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Torture and Ill-Treatment in Australia
Submission to the UN Committee Against Torture
on the issues to be included in the
List of Issues Prior to Reporting

23 August 2010



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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society.

The Centre also aims to 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 through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the enhanced legal protection of human rights at the local, national, regional and international levels; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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1. Introduction

1. This submission by the Human Rights Law Resource Centre, a leading Australian human rights advocacy organisation, sets out a number of issues which we consider the Committee Against Torture (the **Committee**) should consider in its development of a List of Issues Prior to Reporting (**List of Issues**) in respect of Australia's compliance with the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the **Convention**).
2. As a preliminary point, we consider that the Committee should explicitly request that Australia's response to the Committee's List of Issues provide a candid, constructive and comprehensive account of human rights issues arising under the Convention. Given that the focus of a periodic review is to enhance implementation of, and compliance with, human rights obligations on the ground, we consider that Australia's response must do more than provide generic information on Australia's legal framework and funding and program initiatives. The response should provide relevant disaggregated data and details as to practical human rights *outcomes*.

2. Migration Law, Policy and Practice

3. The following aspects of Australia's *current* immigration law, policy and practice raise issues in respect of Australia's compliance with the Convention:
 - (a) the continued policy of mandatory, indefinite immigration detention of asylum-seekers, including children and women;¹
 - (b) the extended periods for which many people are held in immigration detention;²
 - (c) the deleterious impacts on mental health of immigration detention and the high prevalence of mental illness among immigration detainees, particularly long-term detainees;³

¹ *Migration Act 1958* (Cth) s 190. As at 25 June 2010, there were 4116 people in immigration detention, including 1662 in immigration detention on the mainland and 2454 in immigration detention on Christmas Island. Of the total number of immigration detainees, 566 were children: see Department of Immigration and Citizenship, *Immigration Detention Statistics Summary* (25 June 2010) at www.immi.gov.au/managing-australias-borders/detention/pdf/immigration-detention-statistics-20100625.pdf.

² Of the 4116 people in immigration detention as at 25 June 2010, 1810 had been detained for more than three months, 605 for more than six months, and 55 for more than one year: www.immi.gov.au/managing-australias-borders/detention/pdf/immigration-detention-statistics-20100625.pdf.

- (d) the continued detention of asylum seekers in “prison-like” detention facilities, including on the remote Christmas Island and the recently re-opened Curtin detention facility;
- (e) conditions of detention in immigration detention centres, particularly those in excised offshore places, and the lack of adequate mental health care facilities and services, particularly in light of the prevalence of mental distress, trauma and illness among immigration detainees;⁴
- (f) the potentially indefinite detention of persons who are stateless⁵ or who have been the subject of adverse security assessments;⁶
- (g) the failure to comprehensively legislate to ensure compliance with Australia’s obligations of non-refoulement,⁷ particularly given that:
 - (i) Australia regularly deports asylum-seekers to countries that are not signatories to the *Convention relating to the Status of Refugees* (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; and
 - (ii) there is evidence that non-citizens deported by Australia have been subject to torture or ill-treatment and even killed;⁸
- (h) the suspension of the processing of claims by persons from Afghanistan and Sri Lanka for protection under the *Refugee Convention*,⁹ and
- (i) the lack of access to adequate legal assistance or merits or judicial review in respect of decisions made in excised offshore places, including decisions to deny asylum claims and deport asylum-seekers.

³ Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, Anand Grover: Mission to Australia*, UN Doc A/HRC/14/20/Add.4 (3 June 2010), [92]-[93].

⁴ Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, Anand Grover: Mission to Australia*, UN Doc A/HRC/14/20/Add.4 (3 June 2010), [95]-[99].

⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562.

⁶ See, eg, Yuko Narushima, ‘“Security Risk” Refugees Left in Limbo’, *The Age* (Melbourne), 22 April 2010.

⁷ The *Migration Amendment (Complementary Protection) Bill 2009* (Cth) has now lapsed.

⁸ See, eg, AAP, ‘Asylum Seeker Shot Dead in Gaza’, *The Age* (Melbourne), 2 August 2008; Edmund Rice Centre for Justice and Community Education, *Deported to Danger II: The Continuing Study of Australia’s Treatment of Rejected Asylum Seekers* (2006).

⁹ The suspension on the processing of claims by Sri Lankan asylum seekers was lifted on 6 July 2010.

