



Level 1, 550 Lonsdale Street
Melbourne VIC 3000
AUSTRALIA
P: + 61 3 9225 6695
F: + 61 3 9225 6686
hrlrc@vicbar.com.au
www.hrlrc.org.au

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The Hon Philip Ruddock MP
Attorney-General
Parliament House
Canberra ACT 2600

By facsimile: (02) 6273 4102

Dear Attorney

Conditions of Detention of Unconvicted Remand Prisoners

Thank you for your letter of 15 September 2006 in response to our letter of 3 August 2006 regarding the conditions of detention of thirteen unconvicted remand prisoners ('the Detainees').

As you will be aware, the Detainees have been held in the maximum security Acacia Unit of Barwon Prison in Victoria since November 2005 in the case of ten Detainees and since March 2006 in the case of the remaining three Detainees. As you will also be aware, we are gravely concerned that the type, length, conditions and effects of the detention amount to serious ongoing human rights violations. These violations were detailed in our letter and attachment of 3 August 2006.

In your letter of 15 September 2006, you make two submissions in response to our concerns, namely:

1. that human rights may be subject to limitation, including in the interests of national security; and
2. that the conditions of detention of prisoners are primarily a matter for the States and Territories.

Set out below is our response to those submissions.

Permissible Limitations on Human Rights

In your letter you state that human rights may be qualified and that Australia's counter-terrorism legislation is a necessary and proportionate response to the threat of terrorism. We fully appreciate and accept that the threat of terrorism may justify exceptional measures. However, our letter of 3

August 2006 is not concerned with the Government's counter-terrorism legislation but rather with the conditions and impact of detention of unconvicted remand prisoners. As outlined in our letter, we are particularly concerned that these conditions and their effects constitute violations of the right to be free from cruel, inhuman or degrading treatment or punishment under art 7 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), the right of prisoners to be treated with dignity and respect under art 10(1) of the *ICCPR*, and the right to freedom of religion under art 18(1) of the *ICCPR*, among others.

According to the UN Human Rights Committee, the right to freedom from cruel, inhuman or degrading treatment or punishment is non-derogable; it is an unqualified right in respect of which no limitations or restrictions are permissible. In its *General Comment No 20*, the Committee affirmed that 'no justification or extenuating circumstances may be invoked to excuse a violation of art 7 for any reasons'.¹ Both the Committee and the European Court of Human Rights have also stated that a state's failure to act to protect people from a breach of the right, including by providing safeguards to enforce the right, may itself constitute a breach.²

While the other human rights with which we are concerned may be subject to limitations, those limitations must be reasonable, proportionate and demonstrably necessary. The onus is clearly on the Australian Government to justify any limitations, qualifications or derogations.

We look forward to hearing from you as to:

1. What measures the Australian Government is or will implement to ensure that, consistent with the non-derogable right under art 7 of the *ICCPR*, the Detainees are not subject to conditions that are cruel, inhuman or degrading; and
2. In respect of the other rights which are the subject of our letter of 3 August 2006, how the limitations imposed are reasonable, proportionate and demonstrably necessary.

Responsibility for Implementation of and Compliance with Human Rights

Your letter of 15 September 2006 also states that, 'although the detention of federal offenders is dependent on authority from Commonwealth law, the day-to-day management of prisoners is primarily a matter for the States and Territories'.

While we understand and appreciate Australia's constitutional arrangements, under international law any human rights violations committed by States, Territories or public authorities are imputable to the Commonwealth. As the UN Human Rights Committee stated in the recent decision of *Coleman v Australia*, pursuant to 'ordinary rules of State responsibility' and 'in light of art 50' of the *ICCPR* (which provides that 'the Covenant extends to all parts of federal states without limitations or exceptions'), the 'acts and omissions of constituent political units and their officers are imputable to Australia'.³ This jurisprudence is consistent with art 27 of the *Vienna Convention on the Law of Treaties* and the Committee's own *General Comment 31*, which provide, in effect, that all branches of government

¹ HRC, *General Comment No 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment* (2001) [3].

² (2001) 33 EHRR 913. See also *McGlinchey v United Kingdom* (2003) 37 EHRR 821; *Price v United Kingdom* (2001) 34 EHRR 1285.

³ *Coleman v Australia*, HRC, Communication No 1157/2003, UN Doc CCPR/C/87/D/1157/2003 (10 August 2006).

(legislative, executive and judicial) and other public or governmental authorities, at whatever level (national, state or local) must act to respect, protect and fulfill human rights.⁴

In light of the above, we would appreciate your advice as to what steps and measures the Commonwealth is taking and implementing to ensure that the detention of Commonwealth 'offenders' in state correctional facilities is fully compatible with Australia's obligations under international human rights law.

Please contact us with any questions on (03) 9225 6695.

We look forward to your response.

Yours sincerely

Philip Lynch
Director and Principal Solicitor
Human Rights Law Resource Centre Ltd

⁴ HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), [4]. See also art 27 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('VCLT'), which provides that a state party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.