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# **Australia**

## **A Briefing for the Committee against Torture**



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# Australia

## A Briefing for the Committee against Torture

### I. Introduction

In November 2007, the Committee against Torture (the Committee) is scheduled to examine Australia's third periodic report on its implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture or the Convention). This briefing summarizes Amnesty International's views about Australia's implementation of the Convention.

Amnesty International notes that Australia ratified the Convention against Torture in 1989, and has not yet acceded to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment authorizing independent international experts (the Subcommittee on Prevention) to conduct regular visits to places of detention and requiring the establishment of a national mechanism to conduct visits to places of detention and to cooperate with the international experts.

Amnesty International notes the following positive developments:

- Although the deaths of Indigenous Australians in custody remain of serious concern, the first recorded prosecution of a police officer in relation to such a death occurred in 2007. This signals two things – first, the State accepts that it has a role in protecting the rights of Indigenous people who are taken into custody and, second, that police are themselves subject to the rule of law when they arrest and detain Indigenous people.
- Australia has not only ratified the Rome Statute, but has been championing the Statute in the Asia Pacific region. In doing so it has demonstrated a commitment to ending impunity for large scale and systematic human rights violations.
- The Prime Minister's announcement on 17 June 2005 of changes to the mandatory detention policy in relation to a certain class of asylum-seekers. Despite the retention of mandatory detention, which Amnesty International opposes, a number of improvements have been introduced, including: the placement of families with children in community detention instead of detention centres; the imposition of time limits of 3 months for primary decisions in relation to applications for refugee status

and merits appeal decisions by the Refugee Review Tribunal, and the tabling in Parliament of the Ombudsman's reports and recommendations on people in detention longer than 2 years.<sup>1</sup>

- The introduction of the *Human Rights Act* in the Australian Capital Territory in 2004, the *Charter of Human Rights and Responsibilities Act 2006* in Victoria, and the conduct of consultations concerning the introduction of human rights legislation in Western Australia and Tasmania.

The present briefing focuses on the following concerns:

- Lack of a comprehensive framework for the implementation and monitoring of the Convention obligations. There are some clear differences in the extent to which certain provisions of the Convention against Torture have been incorporated in municipal law across state and territory jurisdictions, and many areas of uncertainty.
- The decision not to sign the Optional Protocol to the Convention against Torture, which represents a missed opportunity to show regional leadership on the prevention of Convention against Torture violations, and an unwillingness to acknowledge that, although Australia has made some notable achievements in human rights protection, it cannot afford to relax efforts to improve its own standards or ignore the opportunity to receive independent advice, particularly where it is both expert and confidential.
- Gaps in the Australian Government's compliance with its obligation to avoid *refoulement* and other features of migration policy, such as mandatory detention and off-shore processing of refugee claims, that do not appear to be justified in policy terms, and are very costly in human terms.
- Persistence of the systemic factors that underlie continuing high rates of deaths of Indigenous Australians in custody; and
- Failure to exert jurisdiction to investigate credible claims of torture and other cruel, inhuman and degrading treatment of Australian nationals detained by the United States Government in Guantánamo Bay, Cuba and elsewhere in the context of the 'war on terror'.

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<sup>1</sup> Phillips J & Millbank A "The detention and removal of asylum seekers" E-Brief: Online Only issued 5 July 2005 at [http://www.aph.gov.au/library/INTGUIDE/SP/asylum\\_seekers.htm](http://www.aph.gov.au/library/INTGUIDE/SP/asylum_seekers.htm). (as at 18/10/2007).

## II. Legislation (Articles 1, 2, 4, 5, 13, 14, 15 and 16)

### *Gaps in criminal jurisdiction over acts of torture committed in territory of State (Articles 1, 2 and 4)*

The Australian Government has asserted in its Report to the Committee that:

*Acts constituting torture and other cruel, inhuman or degrading treatment or punishment are a criminal offence and/or civil wrong in all Australian jurisdictions.<sup>2</sup>*

This assurance falls short of the requirement set out in Article 4 of the Convention that a State Party “ensure that all acts of torture are offences under its criminal law.” Amnesty International’s examination of the criminal legislation in all States and Territories of Australia has revealed certain gaps in the criminalisation of torture.

It is clear that the following Australian jurisdictions adequately criminalise torture – Victoria, Queensland, Australian Capital Territory (which covers actions of the Australian Defence Force), Northern Territory and South Australia. It seems likely that Tasmania does so, although this depends on interpretation of the concepts of ‘bodily harm’ and ‘other injury’ – which may mean that some acts resulting in only severe pain or suffering are not proscribed. Analysis of the criminal legislation in New South Wales<sup>3</sup> and Western Australia respectively indicates that neither jurisdiction criminalises acts of torture as such – both rely on the concept of ‘aggravated assault’, which covers acts that result in extreme physical or mental injury, but does not cover acts that result simply in severe pain or suffering. Western Australian law is applied on Christmas Island and Cocos (Keeling) Islands, which are Australian territories and may be used for the purposes of immigration detention.

Details of the criminal legislation in three jurisdictions illustrate the point that there are inconsistencies in the treatment of acts of torture.

The Northern Territory Criminal Code provides in s 186 that:

*Any person who unlawfully causes harm to another is guilty of a crime and is liable to imprisonment for 5 years or, upon being found guilty summarily, to imprisonment for 2 years.*

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<sup>2</sup> Third periodic report of Australia, UN Doc. CAT/C/67/Add.7, 25 May 2005

<sup>3</sup> Although s 91 of the NSW Crimes Act creates offences of producing pornographic material that depicts children as the victims of torture or cruelty, and of disseminating such material.

The word 'harm' was substituted for the expression 'bodily harm' by the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* which came into operation on 20 December 2006. Section 1A, which was inserted in the Code by the same Act, provides:

(1) *Harm is physical harm or harm to a person's mental health, whether temporary or permanent.*

(2) *Physical harm includes . . . pain . . .*

Section 54 of the *NSW Crimes Act 1900* makes it an offence, punishable with imprisonment for 2 years, for a person by an unlawful or negligent act, or omission, to cause grievous bodily harm<sup>4</sup> to another. Subsection 59(1) provides that it is an offence, punishable with imprisonment for 5 years, to occasion actual bodily harm to someone by assaulting them. Cases indicate that 'harm' means 'injury' but includes an hysterical and nervous condition.

Section 317 of the Western Australian Criminal Code makes it a serious offence to assault another person, causing 'bodily harm', defined by s1 as "*any bodily injury which interferes with health or comfort.*" This offence is punishable with imprisonment for 5 years. Section 294 creates the yet more serious offence of unlawfully and with intent doing any grievous bodily harm to any person by any means whatever. It is punishable with imprisonment for 20 years. Section 1 defines 'grievous bodily harm' as "*any bodily injury of such a nature as to endanger, or be likely to endanger, life or to cause, or be likely to cause, permanent injury to health.*"

The maximum penalties available for an act of torture, in those jurisdictions where it is specified, are: Victoria - 20 years' imprisonment, Queensland – 14 years, South Australia – 13 years, Australian Capital Territory (and Australian Defence Force) – 10 years. In the Northern Territory the maximum penalty is 5 years imprisonment, which does not place it in the most serious rank of penalties.

### ***Establishing extraterritorial jurisdiction (Article 5)***

The Commonwealth of Australia has passed the *Crimes (Torture) Act 1988* which creates the offence of torture in the same terms as the Convention against Torture and provides that any person being an Australian citizen or present in Australia, who has committed an act of torture outside Australia that would have been an offence in a particular Australian jurisdiction, can be prosecuted for the offence in that jurisdiction. It provides for attempts and acts of

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<sup>4</sup> Defined only as including: "*(a) the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and*

*(b) any permanent or serious disfiguring of the person.*"

complicity and of participation by applying Chapter 2 of the *Commonwealth Criminal Code Act* 1995. It also provides that an offender can be found guilty of an alternative offence, to take into account the possibility that the jurisdiction in question has not created an offence of torture.

Australia has not taken steps to establish jurisdiction in the case of Australian national victims of acts of torture outside its territory. This briefing contains two case studies of credible reports of the torture in overseas places of detention of Australian nationals David Hicks and Mamdouh Habib (see Section IV below).