4. Australia held a general election on 21 August 2010. At the date of writing, the outcomes of this election are unclear. During the election campaign, however, the Liberal/National Coalition and the Labor parties, one of which will form government, outlined the following proposed reforms to Australia's immigration law, policy and practice which raise major issues in respect of Australia's compliance with the Convention:
- (a) Labor policy:
 - (i) establish a "regional processing centre", most likely in Timor Leste, to which all asylum seekers who arrive in Australia by boat will be removed for processing.¹⁰
 - (b) Liberal/National Coalition policy:
 - (i) remove all asylum seekers who arrive in Australia by boat to another country, most likely Nauru, for processing;
 - (ii) deny permanent residency to any asylum seeker arriving by boat through the re-introduction of a "temporary protection visa" scheme;
 - (iii) enact a legislative presumption that an asylum seeker is not a refugee "if it is believed they have disposed of their identity documents";
 - (iv) "turn back asylum seeker boats where circumstances allow"; and
 - (v) enact legislation to deny work rights and Medicare benefits to any asylum seeker who does not submit their claim for protection within 45 days of arrival in Australia.¹¹

¹⁰ Australian Labor, "Gillard Government Strengthens Australia's Border Protection" at www.alp.org.au/federal-government/news/gillard-government-strengthens-australias-border-protection/.

¹¹ Liberal/National Coalition, *Restoring Sovereignty and Control to Our Borders: Policy Directions Statement* (May 2010) at www.liberal.org.au/~media/Files/Policies%20and%20Media/National%20Security/100527%20Coalition%20Border%20Protection%20Policy%20Directions%20Document.ashx.

Case Study: Breach of Obligation of Non-Refoulement to China¹²

A Chinese man, known as Mr Zhang, was refused asylum in Australia after he spent 10 years in Australia arguing his case for asylum. Mr Zhang was of interest to the Chinese Government because he had supported students during the 1989 pro-democracy movement and feared for his life should he be returned to China.

Despite an interim measures request by the Human Rights Committee, Mr Zhang was deported from Australia in June 2007. Immediately prior to his deportation, Mr Zhang unsuccessfully attempted to end his life by embedding a razor blade in his oesophagus due to fear of returning to China. Once deported to China, Mr Zhang said that he was interrogated and roughed up by Chinese officials as soon as he returned.

In June 2008, Mr Zhang committed suicide, reportedly to avoid further persecution and torture.

Case Study: Breach of Obligation of Non-Refoulement to Gaza¹³

A Palestinian asylum seeker, Mr Akram al Masri, arrived in Australia by boat in June 2001, suffering a bullet wound to the leg. He claimed asylum saying that Palestinian officials believed he was an Israeli spy. He was detained at the Woomera Immigration Detention Centre for eight months after his claim for asylum was rejected.

Mr al Masri was removed to Gaza in September 2002. At the time, he said that he feared for his life if forced to return to Israel but that he would rather be returned home than go back to the detention centre.

On 31 July 2008, Mr al Masri was shot a number of times in the head at close range in Gaza. A Department of Immigration spokesperson said that "we emphasise the fact that even if the person has spent some time in Australia, this does not mean that Australia is responsible for all events that may befall them in the future".

¹² Case study drawn from the following sources: Asylum Seeker Resource Centre, *Chinese Man Still at Risk of Being Deported and Facing Torture* (12 September 2007), available at www.asrc.org.au/humanrights/2007/09/12/chinese-man-still-at-risk-of-being-deported-and-facing-torture; AAP, 'Deported Chinese Man "Interrogated"', *The Epoch Times* (29 June 2007), available at <http://en.epochtimes.com/news/7-6-29/57048.html>; ABC, 'China Dissident Commits Suicide after Forcible Deportation', *ABC News* (16 June 2008), available at <http://www.abc.net.au/news/stories/2008/06/16/2275279.htm>.

¹³ Case study drawn from the following sources: AAP, 'Asylum Seeker Shot Dead in Gaza', *The Age* (Melbourne), 2 August 2008, available at <http://news.theage.com.au/national/asylum-seeker-shot-dead-in-gaza-20080801->

3. Prisoners' Rights and Conditions of Detention

5. The following aspects of Australia's law, policy and practice in respect of prisoners and conditions of detention raise issues in respect of Australia's compliance with the Convention:
- (a) the significant over-representation of persons with mental illness in prison and the inadequacy of mental health care facilities and services in prison;¹⁴
 - (b) the incarceration of persons with mental illness, including beyond their term of sentence, due to inadequate mental health care facilities and services in the community;¹⁵
 - (c) the gross over-representation of Indigenous persons in detention, and the continued deaths of Indigenous persons in custody.¹⁶ This is despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody close to 20 years ago, many of which have still not been implemented;¹⁷
 - (d) unacceptable conditions of detention in some places of detention, including police cells and prisons,¹⁸ and inhumane – sometimes fatal – conditions for the transportation of prisoners, particularly from remote communities (see the case of Mr Ward below);¹⁹

[3ood.html](#); AAP, 'Investigation into Deportee's Death', *The Sydney Morning Herald* (Sydney), 2 August 2008, available at www.smh.com.au/news/national/investigation-into-deportees-death/2008/08/02/1217097596349.html.

