' of the individual concerned.[67]

52. Australia does not collect or publish data on conditions in Australian prisons and, accordingly, it is difficult to definitively comment on the prevalence of the use of solitary confinement as a management tool, particularly for prisoners with mental illness. Anecdotal evidence suggests, however, that the use of solitary confinement is widespread, with inmates being locked up for 22 or 23 hours a day in their cells, provided with incorrect, or inappropriate medications, and with limited access to mental health professionals. If prisons are in lock down, inmates stay in their cells at all times. Greg Barns, barrister and legal adviser to a state based Prison Action Reform group, has observed that: 'Solitary confinement is routinely used for prisoners who have mental illness. Hundreds of prisoners around Australia are in solitary confinement.'[68]

53. In June 2006, the Deputy State Coroner of New South Wales investigated the suicide death in custody of an inmate, Scott Simpson. At the time of his death, Mr Simpson was awaiting admission into a prison hospital facility for treatment for his mental illness, but this admission had been repeatedly delayed. At the time of his death, he had no traces of anti-psychotic medication in his system, despite the fact that a number of psychiatrists had diagnosed him as suffering from a serious case of paranoid schizophrenia, and the fact that he was urgently awaiting admission into hospital for treatment. He had been found not guilty on the grounds of mental illness but was still being kept in a segregation unit in the main high security prison, and was in a cell with hanging points. For the final 26 months of his life (except for two short periods), he was kept in solitary confinement. The Deputy State Coroner was critical of the circumstances of his incarceration. She recommended, in line with international human rights law, that inmates suffering from mental illness should be held in solitary confinement only as a last resort, and for a limited period.[69] This recommendation, however, has only been poorly and patchily implemented across Australia.

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[67] Forensicare, *Submission to Senate Select Committee on Mental Health* (May 2005) 21; Official Committee Hansard, Senate Select Committee on Mental Health, 6 July 2005, 48-9. See also the comments of the Victorian Court of Appeal in respect of the use of solitary confinement, normally viewed as a form of punishment, to protect a mentally disturbed prisoner in *R v SH* [2006] VSCA 83 at [22]; Senate Select Committee on Mental Health, A National Approach to Mental Health: From Crisis to Community, First report (March 2006) [13.110] – [13.111].

[68] Elizabeth Wynhausen, 'Jailed in Body and Mind', *The Australian* (Sydney), 28 August 2006.

[69] NSW Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson* (17 July 2006).

6.4 Women in Prison

Articles 2, 11

54. Women in prison present with significant health needs. Recent research conducted in New South Wales, Queensland and Western Australia indicates that more than half of the women inmates had been diagnosed with a mental health condition and that between 30 and 40 per cent had attempted suicide at some time.[70] Women labelled with an intellectual, psychiatric or learning disability are more likely to be classified as maximum-security prisoners.[71] Substance abuse and rates of infectious disease are also reported to be high.

55. Women in prison are not able to access adequate care and services, and prison staff are unable to ensure proper treatment for women with mental health issues.[72]

56. The systemic discrimination faced by women in prison may constitute torture or cruel, inhuman or degrading treatment or punishment. Fundamental breaches of the right may arise in relation to one or a combination of the following issues:

(a) lack of access to health care;

(b) routine strip searches;

(c) the detention of low security prisoners in high security facilities;

(d) oppressive disciplinary regimes;

(e) restrictive visitation rules;

(f) limited access to educational and employment programs; and

(g) the significant overrepresentation of Indigenous women and women from cultural, ethnic and religious minorities.

6.5 Indigenous Women Prisoners

57. Indigenous women prisoners are the fastest growing prison population. In the decade to 2005, the Indigenous women prisoner population has increased by 420 per cent.[73] More than half of women in jail have been diagnosed with a mental illness and over 89 per cent of women prisoners are survivors of sexual assault.[74]

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[70] Australian Bureau of Statistics, *4102.0 - Australian Social Trends, 2004: Crime and Justice: Women in Prison* (2005)

[71] See www.sistersinside.com.au/media/adcqsubmission.pdf, www.sistersinside.com.au/media/NSWADCreport.pdf and www.sistersinside.com.au/media/VICComplaint.pdf.

[72] Ibid.

[73] This compares with an increase over the same decade of 110 per cent in the male Indigenous prison population, and of 45 per cent in the general male prison population. In March 2004, the incarceration rates of indigenous women nationally were 20.8 time that of non-Indigenous women. Source: Human Rights and Equal Opportunity Commission 2006, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2006) Chapter 9(b).