***Rights to complain and have prompt and impartial investigation of alleged torture by competent authority (Article 13)***

The preceding section shows that the Australian Government has failed to ensure consistency in the criminalisation of torture across states and territories. Further, there is no evidence that the Australian Government has carried out a review of the adequacy and effectiveness of complaint and investigation mechanisms that would be available to all persons deprived of their liberty or otherwise vulnerable to treatment amounting to torture in institutions run by or for the state – particularly prisoners – across all Australian jurisdictions.

Documented reports of maltreatment of vulnerable persons have arisen in a number of different settings over the period – in prisons<sup>5</sup>, immigration detention centres<sup>6</sup>, police custody<sup>7</sup>, military institutions<sup>8</sup>, and nursing homes<sup>9</sup>.

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<sup>5</sup> See for example, *Women in Prison: A Report by the Anti-Discrimination Commission of Queensland* 2006, at [www.adcq.qld.gov.au/pubs/WIP\\_report.pdf](http://www.adcq.qld.gov.au/pubs/WIP_report.pdf) (as at 18/10/2007).. This report recommends, *inter alia*, the replacement of routine strip searching of prisoners with “less intrusive and humiliating” procedures. It also recommended “*the creation of an independent, statutory office of Chief Inspector of Prisons, which reports directly to Parliament to ensure independence from the DCS and builds an organizational culture that values genuine, critical reflection about the purposes stated in the Corrective Services Act 2000*” (p 10). The NSW Council of Civil Liberties Addendum to its Shadow Report to the Committee Against Torture, of 16 September 2007 (at [www.nswccl.org.au/docs/pdf/CAT%20shadow%20report%20addendum.pdf](http://www.nswccl.org.au/docs/pdf/CAT%20shadow%20report%20addendum.pdf) (as at 18/10/2007)) details concerns that conditions in the High Risk Management Unit at Goulburn Gaol violate the Convention against Torture Article 16.

<sup>6</sup> “*Detention Centre Operator to Pay for Maltreatment*” ABC Online news report, July 29 2005, at [www.abc.net.au/news/newsitems/200507/s1425981.htm](http://www.abc.net.au/news/newsitems/200507/s1425981.htm) (as at 18/10/2007). The regime of immigration detention has been found to have negative consequences for mental health *cf* Sultan A & O’Sullivan K.(2001) Psychological disturbances in asylum seekers held in long-term detention: a participant-observer account. *Med J Aust* v.175: 593-596.

<sup>7</sup> For example: Rich Edney (2000) “*The More Things Change, the More They Stay the Same: Police Treatment of Indigenous Persons in Custody: Frederick John Beaver Robinett v South Australian Police,*” at [www.austlii.edu.au/au/journals/ILB/2001/71.html](http://www.austlii.edu.au/au/journals/ILB/2001/71.html) (as at 18/10/2007).

Amnesty International believes that the Australian Government should carry out a thorough review of the adequacy and effectiveness of complaint and investigation mechanisms that cover all persons under Australian jurisdiction who are deprived of their liberty or otherwise vulnerable to abuse by state employees or agents.

### ***Right of victims of torture to redress and compensation (Article 14)***

As noted above, “torture” is not a criminal offence in all Australian jurisdictions. In any case, even where torture has been criminalised, it is not necessarily covered by criminal compensation provisions. The following example from Queensland illustrates this.

Section 320A of the Queensland *Criminal Code 1899* provides that torture is a crime. However, s 5(a) of the Queensland *Criminal Offence Victims Act 1995* limits compensation to cases of crime involving “violence committed against the person in a direct way”.

Regardless of whether it is criminalised, it has not been clearly established that an act of torture constitutes a tort providing grounds for seeking compensation through the courts.

Administrative complaint mechanisms, including Commonwealth, State or Territory Ombudsmen, have strong investigatory powers, but doubts have been raised about their effectiveness in relation to prisons.<sup>10</sup> Internal investigation structures in the police and the military may lack sufficient independence to carry out credible investigations.<sup>11</sup> Further, administrative investigation mechanisms lack the power to enforce recommendations regarding compensation.

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<sup>8</sup> Eg “*New allegations of bastardisation in the army*” ABC news report, 16 August 2000 at [www.abc.net.au/am/stories/s164034.htm](http://www.abc.net.au/am/stories/s164034.htm) (as at 18/10/2007). See for example “*Claims of sexual abuse at Vic nursing home*” Lateline Report ABC TV 20 February 2006 at [www.abc.net.au/lateline/content/2006/s1574384.htm](http://www.abc.net.au/lateline/content/2006/s1574384.htm) (as at 18/10/2007). Such reports have sparked calls for mandatory reporting of abuse.

<sup>9</sup> See for example “*Claims of sexual abuse at Vic nursing home*” Lateline Report ABC TV 20 February 2006 at [www.abc.net.au/lateline/content/2006/s1574384.htm](http://www.abc.net.au/lateline/content/2006/s1574384.htm) (as at 18/10/2007). Such reports have sparked calls for mandatory reporting of abuse.

<sup>10</sup> See note 5 above.

<sup>11</sup> A 2005 Senate Inquiry “*received a significant volume of submissions describing a litany of systemic flaws in both law and policy*” including “*serious abuses of power in training schools and cadet units, flawed prosecutions and failed, poor investigations*” (Report of the Senate Foreign Affairs, Defence and Trade Committee: “*The effectiveness of Australia's military justice system*”, 16 June 2005 at [www.aph.gov.au/SEnate/committee/fadt\\_ctte/miljustice/report/index.htm](http://www.aph.gov.au/SEnate/committee/fadt_ctte/miljustice/report/index.htm) (as at 18/11/2007)).

If torture constitutes a tort, an action through the courts would be open in specified cases. For example, s105.51 of the Commonwealth *Criminal Code Act 1995* permits people to bring proceedings for a remedy in a federal court in relation to their treatment during their preventative detention. They may contact lawyers to act for them, subject to a prohibited contact order under s105.40. However, s105.38 provides that all contact in such cases must be capable of being monitored by the police. The Code only permits proceedings related to treatment in preventative detention to be brought in a State or Territory court after release.

The ASIO Act makes it clear that persons detained for questioning under warrants can seek remedies from courts regarding their treatment. However, it is not clear that those remedies include compensation for acts of torture.

Complaint investigations undertaken by an Ombudsman, or by a human rights body such as the Human Rights and Equal Opportunity Commission<sup>12</sup> (HREOC), may result in recommendations of redress or compensation, but such recommendations cannot be enforced. Such a lack of enforcement undermines the efficacy of these complaint mechanisms.

Amnesty International believes that the Australian Government should conduct a comprehensive study of the accessibility, independence and effectiveness of Australian mechanisms for the investigation of complaints of torture as well as their ability to provide redress.

### ***Inadmissibility of statements obtained by torture (Article 15)***

A suite of legislation dealing with the admission of evidence in court proceedings, called the “uniform Evidence Acts”, has been enacted in several states, namely the Australian Capital Territory, New South Wales and Tasmania, to bring about consistency in law on the use of evidence. These acts replicate the Commonwealth *Evidence Act 1995* which applies to proceedings in the Federal Court. Other states are actively considering adoption of the Commonwealth model.

Section 84 of the Evidence Act makes inadmissible in criminal or civil proceedings any admissions (statements made against interest) by a party that were influenced by actual or threatened violent, oppressive, inhuman or degrading conduct against the party or another person. However, s38 provides that evidence obtained improperly or in contravention of an

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<sup>12</sup> It should be noted that although HREOC has jurisdiction to investigate breaches of the ICCPR, including Article 7 which proscribes torture and cruel, inhuman and degrading treatment, it does not have jurisdiction to investigate violations of the CAT. See HREOC website for the international instruments that fall within the jurisdiction of the Commission as set out in the *Human Rights and Equal Opportunity Commission Act 1986* at [www.humanrights.gov.au/about/legislation/index.html#hreoca](http://www.humanrights.gov.au/about/legislation/index.html#hreoca) (as at 18/10/2007).