¹⁴ Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health*, Anand Grover: *Mission to Australia*, UN Doc A/HRC/14/20/Add.4 (3 June 2010), [69]-[72].

¹⁵ See, eg, *R v White* [2007] VSC 142; 'Judge "Forced" to Keep Mentally Ill Man in Jail', *ABC News Online*, 22 December 2008; Natasha Robinson, 'Hopeless Days of Man, Adrian Faulton, Lost in the Legal System', *The Australian* (Sydney), 20 December 2008.

¹⁶ James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Addendum – The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15 (4 March 2010) [52].

¹⁷ Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) volumes 1-5, available at www.austlii.edu.au/au/other/IndigLRes/rciadic/.

¹⁸ See, eg, Ombudsman Victoria, *Conditions for Persons in Custody* (2006); Greg Skelton, 'Overcrowding Pressures Prisons', *The Advertiser* (Adelaide), 17 February 2008; 'Juvenile Prisoners Sharing One-Person Cells', *ABC News Online*, 7 April 2008.

¹⁹ See, eg, State Coroner (Western Australia), *Inquest into the Death of Ian Ward* (Ref No 9/09).

- (e) high rates of blood borne virus transmission and sexually transmitted diseases, together with an absence of adequate harm minimisation strategies, including condoms or needle and syringe exchange programmes;²⁰ and
- (f) the lack of independent, effective mechanisms for monitoring, oversight, investigation and inspection of places of detention in most states and territories, despite Australia having signed (but not ratified) the *Optional Protocol to the Convention Against Torture*.

Case Study: Death of Aboriginal Elder in Custody

On 27 January 2008, a respected Ngaanyatjarra Aboriginal elder, Mr Ward, was placed in the back of a prison transport van for up to four and half hours while temperatures outside exceeded 40 degrees Celsius. Mr Ward was being transferred from Laverton to Kalgoorlie in remote Western Australia to face a charge of driving under the influence of alcohol. Mr Ward was found unconscious in the back of the van, having suffered heat stroke. He subsequently died in hospital. The van's air-conditioning system was faulty.²¹

A coronial inquest into Mr Ward's death revealed systemic failings which contributed to the death. These included over policing of Aboriginal persons, denial of bail, inhumane prisoner transport, lack of training of justices of the peace, police and private contractor staff, lack of governmental supervision of contractual duties, and inadequate funding. In June 2009, the coroner found that Articles 7 and 10 of the International Covenant on Civil and Political Rights had been breached.²² Despite these findings, the Director of Public Prosecutions in Western Australia has confirmed that no charges will be laid as a result of Mr Ward's death.

On 29 July 2010, the Western Australian Government announced that Mr Ward's family would receive compensation of \$3.2 million for the death of Mr Ward.²³

4. Policing, Police Use of Force and Police-Related Deaths

- 6. The following aspects of Australia's law, policy and practice in respect of police and policing raise issues in respect of Australia's compliance with the Convention:

²⁰ J Ryan et al, 'Prisons, Needles and OHS' (2010) 26(1) *Journal of Health, Safety and Environment* 63.

²¹ Paige Taylor, 'Drink Driver Dies in Custody', *The Australian* (Sydney), 28 January 2008.

²² See www.safetyandquality.health.wa.gov.au/docs/mortality_review/inquest_finding/Ward_finding.pdf.

- (a) a number of recent deaths in or immediately following police custody;²⁴
- (b) in many Australian jurisdictions, there is a lack of regulation regarding police use of force, including lethal force, in particular the requirement that any such force be a last resort, reasonable, strictly necessary and proportionate;
- (c) lethal police shootings of persons with mental illness and children as young as 15;²⁵
- (d) the increased use of Taser weapons, without adequate training, regulation or justification, including against children and people with mental illness;²⁶
- (e) inadequate mechanisms for independent investigation and oversight of police, and a lack of access to effective remedies for police misconduct;
- (f) the absence or inadequacy of mechanisms to independently and effectively investigate police-related deaths, meaning deaths caused by or implicating police are themselves investigated by police;²⁷ and
- (g) evidence of police targeting, harassment and excessive use of force against Aboriginal peoples²⁸ and newly arrived migrants, particularly Africans.²⁹

Case Study: Death in a country town

Mr Carter was a 33-year-old Aboriginal man with a cognitive impairment, a mental illness and

²³ See, Chalpat Sonti, 'Multimillion Dollar Payout to Mr Ward's Family After Prison Van Death', *WAToday* (Perth), 29 July 2010.