[74] Women's Report Card Project, WRANA (Women's Rights Action Network Australia), *Our Rights, Our Voices, The Australian Community Report* (2004) 25. .

6.6 Proposed Recommendations in relation to Prisons

THAT Australia ensure that prisoners are not subject to any deprivations of rights or freedoms that are not a necessary consequence of the deprivation of liberty itself.

THAT Australia take further steps and measures to address overcrowding in prisons.

THAT Australia ensure that all prisoners have adequate access to health care, including mental health care, consistent with the human right to the highest attainable standard of physical and mental health.

THAT Australia ensure that persons with mental illness are not subject to solitary confinement and are provided with access to appropriate treatment in a therapeutic environment.

THAT Australia take immediate steps to ensure that women in prison are not subject to any systemic discrimination or substantive inequality relative to male prisoners.

7. Counter-Terrorism Law and Practice

There are insufficient safeguards in Australia's counter-terrorism laws to ensure compliance with the *CAT*. Since the events of 11 September 2001, the Australian Government has introduced more than forty new pieces of legislation to address terrorism and related activities.[75] In the absence of a federal Charter of Rights, these laws have not been assessed against, or counterbalanced by, a legislative human rights framework. The enactments have been heavily criticised both domestically[76] and internationally[77] for their failure to allow for adequate judicial oversight and redress mechanisms.

7.1 Inadequate Safeguards in relation to Incommunicado Detention and Prolonged Solitary Confinement

Articles 2, 11, 16

58. It is well recognised that there is a strong interrelationship between incommunicado detention and torture[78] and, moreover, that incommunicado detention may, in and of itself, amount to cruel, inhuman or degrading treatment.[79] It is also well established that prolonged solitary confinement may amount to torture or other cruel, inhuman or degrading treatment.[80] Accordingly, the Human Rights Committee has stated that States have an obligation not only to prohibit torture, but also to enact and promote safeguards to realise this prohibition,

[75] A comprehensive list of the 'legislative suite' can be found at the Government's 'National Security' website.

[76] For example, there was vociferous opposition in the Parliament to the *ASIO Legislation Amendment Bill* (2003) (Cth). The Chairman of the Joint Committee which reviewed the Bill described it as 'the most draconian legislation ever to come before parliament' (*The Australian,* 19 June 2002, 3).

[77] See, eg, Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism,* UN Doc A/HRC/4/26/Add.3 (2006).

[78] See, eg, Nigel Rodley, *The Treatment of Prisoners under International Law* (2nd edition, 1999) 348.

[79] See, eg, *Mukong v Cameroon,* Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994).

[80] See, eg, Human Rights Committee, General Comment 20: *Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)* (1992), para 6; *Larossa v Uruguay*, HRC Communication No 88/1981, para 10.3.

including provisions against detention incommunicado, and granting persons such as doctors, lawyers and family members access to detainees.[81]

59. Following amendments introduced under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* and the *ASIO Legislation Amendment Act 2006* (Cth), a person can be detained without charge under an ASIO warrant for up to 168 hours, or 7 days.[82] A separate warrant can be issued at the end of the 168 hours if new material justifies it.[83] A person may thus be held in detention indefinitely for rolling periods of 7 days, without any charge having been made out against them in accordance with conventional criminal procedure. Further, under this legislation:

- the person may be prohibited and prevented from contacting anyone at any time while in custody;[84]
- the person may be questioned in the absence of a lawyer;[85]
- the person's lawyer may be denied access to information regarding the reasons for detention and also in relation to the conditions of detention and treatment of the person;[86]
- the person is prohibited from disclosing information relating to their detention at risk of five years imprisonment; and[87]
- the person's lawyer, parents and guardian may be imprisoned for up to five years for disclosing any information regarding the fact or nature of the detention.[88]

60. These secrecy provisions prevent the press, academics and human rights advocates from independently monitoring the use of ASIO questioning and detention powers. As Amnesty International noted, '[t]he level of secrecy and lack of public scrutiny provided for by this Bill has the potential to allow human rights violations to go unnoticed in a climate of impunity.'[89]

61. The legislation does provide that a detainee should be treated with humanity and with respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.[90] However, the legislation does not provide for any offence or penalties for contravening conduct. Therefore, the only means of recourse is for the subject to make a complaint to the Inspector-General of Intelligence and Security, the Commonwealth Ombudsman or a State/Territory complaints agency. In our view, the lack of enforcement provisions for a breach of the prohibition against torture or ill-treatment under s 34J(2) is manifestly inadequate.