Australian law or in consequence of such an impropriety or contravention, is not to be admitted:

*unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.*

This discretion means that where the evidence in question is not an “admission”, because it was obtained from a person who is not a party to the proceedings, the fact that it was obtained by torture does not present an absolute barrier to its being admitted to the proceedings by the court.<sup>13</sup>

The Australian Government has failed to provide entrenched guarantees that statements obtained under torture are inadmissible in proceedings in all Australian jurisdictions. Moreover, the Australian Government did not object to the use of statements made by Australian national, David Hicks, reportedly obtained under torture or other ill-treatment, in the US Military Commission proceedings against him (see Chapter IV).

### ***Cruel, inhuman or degrading treatment or punishment (article 16)***

Some jurisdictions in Australia have legislation which explicitly criminalises acts amounting to cruel or inhuman treatment on the part of any public official: the Northern Territory – maximum period of imprisonment 5 years; Victoria – 10 years; Tasmania – subject to the understanding of the concepts of ‘bodily harm’ and ‘other injury’, 21 years; and South Australia – 13 years. This legislation does not seem to incorporate degrading treatment.

It seems incongruous that the Australian Capital Territory legislation, which was specifically directed at implementing the Convention against Torture, does not deal with acts of cruel, inhuman or degrading treatment. Actions of members of the Australian Defence Forces are covered by Australian Capital Territory law.

Some Australian jurisdictions have legislation that applies to the action of certain public officials only. For example, in all States (but not the Northern Territory and the Australian Capital Territory), legislation relating to mental health or drug and alcohol abuse makes it an offence for a person responsible for patients in a treatment centre to ill-treat a patient, punishable with imprisonment as follows: Queensland – 1 year, Victoria - 3 years, Tasmania - one year, Western Australia - one year, New South Wales – 6 months and South Australia – 2

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<sup>13</sup> Saul, B “The Torture Debate: International Law and the Age of Terrorism” Australian Red Cross: NSW International Humanitarian Law Program Lecture Series NSW Law Week, 28 March 2006, Gilbert + Tobin, Sydney, p 9 at [http://law.unsw.edu.au/news\\_and\\_events/doc/BenSaulTortureSpeech2006.pdf](http://law.unsw.edu.au/news_and_events/doc/BenSaulTortureSpeech2006.pdf) (as at 22/10/2007)

years. Note that the omission in the Northern Territory is not significant in this context because the general legislation mentioned in the previous paragraph is applicable.

Commonwealth legislation relating to anti-terrorism, such as provisions relating to those detained under preventive detention orders or for questioning, makes it an offence punishable with imprisonment for up to two years, to subject a person to cruel, inhuman or degrading treatment.

It can be concluded from the above analysis that actions amounting to cruel, inhuman or degrading treatment or punishment on the part of public officials are not uniformly prohibited by law in Australia. Despite the fact that the conduct of public officials is mostly covered by codified standards or legislation, departures from the law that would amount to violations of Article 16 would not necessarily be subject to serious sanctions or create a right of redress for a victim. That being so, it seems reasonable to conclude that the Australian Government should take further steps to give effect to Article 16 within its jurisdiction.

### ***Conclusion***

The Australian Government has not yet created an adequate framework to give effect to its obligations to ensure that all acts of torture and other cruel, inhuman and degrading treatment are criminal acts attracting severe punishment in Australian jurisdictions (see table in Annex 1). It has not ensured that statements obtained under torture are inadmissible in evidence in all jurisdictions in cases where an Australian national is affected in a foreign jurisdiction, nor has it ensured that acts of cruel, inhuman and degrading punishment are prohibited and subject to punishment. It has not acted to establish a uniform, accessible complaint investigation mechanism capable of determining and enforcing remedies or compensation as HREOC and the Ombudsman, for example, can only make recommendations which are not enforceable.

The analysis of implementation undertaken by Amnesty International shows that the Australian Government has not responded adequately to the concluding observations of the Committee Against Torture in November 2000 that:

*The State party ensure that all States and territories are at all times in compliance with its obligations under the Convention.*<sup>14</sup>

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<sup>14</sup> Concluding observations of the Committee against Torture: Australia, UN Doc. A/56/44, 21 November 2000, paras.47-53, at para. 53(a).

### III. Indigenous persons in custody

#### *Background*

Amnesty International is concerned that the Australian Government has failed to adequately address issues related to the deaths of Indigenous Australians in custody. In Concluding Observations in 2000, the Committee recommended that:

*The State party 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.*<sup>15</sup>

Convention against Torture Articles 2(1) and 16 enjoin State parties to prevent acts of torture and of other cruel, inhuman or degrading punishment. Successive inquiries into police behaviour<sup>16</sup> and into the treatment of prisoners<sup>17</sup> illustrate the potential for abuse of coercive power. As previously noted by the Committee, the highly disproportionate rates of arrest and imprisonment of Indigenous people mean that they are also disproportionately exposed to the types of violations that occur in these contexts.

The continuing history of Indigenous cultural dispossession and disadvantage, well documented in the 1991 *Report of the Royal Commission into Aboriginal Deaths in Custody*<sup>18</sup> is evident in the substantial gap between the health and material welfare of Indigenous and non-Indigenous Australians.<sup>19</sup> The accumulation of social and economic disadvantage

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<sup>15</sup> *Ibid*, para. 53(g).

<sup>16</sup> See for example, Fitzgerald J. (1987) *Royal Commission into Possible Illegal Activities and Associated Police Misconduct, Report*, Queensland Government Printing Office, Brisbane and Wood, J. (1997) *Royal Commission into the New South Wales Police Service, Report*, Vols. 1, 2, and 3, NSW Government Publishing Office, Sydney. The Crime and Misconduct Commission in Queensland is currently holding an Inquiry into Policing in Indigenous Communities. See Issues paper at [www.cmc.qld.gov.au/data/portal/00000005/content/83285001176423108826.PDF](http://www.cmc.qld.gov.au/data/portal/00000005/content/83285001176423108826.PDF) (as at 18/10/2007).

<sup>17</sup> See for example, Nagle, J. (1979) *Royal Commission into New South Wales Prisons, Report*, NSW, Government Publishing Office, Sydney; Ombudsman of Tasmania (2001) *Report on an Inquiry into Risdon Prison: Volume 1 Risdon Prison Hospital & Forensic Mental Health Services*, at [www.ombudsman.tas.gov.au/data/assets/pdf\\_file/0017/50552/Prison\\_Hospital\\_Report.pdf](http://www.ombudsman.tas.gov.au/data/assets/pdf_file/0017/50552/Prison_Hospital_Report.pdf) (as at 18/10/2007).

<sup>18</sup> See the full report at [www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/rciadic\\_summary/rcsumk01.html](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/rciadic_summary/rcsumk01.html) (as at 18/10/2007).

<sup>19</sup> See for example Australian Medical Association *Media Release: Indigenous Health Report Card 2007* 22 May 2007 at [www.ama.com.au/web.nsf/doc/WEEN-73EVH8](http://www.ama.com.au/web.nsf/doc/WEEN-73EVH8) (as at 18/10/2007) and Oxfam campaign Close the Gap, intended to reduce inequalities in health, housing, nutrition and education at [www.oxfam.org.au/campaigns/Indigenous-health/the-issue/index.php](http://www.oxfam.org.au/campaigns/Indigenous-health/the-issue/index.php) (as at 18/10/2007).

increases the risk of contact with the criminal justice system, the risk of arrest, and of imprisonment and recidivism.

The 1991 *Report of the Royal Commission into Aboriginal Deaths in Custody* made 339 recommendations. Some were designed to address the conditions of socio-economic deprivation associated with increased crime rates in Indigenous communities. Some were designed to remove barriers to Indigenous access to diversionary programs. However, the majority were intended to induce positive change in criminal justice administration, so that arrests and custodial sentences would be used only where there were no reasonable alternatives. There were also to be improvements in the standards of care of prisoners, the effectiveness of rehabilitation and post-release re-integration programs, the training of police and custodial officers, and relationship between police and Indigenous communities.

Mandatory sentencing (see below) was abolished in the Northern Territory in 2000. However, Western Australia, which has the highest rate of Indigenous people in custody, both juvenile and adult, has not contemplated a similar change.<sup>20</sup>

Amnesty International is concerned that there has been little progress in the implementation of these recommendations and Indigenous Australians remain disproportionately represented in the criminal justice system. This in turn makes Indigenous Australians more vulnerable to violations of the Convention against Torture.