²⁴ See, eg, 'Police Probe Second Death in Custody', *ABC News Online*, 24 May 2010.

²⁵ See, eg, Coroner's Court of Victoria, *Inquest into the Death of Tyler Cassidy* (2010); Mex Cooper, 'Tyler Cassidy's Family Vent Fury Over Police Probe', *The Age* (Melbourne), 21 December 2009.

²⁶ See, eg, Tony Moore, 'Officer "Quietly" Subdued Girl Before She was Tasered', *Brisbane Times* (Brisbane), 7 March 2009.

²⁷ See, eg, Human Rights Law Resource Centre, *Submission to Office of Police Integrity Inquiry into the Investigation of Deaths Associated with Police Contact* (June 2010) at www.hrlrc.org.au/content/topics/victorian-charter-of-human-rights/right-to-life-submission-on-investigation-of-police-related-deaths-18-june-2010/.

²⁸ See, e.g. Vic Health, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (December 2009) 31 at www.vichealth.vic.gov.au/Resource-Centre/Publications-and-Resources.aspx; Ethical Standards Department, Victoria Police and Indigenous Issues Unit, Department of Justice, *Koorie Complaints Project – 2006-2008 – Final Report* (2008), 7, 18 and 19.

²⁹ Victorian Equal Opportunity & Human Rights Commission, *Rights of Passage: The Experiences of Australia-Sudanese Young People* (2008) 30-8 at www.humanrightscommission.vic.gov.au/pdf/rights_of_passage.pdf. Bec Smith and Shane Reside, Fitzroy Legal Service, *Boys, You Wanna Give Me Some Action?: Interventions into Policing of Racialised Communities in Melbourne: Report of the 2009/10 Racism Project* (2010).

a history of substance abuse. He lived in a town in rural Victoria. On 6 August 2006, Mr Carter learned that his brother had died suddenly. Following a complaint of disturbance, police attended Mr Carter's girlfriend's home and Mr Carter was taken away in a police van. Mr Carter had been drinking heavily.

Mr Carter was taken 13 kilometres out of town by the police and left by police on the side of the Sturt Highway. Mr Carter was subsequently struck by a heavy transport vehicle and died. The Coroner ruled that the death was a suicide but the conduct of police and the investigation of the incident highlight problems with policing and the investigations system.

Further, during the Coronial inquest into Mr Carter's death, at least one other Aboriginal witness gave evidence of being taken out of town by police and left on the Sturt Highway near the airport. Evidence before the Coroner was that complaints made by Aboriginal people went nowhere, and the coroner found that Aboriginal people feared retribution by the police if they complained about police conduct.³⁰

5. Counter-Terrorism Law, Policy and Practice

7. The following aspects of Australia's counter-terrorism law, policy and practice raise issues in respect of Australia's compliance with the Convention:
- (a) the possibility of incommunicado pre-charge detention and prolonged, potentially indefinite detention, under the *Australian Security Intelligence Organisation Act 1979* (Cth);
 - (b) the unlawful detention and false imprisonment (found to be in one case common law kidnapping) of persons for the purpose of questioning by the Australian Security Intelligence Organisation;³¹
 - (c) the possibility of incommunicado preventative detention without judicial oversight under the *Criminal Code* (Cth);³²

³⁰ Aboriginal and Torres Strait Islander Legal Services, Joint Submission to the Human Rights Consultation (June 2009), pages 31-34 and also the decision of the State Coroner of Victoria, delivered 13 May 2009.

³¹ See, eg, *R v Ul-Haque* [2007] NSWSC 1251, [62]. Cf Inspector General of Intelligence and Security, *Report of Inquiry into Actions Taken by ASIO in 2003 in Respect of Mr Izhar Ul-Haque and Related Matters* (2008).

³² See, especially *Criminal Code* Div 105.