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[81] Human Rights Committee, General Comment 20: *Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)* (1992), para 11; Nigel Rodley, *The Treatment of Prisoners under International Law* (2nd edition, 1999) 348.

[82] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34S.

[83] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34F(6) and s 34G(2).

[84] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34F(8).

[85] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34TB.

[86] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VA.

[87] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(2).

[88] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34U(7) and s 34V.

[89] Amnesty International Australia, *Concerns Regarding the ASIO Legislation Amendment Bill 2003* (2003).

[90] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34J(2).

7.2 Preventative Detention and Control Orders

Articles 2, 11, 16

62. The *Anti-Terrorism Act (No 2) 2005* amended the *Criminal Code* and introduced, among other things, control orders and preventative detention orders. In addition to raising concerns regarding freedom from arbitrary detention, the presumption of innocence and the right to a fair hearing, the regime raises significant concerns due to the inadequacy of safeguards to comprehensively prevent ill-treatment.

63. A preventative detention warrant for up to 48 hours may be made by a senior member of the Australian Federal Police, with no requirement of judicial authorisation.[91] For the extension of an initial detention order or the continuation of a preventative detention order, a police member is merely required to adduce 'such facts and grounds' which would make the continuation of a detention order 'reasonably necessary' in the circumstances.[92] Under a preventative detention warrant:

- The detainee is held in circumstances of extreme secrecy and may effectively be held incommunicado, except for limited contact with family. Contact with a lawyer of choice, or any lawyer at all, may be prohibited through a 'prohibited contact order.'[93]
- Even where contact with a lawyer is permitted, the detainee's ability to effectively communicate is hampered as all communications may be monitored by police.[94]
- A reporter, advocate or accused who discloses circumstances of their detention may be liable to five years imprisonment under the 'non-disclosure' offences.[95]

64. Under the preventative detention regime in the *Criminal Code*, an individual can be held for up to 48 hours on virtually untested bases and information, with limited contact with the outside world and no ability to appeal or challenge their detention. This period may be extended to 14 days under state legislation.

7.3 Proposed Recommendations in relation to Counter-Terrorism Laws and Measures

THAT Australia comprehensively review all counter-terrorism laws and practices and take all necessary steps and measures, including legislative measures, to ensure that such laws and practices are compatible with human rights.

[91] *Criminal Code* Div 105.7 and 105.8.

[92] See *Criminal Code* s 105.10(2) and 105.11(2).

[93] *Criminal Code* Div 105.16. See also Div 105.14A and 105.15.

[94] *Criminal Code* Div 105.38.

[95] *Criminal Code* Div 105.41.

8. Obtaining and Using Evidence

8.1 Inadequate Prohibition against Use of Evidence obtained under Torture

Articles 2, 15

65. Article 15 of the *CAT* provides that evidence obtained contrary to the prohibition against torture must not be invoked as evidence in any proceeding. Australian domestic law, however, contains a number of exceptions to this absolute prohibition.

66. For example:

- Section 138 of the *Uniform Evidence Act 1995* (Cth) provides that evidence obtained improperly or in contravention of Australian law may be admitted where, in the opinion of the trial judge, the desirability of admission outweighs the undesirability of excluding it.
- Section 26 of the *Foreign Evidence Act* (Cth), which applies to evidence obtained from a foreign country for use in Australia, provides that, in matters relating to terrorism and national security, evidence may only be excluded where it would have a substantial adverse effect on the right of a defendant to a fair hearing.
- The *Mutual Assistance in Criminal Matters Act 1987* (Cth) does not contain any prohibition on the provision on government-to-government assistance where such assistance may expose a person to torture or other cruel, inhuman or degrading treatment or punishment. Section 8(1A) of the Act does provide that mutual assistance should be refused in capital cases, unless 'special circumstances' exist justifying assistance.

8.2 Confessional Evidence Obtained Under Duress

Articles 2, 15

67. Officers of the Australian Federal Police and ASIO have been involved in obtaining confessional evidence as the result of a long period of ill-treatment in detention and without the presence of a lawyer.