### *Deaths in custody*

Amnesty International welcomes the fact that Indigenous deaths in prisons have declined in numbers and rates since their peak in 1995, when there were 18 deaths, a rate of nearly six per thousand Indigenous prisoners. In 2005 there were seven Indigenous deaths in prison, which represents a rate of 1.2 deaths per thousand Indigenous prisoners. There were 27 non-Indigenous prisoner deaths in 2005 – a rate of 1.4 per thousand non-Indigenous prisoners<sup>21</sup>. According to State and Territory governments there were no Indigenous prisoner deaths from “*apparent unnatural causes*” in 2005/06.<sup>22</sup>

The total number of deaths in police custody fell from 27 in 2004 to 20 in 2005. However, the drop in the number of deaths in police custody between 2004 and 2005 was entirely due to a

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<sup>20</sup> See for example statement dated 28 October 2006 by Western Australian Attorney-General at [www.abc.net.au/am/content/2006/s1775738.htm](http://www.abc.net.au/am/content/2006/s1775738.htm) (as at 18/10/2007).

<sup>21</sup> Joudo J (2006) *Deaths in custody in Australia: National Deaths in Custody Program annual report 2005* Australian Institute of Criminology at [www.aic.gov.au/publications/tbp/tbp021/tbp021.pdf](http://www.aic.gov.au/publications/tbp/tbp021/tbp021.pdf) (as at 18/10/2007).

<sup>22</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2007*, Vol. I, Part C, 7.1, at [www.pc.gov.au/data/assets/pdf\\_file/0004/61771/chapter07.pdf](http://www.pc.gov.au/data/assets/pdf_file/0004/61771/chapter07.pdf) (as at 18/10/2007).

fall in non-Indigenous deaths – from 22 to 12. Six of the deaths in 2004 and eight of the deaths in 2005 were of Indigenous persons (all male).<sup>23</sup>

Amnesty International is concerned about the continuing high incidence of Indigenous deaths in custody. In 2005, 40 percent of deaths in police custody were of Indigenous persons – a figure that seems likely to be well above the proportion of Indigenous people taken into custody in that year, and thus deserves investigation.

### ***Mandatory sentencing and the over-representation of Indigenous people in custody***

Western Australia's *Criminal Code Amendment Act (No 2) 1996*, provides for a mandatory custodial sentence of at least 12 months for repeated property offences.<sup>24</sup>

Mandatory sentencing is inconsistent with the principle that custodial sentences should be used only as a last resort. It denies judges the power to set penalties that take into account the seriousness of the offence as well as the individual circumstances of the offender. On that basis, mandatory detention could, in certain cases, raise issues under Article 16 of the Convention.

The Committee Against Torture and the Human Rights Committee both recommended that the Australian Government review the use of mandatory sentencing to ensure that it does not involve infringements of treaty rights.<sup>25</sup>

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<sup>23</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2006, Vol. I, Part C*, 5.68 at [www.pc.gov.au/data/assets/pdf\\_file/0020/61661/chapter05.pdf](http://www.pc.gov.au/data/assets/pdf_file/0020/61661/chapter05.pdf) (as at 18/10/2007) and Steering Committee for the Review of Government Service Provision, *Report on Government Services 2007, Vol. I, Part C*, 7.1, at [www.pc.gov.au/data/assets/pdf\\_file/0004/61771/chapter07.pdf](http://www.pc.gov.au/data/assets/pdf_file/0004/61771/chapter07.pdf) (as at 18/10/2007). Note that these figures are subject to revision in the light of subsequent Coronial reports. The fact that all Indigenous deaths were male was obtained via personal communication from J Joudo of the Australian Institute of Criminology.

<sup>24</sup> Blagg H, Morgan N, Cunneen C & Ferrante A (2005) *Systematic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System Report to the Equal Opportunity Commission and Aboriginal Justice Forum*, Melbourne states, "Western Australia's three strikes home burglary laws prescribe a minimum of 12 months detention / imprisonment for a third home burglary strike. In theory, the laws apply to all offenders but they have the greatest impact on juveniles (as most adults would have faced at least 12 months under normal sentencing principles). Eighty percent of all the children who have been caught are Indigenous; of those aged under 14, 100 percent are Indigenous; and a disproportionate number are from regional and remote areas." p. 13 at [www.cjrn.unsw.edu.au/news\\_&\\_events/documents/Systemic%20Racism%20Report\\_update.pdf](http://www.cjrn.unsw.edu.au/news_&_events/documents/Systemic%20Racism%20Report_update.pdf) (as at 18/10/2007).

<sup>25</sup> Concluding Observations of the Committee against Torture: Australia, UN Doc. A/56/44, 21 November 2000, paras. 47-53 and Concluding Observations of the Human Rights Committee: Australia, UN Doc. A/55/40, 24 July 2000, paras. 498-528 at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.55.40.paras.498-528.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.55.40.paras.498-528.En?OpenDocument) (as at 18/10/2007).

Mandatory sentencing has further increased an already high rate of Indigenous incarceration. Mandatory sentencing affects juveniles as well as adults. In Western Australia the 2004 imprisonment rate of Indigenous children was 52 times that of non-Indigenous children, so that 70 percent of all children in detention centres were Indigenous<sup>26</sup>.

Nationally, the rates of Indigenous arrest and imprisonment have continued to increase. In 2006/07, the rate of imprisonment of Indigenous Australians was more than 17 times that of non-Indigenous Australians<sup>27</sup>. This marked an increase of over 30 percent on the ratio in 1991, when the Royal Commission Report was released. Indigenous offenders, both juvenile and adult, continue to have difficulty in accessing diversionary programs.

The Western Australian Law Reform Commission has noted the under-representation of Indigenous children in diversionary programs contributes to their disproportionately high rate of detention<sup>28</sup>. Research in other States is consistent with this finding: a study of Victorian Police Statistics for 2001 found that the overall cautioning rate for Indigenous juveniles was 13.3 percent compared with 30.8 percent for non-Indigenous juveniles<sup>29</sup>. Similar discrepancies have been found in New South Wales<sup>30</sup> and South Australia<sup>31</sup>.

Indigenous young people are more likely to receive harsher outcomes from police decisions to apprehend and prosecute. This is the case, even when offence and criminal history

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<sup>26</sup> Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005, vi, cited in Western Australian Law Reform Commission (2006) *Aboriginal Customary Laws Final Report*, Chapter 5 Aboriginal People and the Criminal Justice System, p 82 at [http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/FR/Chapter\\_5.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/FR/Chapter_5.pdf) (as at 18/10/2007).

<sup>27</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2007*, Vol. I, Part C, 7.1, at [www.pc.gov.au/data/assets/pdf\\_file/0004/61771/chapter07.pdf](http://www.pc.gov.au/data/assets/pdf_file/0004/61771/chapter07.pdf) (as at 18/10/2007)

<sup>28</sup> Western Australian Law Reform Commission (2006) *Aboriginal Customary Laws Final Report*, Chapter 5 Aboriginal People and the Criminal Justice System, p 83 at [www.lrc.justice.wa.gov.au/2publications/reports/ACL/FR/Chapter\\_5.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/FR/Chapter_5.pdf) (as at 18/10/2007).

<sup>29</sup> Victorian Aboriginal Legal Service Co-operative Ltd. (2002) *Koori Young People, Diversion and Police Cautioning*, at <http://vals.org.au/news/submissions/42%20Koori%20Young%20People%20Diversion%20%20Police%20Cautioning.pdf> (as at 18/10/2007).

<sup>30</sup> For example see Luke, G & Cunneen, C (1995), *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System*, Juvenile Justice Advisory Council, Sydney, 1995.

<sup>31</sup> Office of Crime Statistics, *Crime and Justice in South Australia: Juvenile Justice 2001*, Adelaide, 2002, cited in Victorian Aboriginal Legal Service Co-operative Ltd. (2002) *Koori Young People, Diversion and Police Cautioning*, at <http://vals.org.au/news/submissions/42%20Koori%20Young%20People%20Diversion%20%20Police%20Cautioning.pdf> (as at 18/10/2007).

differences are controlled for. It seems that young Indigenous people have a 10-15 percent greater chance of going to court than receiving a formal police caution. While this difference is not large, the compounding effect over time may be very significant, particularly in relation to decisions concerning first offenders where the acquisition of a criminal record is likely to influence later discretionary decisions<sup>32</sup>. A recent study of the factors that influenced sentencing of Indigenous and non-Indigenous offenders in New South Wales indicated that legally relevant factors – prior record of serious offences, seriousness of current offence, concurrent offences, prior suspended or custodial sentence(s), and plea – were sufficient to explain the difference in rates of custodial sentences received by Indigenous and non-Indigenous offenders respectively<sup>33</sup>. However, this study could not rule out the possibility of bias in the acquisition of characteristics that are legally relevant to sentencing. For example, access to appropriate legal representation may influence plea, and the likelihood of a prior suspended or custodial sentence, as opposed to placement on a diversionary program, may be affected by Indigenous status.