- (d) the strong presumption against bail and the 'onerous', 'oppressive' and 'austere' conditions of detention of many persons charged and remanded for 'terrorism-related' offences;³³
- (e) the possibility of admitting evidence obtained in contravention of the prohibition against torture or ill-treatment,³⁴ and
- (f) the failure of the State to adequately and effectively investigate allegations of torture and ill-treatment, including in the cases of Guantanamo Bay detainees David Hicks and Mamdouh Habib.

6. Violence Against Women

- 8. Violence against women remains a major issue in Australia. One in three Australian women has experienced physical violence since the age of 15 and Aboriginal women and women with disabilities and women in rural and remote areas are particularly severely impacted.³⁵
- 9. The Australian Government is to be commended for a number of positive initiatives designed to address violence against women, including the creation of the National Plan to Reduce Violence Against Women and Children. The National Plan is yet to be implemented and will require, as a matter of priority, adequate funding and monitoring mechanisms.
- 10. Further areas requiring attention are the lack of adequate access to sexual assault services for rural and remote women and the lack of access to crisis accommodation services, particularly for Aboriginal women and women with disabilities.³⁶

³³ See, eg, *R v Benbrika (Ruling No 20)* [2008] VSC 80; *Opinions Adopted by the Working Group on Arbitrary Detention*, UN HRC, 7th sess, Item 3, 69 (Opinion No 7/2007 (Australia), 9 May 2007), UN Doc A/HRC/7/4/Add.1 (2008); *Raad v Director of Public Prosecutions* [2007] VSC 330, [6].

³⁴ See, eg, *Evidence Act 1995* (Cth) s 138; *Foreign Evidence Act 1994* (Cth) s 25A.

³⁵ Indigenous women are 35.1 times more likely than non-Indigenous women to be hospitalised for family violence: see www.apf.gov.au/library/intguide/sp/ViolenceAgainstWomen.htm. See also: Commonwealth of Australia (2009) *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021, 9.

³⁶ See: Women With Disabilities Australia (WWDA), Submission to the National Human Rights Consultation (2009) at www.wwda.org.au/subs2006.htm. See also Commonwealth of Australia (2009) *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021, 9.

7. Other Issues

11. A number of other areas of Australia's law, policy and practice raise issues in respect of Australia's compliance with the Convention:
- (a) There are over 105,000 people who are homeless in Australia, an increase of over 5 per cent since the last census.³⁷ A number of vulnerable groups are disproportionately represented among the homeless, including children and young people, people with disability and older women.³⁸
 - (b) Non-therapeutic sterilisation of people with disability remains an ongoing practice in Australia and impacts most significantly on the rights of women and girls with disability.³⁹
 - (c) The use of electroconvulsive therapy (ECT) has increased significantly in the last decade, including in some cases on children younger than 4 years old.⁴⁰ The administration of such treatment is often involuntary and without any judicial oversight, often at the discretion of the treating psychiatrist.
 - (d) Several Australian states have passed laws enabling the continued detention in prison of sex offenders beyond their term of imprisonment.⁴¹
 - (e) Australia has consistently failed to prosecute or exercise jurisdiction over alleged war crimes and crimes against humanity.⁴²
 - (f) There remain gaps in Australian law, policy and practice with respect to exposing persons to the death penalty or torture or ill-treatment abroad, whether through

³⁷ Australian Bureau of Statistics, *Counting the Homeless* (2006).

³⁸ See, eg, Sue Lannin, 'Older Women Enter Ranks of Homeless', *ABC News Online*, 4 August 2010; Women With Disabilities Australia, *Shut Out, Hung Out, Left Out, Missing Out: WWDA Submission in Response to the Australian Government's Green Paper on Homelessness* (2008).

³⁹ See, United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268, paras 45-46(e).

⁴⁰ Reported at www.heraldsun.com.au/news/victoria/child-shock-therapy/story-e6frf7kx-1111118657718.

⁴¹ New South Wales, Victoria, Queensland and Western Australia. For example, the *Serious Sex Offenders Act 2006* (NSW) permits the court to impose a fresh sentence on a person convicted of a serious sex offence regardless of the years already served, if there is a high probability that the offender is likely to commit a future serious sex offence.

⁴² See, eg, Fergus Hanson, *Confronting Reality: Responding to War Criminals Living in Australia* (2009).

extradition, the provision of mutual assistance in criminal matters, or the provision of police to police agency assistance.⁴³

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⁴³ Human Rights Law Resource Centre, *Submission Regarding Proposed Extradition and Mutual Assistance Reforms* (August 2009) at www.hrlrc.org.au/content/topics/torture/submission-regarding-proposed-extradition-and-mutual-assistance-reforms-aug-2009/.