68. In the case of Jack Thomas,[96] confessional evidence obtained by the AFP and ASIO in Pakistan during a period of six months detention was used for charges to be brought against him on his return to Australia. During the six months of detention, Mr Thomas was held for extended periods in solitary confinement, including being detained in 'dog-kennel' like conditions and deprived of food and water for up to three days. He was hooded, shackled, manacled, and threatened with electrocution and execution. On one occasion he was strangled with the cord of his hood so that he could not breathe. He was threatened with bashings and the rape of his wife. He was told that his testicles were going to be crushed and was urged to cooperate fully with Pakistani and US interrogators who told him, 'We're outside the law. No one will hear you scream.'

69. Upon his return to Australia, Mr Thomas was convicted of terrorist-related offences on the basis of his confessional evidence, although the evidence was subsequently excluded and the conviction quashed by an appellate court. Mr Thomas was, however, immediately made

[96] *R v Thomas* [2006] VSCA 165 (18 August 2006).

subject to a control order following his successful appeal on the basis of 'very limited evidence'.[97]

8.3 Proposed Recommendations in relation to Use of Evidence

THAT Australia comprehensively legislate to absolutely prohibit the use of evidence that has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment other than for the purpose of establishing such treatment or punishment.

9. Australia's Failure to Investigate Torture

Articles 1, 2, 11, 12 and 14

9.1 Narrowing the Definition of Torture

70. Australian Government ministers have made disturbing comments denying that techniques such as sleep deprivation amount to torture.[98] Ministers have argued that such techniques are only prohibited under the *Convention against Torture* if they are used in combination and over a long period of time.[99] At no time have the Ministers acknowledged that these techniques, or other techniques authorised by the Australian Government, constitute cruel, inhuman or degrading treatment.

9.2 Narrowing the Definition of 'Jurisdiction'

71. The cases of Mamdouh Habib and David Hicks raise concerns about the Australian Government's acceptance that its agents acting abroad are bound by the *CAT*. The Australian Government has refused to thoroughly investigate serious allegations of the torture of Australian citizens, or to accept any responsibility for the advice of the Australian military lawyer who endorsed the interrogation techniques at Abu Ghraib prison as consistent with the *Geneva Conventions*. In these cases, Australia claims it has no jurisdiction.

9.3 Mamdouh Habib: Extraordinary Rendition and a Failure to Investigate

72. In October 2001, Mamdouh Habib, a dual Australian-Egyptian citizen, was detained in Pakistan, where he alleges that he was tortured and ill-treated. When Mr Habib complained to Australian law enforcement and intelligence officers in Pakistan about this abuse, they decided not to investigate the complaints.

73. Mr Habib was extraordinarily rendered by US officials to Egypt, where he was tortured for six months.[100] Mr Habib was routinely beaten. He was handcuffed and taken to a small room which was slowly filled with water until it was just under his chin. He was subjected to electric

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[97] Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006), [38].

[98] ABC-TV, 'Quick Trial for Hicks Essential: Ruddock', *Insiders* (1 October 2006); Richard Sproull, 'Sleep Deprivation is Not Torture: Ruddock', *The Australian* (Sydney), 2 October 2006, 2.

[99] Michelle Grattan, 'PM Rises to Sleep Debate', *The Age* (Melbourne), 6 October 2006, 6. See also Evidence to Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, 31 October 2006, 68-69 (Senator Ellison).

[100] Phil Mercer, 'Fresh Guantanamo Torture Claims', *BBC News* (United Kingdom), 13 February 2005. See also: NSWCCL Shadow Report, [213]-[231].

shocks to all parts of his body, including his genitals. He was told that his family had been murdered. He was told that he would be attacked by dogs trained to rape people. Australia has not officially accepted that Mr Habib was held in Egypt.

74. On the basis of 'confessions' obtained under torture in Egypt, Mr Habib was then rendered to Guantanamo Bay, where he was abused again. When Mr Habib was interviewed by Australian officials at Guantanamo Bay, he complained about his torture and mistreatment. Australia referred the allegations to the United States for investigation. Mr Habib was released without charge from Guantanamo Bay in 2005.

75. Mr Habib alleges that Australian officials were present when he was rendered from Pakistan and, on at least one occasion, when he was being interrogated by Egyptian security officers.