While acknowledging that the lower use of cautioning with Indigenous juveniles was largely attributable to relevant differences in their circumstances<sup>34</sup>, the authors of a Victorian study nevertheless advocated greater use of second cautions on the grounds of ‘over-policing’ such as that found by Luke & Cunneen (1995).<sup>35</sup>

### ***Treatment of persons in custody***

The Australian Government has not sought to exert jurisdiction over the standards applied in the States and Territories in relation to the treatment of persons in custody – for example, by conferring powers of investigation of complaints on the Commonwealth Ombudsman or on HREOC. Reports of human rights violations in prisons, the lack of effective independent complaint mechanisms, and the occurrence of deaths in police custody and in prisons indicate

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<sup>32</sup> Luke G & Cunneen (1995), C “Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System”, Juvenile Justice Advisory Council, Sydney, cited in Victorian Aboriginal Legal Service Co-operative Ltd. (2002), *Koori Young People, Diversion and Police Cautioning*, at <http://vals.org.au/news/submissions/42%20Koori%20Young%20People%20Diversion%20Police%20Cautioning.pdf> (as at 18/10/2007), p. 5.

<sup>33</sup> Weatherburn D, Snowball L & Hunter B (2006) “Indigenous over-representation in prison: The role of offender characteristics” *Crime and Justice Bulletin, No 104 October 2006*, NSW New South Wales Bureau of Crime Statistics and Research. at [www.lawlink.nsw.gov.au/lawlink/bocsar/l\\_bocsar.nsf/vwFiles/cjb104.pdf/\\$file/cjb104.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/l_bocsar.nsf/vwFiles/cjb104.pdf/$file/cjb104.pdf)

<sup>34</sup> Police noted the higher incidence of prior offences, failure to admit commission of an offence, unavailability of parents or guardians, and lower level of cooperation (Victorian Aboriginal Legal Service Co-operative Ltd *Koori Young People, Diversion and Police Cautioning*, p1).

<sup>35</sup> *Ibid.* p. 5

the desirability of stronger monitoring and investigation mechanisms. Amnesty International is concerned that the failure to ensure adequate complaints investigation mechanisms and effective access to redress, particularly for Indigenous people, who face larger barriers in gaining access to the courts for such purposes, is in breach of Australia's obligations under articles 13 and 14 of the Convention.

Amnesty International believes that an effective way of addressing some of these problems would be for Australia to accede to the Optional Protocol to the Convention.

#### **Case Study – the Death of Mulrunji**

The facts that have emerged from the Inquest into the death of Mulrunji, a Palm Island man, after he was taken into police custody in November 2004, indicate grounds for concern about treatment of Indigenous people by police, other criminal justice officials, and the Queensland Government. The following outline of the events that led to Mulrunji's death in a police cell, has been compiled from the Coroner's Report of September 2006.<sup>36</sup>

Mulrunji was arrested on seemingly trivial grounds – swearing at a police officer, a Senior Sergeant, and his Indigenous Liaison Officer as the Sergeant attempted to take another Indigenous man into custody. Mulrunji was heavily under the influence of alcohol, but had offered no violence, and had moved on when asked to do so by the Indigenous Liaison Officer. He had no prior record.

When the Sergeant attempted to arrest him, Mulrunji became very agitated and offered considerable resistance. As he was being removed from the paddy wagon at the police station, he punched Sergeant Hurley in the face. A witness said that Sergeant Hurley responded by punching him in the side. There was a struggle between the two as Sergeant Hurley attempted to drag Mulrunji to the cells. The two fell at one point, and one witness claimed to have seen the Senior Sergeant punching Mulrunji. The Police Register had three entries covering the event: the first for 10:28 pm on 19 November 2004, noted that Mulrunji and another prisoner had arrived. The next, at 10:55 pm, was initialed by the Sergeant involved in the incident and indicated that he had checked both prisoners in their cell and found them sleeping. The next was at 11:23 pm, made by another Sergeant who had checked the prisoners and found Mulrunji dead.

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<sup>36</sup>Coroner's report on death of Mulrunji, Ms Christine Clements, Acting State Coroner 27 September 2006 [www.justice.qld.gov.au/courts/coroner/findings/mulrunji270906.doc](http://www.justice.qld.gov.au/courts/coroner/findings/mulrunji270906.doc) (as at 18/10/2007).

Forensic evidence indicated Mulrunji had died from damage to his liver, which had nearly split in two. This was damage that could only have been sustained as a result of severe external trauma. The Coroner concluded that this trauma must have been caused by the Senior Sergeant.

The Coroner was critical of the police for failing to follow correct procedure in notifying relatives, and for failing to ensure that the incident was properly and impartially investigated.

Riots on Palm Island followed the original revelation of Mulrunji's death in 2004. On 19 December 2006 the Public Prosecutor announced that the Sergeant would not be prosecuted. However, after strong public protests, the Queensland Government commissioned a former Chief Justice of NSW to undertake an independent review of the evidence. In accordance with the recommendation of that review, the Queensland Attorney General announced that charges would be laid.

The Sergeant was charged with assault and manslaughter and became the first person in Australia to face trial over the death of an Indigenous person in custody. At trial he said he accepted that he must have inadvertently caused Mulrunji's death when the two fell during a struggle at the door of the police cell. The jury acquitted him of both charges.

Mulrunji's son, Eric, committed suicide in July 2006, and Patrick Bramwell, a witness at the Coronial Inquiry, who had been in an adjacent cell on the night of Mulrunji's death, committed suicide in January 2007<sup>37</sup>. The Queensland Police Union reacted strongly to the decision to prosecute the Sergeant and following the trial placed advertisements in major newspapers accusing the Government of political interference.

This case illustrates a number of troubling features. Mulrunji, who had no prior contact with the police, was arrested for making an abusive remark whilst drunk. He was not threatening anyone, and had moved on his way when he was arrested. Being arrested in such circumstances seems like a heavy-handed response. Further, the events that occurred after Mulrunji's arrival at the police station at least demonstrate failures in the standard of training in the handling of individuals who are highly intoxicated, and failures in the standard of care

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<sup>37</sup> Living Black, SBS Tragedy Mars Palm Island Visit 16 January 2007 at <http://news.sbs.com.au/livingblack/index.php?action=news&id=134116> (as at 18/10/2007).

of persons in custody. The coroner's criticism of the initial police investigation of the death is also concerning, as was the time taken before the decision not to prosecute was reversed.

### ***Conclusion***

Amnesty International is concerned that the Australian Government has not taken all possible steps to increase the protection of individuals held in police custody or State or Territory prisons. The organisation regrets in particular that the Australian Government has not ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, thereby denying individuals deprived of their liberty the benefits of a national inspection and monitoring scheme. Similarly, Amnesty International is concerned that the Australian Government has failed to reduce the extremely high rates of arrest and imprisonment of Indigenous Australians. It has failed to oversee implementation of all recommendations made in the 1991 *Report of the Royal Commission into Deaths in Custody*. It has also failed to put an end to Western Australia's practice of mandatory custodial sentencing for repeated minor property offences, whose major effect can be seen in the extremely high detention rates of young, Indigenous Australians in that state. It has failed to address systemic factors, including entrenched socio-economic disadvantage, that underlie high levels of contact with the criminal justice system amongst Indigenous Australians.

## **IV. Two case studies of failure to act on allegations of torture and other ill-treatment of Australian nationals abroad [Articles 2, 3, 5(1)(c) and 15]**

Amnesty International is concerned that the Australian Government has failed to act on allegations that two of its citizens, David Hicks and Mamdouh Habib, have been tortured or otherwise ill-treated in custody of the US.

***David Hicks held, successively, in Afghanistan, aboard various United States of America (US) military vessels, and at Guantánamo Bay, Cuba by the United States of America from December 9 2001 to May 2007 (Article 2, 5(1)(c) and 15)***

**Case Study**

David Hicks was transferred from Afghanistan to the detention centre in the US Naval Base, Guantánamo Bay, Cuba on or around 11 January 2002. He was repatriated to Australia on 20 May 2007 and is held in Yatala Prison, South Australia at the date of this submission. He is due to be released in December 2007.

Amnesty International considers that the conditions of detention at Guantánamo Bay – harsh, isolating and indefinite – amount to cruel, inhuman and degrading treatment.<sup>38</sup> A report by leading UN experts to the UN High Commission on Human Rights, released in February 2006, concluded that some of the practices at Guantánamo Bay could amount to torture in individual instances.<sup>39</sup>

In an affidavit sworn in August 2004<sup>40</sup>, relating to the time he was taken into custody in Afghanistan through to his, at that time, two and a half years in Guantánamo, David Hicks alleged that he had been beaten before, during and after interrogations, and that he had been menaced and threatened, directly and indirectly, with firearms and other weapons, before and during interrogations. He also alleged that he had been:

- a) beaten while blindfolded and handcuffed.
- b) subjected to random beating over an eight hour session while handcuffed and blindfolded.
- c) struck with hands, fists, and other objects (including rifle butts).

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<sup>38</sup> See for example Amnesty International *Cruel and Inhuman: Conditions of isolation for detainees at Guantánamo Bay* 5 April 2007 accessed at: [http://web.amnesty.org/library/pdf/AMR510512007ENGLISH/\\$File/AMR5105107.pdf](http://web.amnesty.org/library/pdf/AMR510512007ENGLISH/$File/AMR5105107.pdf); and USA: *Guantánamo – Torture and other ill-treatment* 8 December 2006 accessed at: <http://web.amnesty.org/library/Index/ENGAMR511892006>.

<sup>39</sup> United Nations (UN) Commission on Human Rights, Situation of detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120, 15 February 2006, available at <http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120.pdf>

<sup>40</sup> David Hicks' Affidavit dated 5 August 2004. Available at <http://www.smh.com.au/news/World/David-Hicks-affidavit/2004/12/10/1102625527396.html>.

- d) kicked over the entirety of his body.
- e) slammed headfirst into the asphalt while blindfolded.
- f) handcuffed for extended periods of time causing numbness in his hands for a considerable period thereafter.
- g) forced by injection to take medication of an unknown nature.

He also claimed that during this time he was forced to run in leg shackles that tore skin off his ankles, and that he was deprived of sleep, and held in a solitary cell after his arrival at Camp Echo, and not allowed outside it for exercise in the sunlight, from July 2003 until 10 March 2004.<sup>41</sup>

Under a pre-trial agreement reached in March 2007 that led to his release from Guantánamo and his return to Australia, David Hicks signed a statement that he had “never been illegally treated by any person or persons while in the custody and control of the United States. This includes the period after my capture and transfer to US custody in Afghanistan in December 2001, through the entire period of my detention by the United States at Guantánamo Bay, Cuba. I agree that this agreement puts to rest any claims of mistreatment by the United States.” Amnesty International considers that any such statement given in the coercive conditions of Guantánamo Bay cannot be considered entirely voluntary, and under these circumstances does not excuse governments from their obligations to investigate the prior allegations.

United States officials inflicted the alleged torture or other ill-treatment on David Hicks, and were responsible for the conditions in which he was held. However:

- The Australian Government knew at the time of David Hicks’ incarceration by the US in Guantánamo Bay.
- Australian leaders, including the Prime Minister, made public declarations in support of Hicks’ indefinite detention without charge or trial<sup>42</sup>, which the Committee has

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<sup>41</sup> *Ibid.*

<sup>42</sup> For example, “Interviewer: Just very quickly, David Hicks, the suspected terrorist being held indefinitely without bail – is that fair? “Well, given the circumstances of Afghanistan, I think it is, yes. John Howard – 2 August 2002” This is one of a number of quotations cited in a report by the Law Council of Australia, *The Australian Government’s Position on David Hicks*, 7 December 2006 p 2 at [www.fairgofordavid.org/pubdocs/Hicks\\_LawCouncilReport07Dec061.pdf](http://www.fairgofordavid.org/pubdocs/Hicks_LawCouncilReport07Dec061.pdf) (as at 22/10/2007).

noted, in the very context of Guantánamo Bay, constitutes “*per se* a violation of the Convention.”<sup>43</sup>

- The Australian Government did not publicly call for David Hicks to be repatriated at any time during his incarceration by the US. On the contrary senior members of the Government made statements indicating that they were satisfied with his treatment and did not wish him to be brought home, because he could not be prosecuted in Australia.<sup>44</sup>
- The Australian Government accepted assurances made by the US that David Hicks was not being ill-treated.<sup>45</sup>

Amnesty International considers that such assurances were inadequate in the face of the numerous allegations and documentation regarding the torture and other ill-treatment of other detainees held in US custody in Guantánamo and elsewhere.<sup>46</sup> Further, knowing that both the military commission system established under a Military Order signed by President George W. Bush on 13 November 2001, found unlawful by the US Supreme Court in 2006, and the revised military commission system, authorized under the Military Commissions Act of 2006, could admit information coerced under torture or other cruel, inhuman or degrading treatment or punishment, and having reasonable grounds to believe that statements coerced from David Hicks or other detainees could be relied upon in his trial by military commission, the Australian Government should have protested at the USA’s failure to observe Article 15 of the CAT. Moreover, it is currently imprisoning David Hicks on the basis of a conviction by a US military commission, a system that fails to comply with international fair trial standards.

Given the above, Amnesty International is concerned that the Australian Government has failed to investigate claims that an Australian national was subjected to torture and other ill-treatment in breach of Articles 2, and 16 of the Convention and was the subject of proceedings in which evidence obtained by such methods were admissible. In the absence of

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<sup>43</sup> Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006, para. 22.

<sup>44</sup> For example, the Prime Minister, speaking on SBS World News on 11 November 2005, quoted in a Speech by Malcolm Fraser, Human Rights and Responsibilities, delivered on Wednesday 30 November 2005, New Matilda. [www.newmatilda.com/home/articledetailmagazine.asp?ArticleID=1160&HomepageID=116](http://www.newmatilda.com/home/articledetailmagazine.asp?ArticleID=1160&HomepageID=116)

<sup>45</sup> See for example Law Council of Australia, *The Australian Government’s position on David Hicks* 7 December 2006 pp 8-9 at: [www.lawcouncil.asn.au/get/media/2431031696.pdf](http://www.lawcouncil.asn.au/get/media/2431031696.pdf) (as at 25/06/2007).

<sup>46</sup> See, for example, Amnesty International, USA: Human dignity denied: Torture and accountability in the ‘war on terror’, October 2004, <http://web.amnesty.org/library/index/engamr511452004>, and *Diplomatic Assurances – No protection against Torture and Ill-treatment* 1 December 2005 at <http://web.amnesty.org/library/index/engact400212005> (as at 25/06/2007)..

any valid reason why Australia should not consider it appropriate to establish jurisdiction, Amnesty International considers that issues also arise under 5(1)(c).