76. The Australian Government has failed to:

(a) investigate or indict any individual for complicity in the torture of Mr Habib;

(b) refer Mr Habib's serious allegations to the appropriate mechanism for investigating such extraordinary allegations, such as a Royal Commission[101]

(c) acknowledge that Mr Habib was tortured;

(d) apologise to Mr Habib or compensate him for his ill-treatment; or

(e) condemn the practice of extraordinary rendition.

9.4 David Hicks: Australia and Guantanamo Bay

77. David Hicks was detained shortly after UN troops entered Afghanistan in 2001. Mr Hicks has made allegations of torture and mistreatment while in the custody of the US military in Afghanistan, on board US naval vessels and at Guantanamo Bay.[102] In a sworn affidavit in August 2004, Mr Hicks alleged that he was beaten many times while blindfolded and handcuffed, shackled, deprived of sleep, held in solitary confinement for about nine months, and threatened with firearms and other weapons.[103]

78. All of these allegations were referred by Australia to the US for investigation. US officials found no wrongdoing and the Australian Government accepted these findings.

79. In 2007, having been detained at Guantanamo Bay for almost six years, Mr Hicks was released into the custody of Australia after pleading guilty before a US Military Commission to a charge of being a terrorist sympathiser. As a condition of release, Mr Hicks was required to sign a document stating that he had never been mistreated by US officials and renouncing all previous claims of torture or ill-treatment. Mr Hicks was released from a South Australian prison in December 2007 and immediately made subject to a control order.

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[101] See Australia's Second Report to CAT (1999) UN Doc CAT/C/25/Add.11, [13].

[102] In 2002, Mr Hicks submitted a report to the International Committee of the Red Cross outlining abuses by United States officials that he suffered in Guantanamo. Information accessed on Amnesty International website at http://news.amnesty.org/pages/torture-case-eng at 6 February 2007.

[103] Affidavit of David Hicks dated 5 August 2004. See also: Tom Allard, 'Hicks: My Life of Terror and Torture', *Sydney Morning Herald* (Sydney) 2 March 2007.

9.5 Proposed Recommendations in relation to Investigation of Torture

THAT, consistent with the extraterritorial application of the *Convention Against Torture*, Australia take all necessary steps and measures, including legislative measures, to ensure that allegations of torture and other forms of cruel, inhuman or degrading treatment or punishment, including by Australian agents abroad, be fully investigated and that full reparations be made where such conduct is found to have occurred.

10. Failure to Protect Australians from the Death Penalty and Ill-Treatment

Articles 2

80. By becoming a party to the *Second Optional Protocol to the ICCPR*, Australia has committed itself not to expose a person to the real risk of the application of the death penalty.[104] The last use of the death penalty in Australia was in Victoria in 1967 and it was officially abolished in 1985. However, over the last few years Australia has weakened its stance in relation to the application of the death penalty to individuals, including Australian citizens, in other countries and indicated that it is inappropriate to intervene in the affairs of a foreign country.

81. Of particular concern was Australia's involvement in the case of the nine Australian citizens (known as the 'Bali Nine') who were arrested in Bali, Indonesia for alleged involvement in heroin trafficking. The arrests resulted from intelligence provided by members of the Australian Federal Police. Presently, six members of the 'Bali Nine' face execution as a result of their respective convictions for drug trafficking offences. The death sentence may therefore be applied as a direct result of the actions of the AFP.

82. This case represents an example of the failure of the Australian Government to protect the fundamental human rights of Australian citizens by exposing them to a real risk of the death penalty being applied. In addition, the Australian Government has condoned the application of the death penalty in Indonesia to members of the 'Bali Nine'. Former Australian Prime Minister Howard said at the time that the '[Bali Nine] should be dealt with in accordance with Indonesian law. …and if [the death penalty] is what the law of Indonesia provides, well, that is how things should proceed. There won't be any protest from Australia'.[105]

10.1 Proposed Recommendations in relation to Protecting Australians from the Death Penalty and Ill-Treatment

THAT Australia desist from cooperating with or assisting with the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed or which may result in a person being subject to cruel, inhuman or degrading treatment or punishment.

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[104] In *Judge v. Canada*, the HRC decided that Canada had breached its obligations under article 6(1) of the ICCPR by deporting Mr Judge 'without ensuring that the death penalty would not be carried out'. The HRC stated: For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence will not be carried out. See Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003) at [10/4].

[105] ATV Channel 7, 'Interview with John Howard (Part 2)', *Sunday Sunrise*, 16 February 2003.