***Allegations that Mamdouh Habib, dual Australian and Egyptian national, was subjected to torture and other ill-treatment during his detention in Egypt, Afghanistan and Guantánamo Bay, Cuba from May 2002 to January 2005***

**Case Study**

Mamdouh Habib holds Australian and Egyptian citizenship. On 5 October 2001 he was arrested in Pakistan, and subsequently spent 6 months in detention in Egypt before being transferred to Afghanistan, and thence, on 4 May 2002, to Guantánamo Bay, where he was detained until his release without charge on 27 January 2005.<sup>47</sup>

Prior to his transfer to US custody, it is reported that Mamdouh Habib was tortured in Egypt including by suspension from a ceiling with only an electrified barrel to stand on.<sup>48</sup>

The US State Department, in its report on Egypt in the relevant years of 2001 and 2002, stated that “there were numerous, credible reports that security forces tortured and mistreated prisoners and detainees”.<sup>49</sup> This was echoed by the Egyptian Organization for Human Rights.<sup>50</sup>

It is alleged that, after six months in Egypt, Mamdouh Habib was transported via Afghanistan to Guantánamo Bay where he received beatings and humiliating treatment, including female interrogators straddling him and smearing fake menstrual blood on him.<sup>51</sup>

A report by Amnesty International documents the following claims concerning Mamdouh Habib’s treatment in Guantánamo Bay: “A witness states [he saw] five people go into his [Mamdouh Habib’s] prison cell, spray Mr. Habib with mace, use their hands to kick and punch him and then drag him out, from the chains that were around his feet...out of the cell and into the corridor.”<sup>52</sup>

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<sup>47</sup> *A chronology of the detention of Mamdouh Habib and David Hicks* Chronologies Online Australian Parliamentary Library at [www.aph.gov.au/library/pubs/online/Australians\\_GuantánamoBay.htm](http://www.aph.gov.au/library/pubs/online/Australians_GuantánamoBay.htm)

<sup>48</sup> Sydney Morning Herald: *Prostitute Used in Habib Torture*, January 27, 2005 accessed at [www.smh.com.au/news/National/Prostitute-used-in-Habib-torture-lawyer/2005/01/26/1106415668003.html](http://www.smh.com.au/news/National/Prostitute-used-in-Habib-torture-lawyer/2005/01/26/1106415668003.html)

<sup>49</sup> U.S Department of State: *Egypt* accessed at [www.state.gov/g/drl/rls/hrrpt/2005/61687.htm](http://www.state.gov/g/drl/rls/hrrpt/2005/61687.htm)

It is reported that Australian state officials knew of Mamdouh Habib's detention in Egypt. This has been confirmed by the Australian Security Intelligence Organisation (ASIO).<sup>53</sup> Former US Central Intelligence Agency officers have also confirmed that Mamdouh Habib's rendition (from Pakistan) to Egypt for interrogation would have required the approval of Australian authorities.<sup>54</sup>

Amnesty International is concerned that the Australian Government knew of Mamdouh Habib's and was complicit in Mamdouh Habib's rendition to Egypt. Agreeing to the rendition of one of its own nationals to another state where there is a real risk that the individual may be tortured, may involve Australia's obligations under Article 3 of the Convention, which prohibits *refoulement*.

The Australian Government was aware of Mamdouh Habib's imprisonment in Pakistan, rendition to Egypt and subsequent transfer to Guantánamo Bay<sup>55</sup> Furthermore, it is alleged that, on at least one occasion, an Australian Government official stood by and observed Mamdouh Habib being tortured and humiliated by US agents in Pakistan.<sup>56</sup>

Given the possible consent or acquiescence of Australian officials to the alleged torture of an Australian national, Australia had a duty, under Article 5(1)(b), to investigate the allegations and prosecute suspected perpetrators.

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<sup>50</sup> The Egyptian Organization for Human Rights, *Torture in Egypt an Unchecked Phenomenon* 2005 at [www.eohr.org/report/2004/re3.htm](http://www.eohr.org/report/2004/re3.htm) (as at 22/10/2007).

<sup>51</sup> Allard, T and Seccombe, M, "Tortured Truth," *The Sydney Morning Herald*, February 19 2005 at [www.smh.com.au/articles/2005/02/18/1108709434463.html](http://www.smh.com.au/articles/2005/02/18/1108709434463.html) (as at 22/10/2007).

<sup>52</sup> Amnesty International, *Case Sheet 5: Who are the Guantánamo detainees?* September 2004 at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/index/AMR511152004ENGLISH/\\$File/AMR5111504.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR511152004ENGLISH/$File/AMR5111504.pdf) (as at 22/10/2007).

<sup>53</sup> "ASIO confirms Habib was held in Egypt", *ABC News*, February 15 2005 at [www.abc.net.au/news/newsitems/200502/s1303102.htm](http://www.abc.net.au/news/newsitems/200502/s1303102.htm) (as at 22/10/2007).

<sup>54</sup> "Documents Show AFP, ASIO knew of Habib 'rendition,'" *ABC News* June 11 2007 at [www.abc.net.au/news/newsitems/200706/s1948035.htm](http://www.abc.net.au/news/newsitems/200706/s1948035.htm) (22/10/2007).

<sup>55</sup> Joint new release of former Attorney General and Minister for Foreign Affairs 18 April 2002 "Mamdouh Habib in United States Custody" at [www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media\\_Releases\\_2002\\_April\\_2002\\_Mamdouh\\_Habib\\_in\\_United\\_States\\_custody\\_\(18\\_April\\_2002\)](http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_2002_April_2002_Mamdouh_Habib_in_United_States_custody_(18_April_2002)) (as at 22/10/2007).

<sup>56</sup> "Australian Official saw Habib being tortured: report," *The Sydney Morning Herald*, January 6 2005 at [www.smh.com.au/news/Global-Terrorism/Habib-details-torture-claim-in-court-documents/2005/01/06/1104832208379.html#](http://www.smh.com.au/news/Global-Terrorism/Habib-details-torture-claim-in-court-documents/2005/01/06/1104832208379.html#) (as at 22/10/2007).

### ***Complaint Mechanism***

In its concluding observations on the US, the Committee against Torture expressed concerns about the lack of complaint mechanisms for detainees in Guantánamo Bay and elsewhere.<sup>57</sup> In view of this, Amnesty International is concerned that Mamdouh Habib will be left without a formal means of redress if the Australian authorities fail to address his complaints. Despite the fact that his alleged torture did not occur on Australian territory, Australia is obliged to investigate Mamdouh Habib's complaints, in view of its possible involvement in his rendition. Moreover, in the absence of any valid reason why Australia should not consider it appropriate to establish jurisdiction, Amnesty International considers that issues also arise under 5(1)(c).

### ***Conclusion***

Amnesty International is concerned that the Australian Government failed to establish jurisdiction in relation to claims that David Hicks was being tortured whilst he was detained at Guantánamo Bay, that it subsequently agreed to implement a prison sentence imposed on David Hicks by a Military Commission that did not exclude evidence obtained under torture, and that the release signed by David Hicks as a condition for his removal from Guantánamo Bay was signed under duress and may unfairly impair his right to redress for any substantiated claim of torture involving complicity by the Australian Government.

Amnesty International is concerned about reports that Mamdouh Habib was subjected to torture or other ill-treatment.

Whether directly involved in his treatment, by approving Mamdouh Habib's rendition, or through the applicability of Article 5(1)(c), Australia should establish its jurisdiction to investigate his alleged torture or ill-treatment and ensure that he has a mechanism for obtaining redress should for any substantiated claims of torture that involve complicity on the part of the Australian Government.

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<sup>57</sup> Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006, para. 27.

## **V. Australian Government's failure to comply with its non-refoulement obligations regarding asylum seekers; the indefinite detention of asylum seekers; lack of redress (Articles 3, 14 and 16)**

### *Non-refoulement*

Amnesty International is concerned that Australia is not adequately addressing the issues of safeguards against in refoulement of asylum seekers, and is thus failing to comply with its obligations under the Convention. The Edmund Rice Centre's<sup>58</sup> publications, *Deported to Danger* and *Deported to Danger II*, highlight the risks faced by some failed asylum after they have been returned by the Australian Government by providing case studies of individuals who have 'disappeared' or been killed upon arrival in their country of origin.

In September 2007, Australia signed an extradition agreement with China. Many of the failed asylum seekers from China in Australia have made claims based on involvement in Christianity, the Falun Gong spiritual movement or on support for democracy; any of which can lead to the risk of torture in China.<sup>59</sup>

In accordance with Article 3 of the Convention, no-one may be forcibly returned to a country where they are at risk of torture. Amnesty International considers that the lack of transparency and secrecy surrounding the imposition of the death penalty and the arbitrary nature of its application in China, mean that assurances from the Chinese authorities that the death penalty will not be imposed on a particular individual cannot be monitored or relied upon as effectively as they can in countries where the death penalty is imposed in an open judicial process.

It is further important to note that torture and ill-treatment remain widespread and are very difficult to monitor owing to lack of transparency within the criminal justice system and lack of prompt access to lawyers. Allegations made by suspects that they have been subjected to torture or ill-treatment are frequently ignored by courts, and criminal procedure does not fully prevent information obtained under torture from being used as evidence in court (only that it cannot become the basis for determining the case). Chinese legal definitions of torture also

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<sup>58</sup> The Edmund Rice Centre is an Australian Catholic NGO that promotes research, community education, advocacy and networking on social justice issues in Australia.

<sup>59</sup> Report of the Special Rapporteur, Manfred Nowak, on torture and other cruel, inhuman or degrading treatment or punishment, Mission to China, Commission on Human Rights, E/CN.4/2006/6/Add.6, 10 March 2006.

fail to comply with definitions in international human rights standards. Given this situation, Amnesty International does not believe that diplomatic assurances made by China that an individual will not be subjected to torture or ill-treatment provide an adequate level of protection.

The Committee has also drawn attention to HREOC's recently expressed concerns that the then *Migration Amendment (Review Provisions) Bill 2006* (now enacted), would create the potential for an unfair process and thus increase the risk of incorrect decisions and the likelihood of refoulement of asylum seekers.

Amnesty International Australia's submission to the Senate Committee on Legal and Constitutional Affairs Inquiry on the Bill supported HREOC's submission that these amendments undermine the fairness and the effectiveness of the refugee assessment process, and increase the risk of "false negatives" and refoulement. Amnesty International also provided the following case study that illustrated how thorough investigation of asylum seeker is both time consuming and critical to preventing refoulement.<sup>60</sup>

#### Case Study

After asylum seeker Mr W had his case rejected by the Tribunal, the Federal Court referred the matter back to the Tribunal for another review. In the first Tribunal matter, Mr W's credibility was thoroughly questioned, documents he presented were not believed to be genuine and the entire basis of his claim was viewed as fraudulent. The Tribunal member relied on information provided by the Department of Foreign Affairs and Trade (DFAT) who had been asked to verify a piece of information Mr W had submitted, showing that he was 'wanted for arrest' in his country of origin. The information returned by DFAT was that Mr W's account and documentation was fraudulent and this acted to sully the rest of his case and evidence. For his second Tribunal matter, Mr W enlisted the assistance of Amnesty International Australia, a migration agent and a friend in his country of origin. After much research and some very complex endeavours by Mr W's friend overseas, documents defending Mr W were submitted to the reconstituted Tribunal. It was then found by this Tribunal that the information provided by DFAT was in-fact incorrect and their investigations had not been completely thorough. Mr W was eventually

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<sup>60</sup>Amnesty International Australia, *Submission to the Senate Legal and Constitutional Affairs Committee on the Migration Amendment (Review Provisions) Bill 2006* at [www.aph.gov.au/senate/committee/legcon\\_ctte/mig\\_review\\_provisions/submissions/sub14.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/mig_review_provisions/submissions/sub14.pdf) (as at 18/10/2007).

found to be a refugee and all of his claims were accepted by the Tribunal.

This case demonstrates that time restrictions are inappropriate and can operate against the interests of asylum seekers who need protection. Mr W could not have obtained all of the necessary information from his home country within a 28 day time frame. Should he have been required to do so under the new s 417 of the Migration Act<sup>61</sup> (if he were applying for Ministerial discretion) Mr W would have been returned to his home country, where it is a risk that he would have been either imprisoned and tortured or killed. With a short time frame and the Minister likely to rely primarily on information from sources such as DFAT, this case illustrates the potential for Australia to engage in refoulement under this legislation.

### ***Non-refoulement and asylum seekers detained for offshore processing in third countries***

Amnesty International wishes to draw the Committee's attention to the anomalous situation of asylum seekers detained for offshore processing in third countries. Since the Tampa incident<sup>62</sup> in 2001 the Australian Government has implemented a policy of sending asylum seekers who attempt to enter Australia without correct documentation to specially established immigration detention centres, including centres in other countries, such as Nauru and Papua New Guinea, where they have been detained pending resolution of their claims<sup>63</sup>. Some offshore asylum seekers, who may have actually reached territorial Australia, albeit an area 'excised from the migration zone', have also been transferred to third countries.

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<sup>61</sup> Section 417 of the Migration Act 1958 allows the Minister to substitute a more favorable decision if the Minister thinks that it is in the public interest to do so. The discretion is non-compellable.

<sup>62</sup> On 26 August 2001 Tampa, a Norwegian cargo ship named the Tampa, responding to a request broadcast by the Australian Government rescued 438 asylum seekers from a sinking fishing vessel that had been taking them to Christmas Island. The Australian Government denied the ship's master, Arne Rinnan, permission to enter Australian waters, and after a tense stand-off, the asylum seekers were eventually removed from the boat by an Australian SAS contingent and taken to Nauru for the processing of their claims. This inaugurated what became known as the 'Pacific solution' – which denotes off-shore processing of claims for asylum on locations outside the Australian mainland. See Kathryn Gentry, 'The Tampa incident and how it became a turning point in Australian history', at [http://action.amnesty.org.au/refugees/comments/how\\_tampa\\_became\\_a\\_turning\\_point/](http://action.amnesty.org.au/refugees/comments/how_tampa_became_a_turning_point/) (as at 18/10/2007).

<sup>63</sup> The Department of Immigration and Citizenship, Fact Sheet No. 76, *Offshore Processing Arrangements*, revised June 2007 at [www.immi.gov.au/media/fact-sheets/76offshore.htm](http://www.immi.gov.au/media/fact-sheets/76offshore.htm) (as at 18/10/2007). See also Oxfam Australia and A Just Australia 2007 *A Price too High: the Cost of Australia's Approach to Asylum Seekers* at [www.oxfam.org.au/media/files/APriceTooHigh.pdf](http://www.oxfam.org.au/media/files/APriceTooHigh.pdf) (as at 18/10/2007).

The Department of Immigration and Citizenship's Fact Sheet No. 76 deals with Offshore Processing Arrangements.<sup>64</sup> It states that asylum seekers are not detained under Australian law or the law of Nauru or Papua New Guinea but are instead granted special purpose visas by those countries to facilitate their stay while they await processing and resettlement (in Australia or another country) or return to their country of origin. Asylum seekers are to be provided with appropriate care and protection (by the relevant declared country) pending determination of their refugee claims.

The International Organisation for Migration (IOM) manages and operates the offshore processing facilities in the declared countries. The original visa conditions issued by the Government of Nauru allowed all residents of the offshore processing centre to move freely outside the centre within the community between 8:00a.m and 7:00p.m<sup>65</sup>. The IOM is responsible for the management of the detention facilities and the supervision of detainees during curfew. Amnesty International is concerned about complaints of depression and poor conditions made by those incarcerated in these centres isolation.

A recent report on the 'Pacific Solution' concluded, *inter alia*, that:

*In the six years since the Tampa crisis in August 2001, Australian taxpayers have spent more than \$1 billion to process less than 1,700 asylum seekers in offshore locations – or more than half a million dollars each. Most, if not all, of these asylum seekers have paid a substantial personal toll through poor mental and physical health and wellbeing, both in the immediate and longer term*<sup>66</sup>.

Figures provided by the Department of Immigration and Citizenship to the Senate Committee on Legal and Constitutional Affairs in 2006 highlight the prevalence of mental health problems amongst detainees on Nauru:

*By late 2005 all remaining 27 detainees on Nauru had identified mental health concerns – four had suffered a psychotic episode and were at risk of self harm. Thirteen members of the group were being treated for insomnia and were taking anti-depressant medication (7), anti-psychotic medication (4), and anti-anxiety medication*

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<sup>64</sup> The Department of Immigration and Citizenship, Fact Sheet No. 76, *Offshore Processing Arrangements*, revised June 2007 at [www.immi.gov.au/media/fact-sheets/76offshore.htm](http://www.immi.gov.au/media/fact-sheets/76offshore.htm) (as at 18/10/2007).

<sup>65</sup> Sri Lankan detainees are, at the time of writing, undergoing a two month suspension of this arrangement following charges against seven members of their group. The individuals facing court proceedings are not released from the detention centre, and others are permitted to leave if accompanied by an authorised person (personal communication 18 October 2007 from officer of the Department of Immigration and Citizenship).

<sup>66</sup> Oxfam Australia and A Just Australia (2007), *A Price too High: the Cost of Australia's Approach to Asylum Seekers*, p. 49, see footnote 65 supra.

*(10). In October 2005 a group of 25 detainees on Nauru were brought back to Australia because of serious concerns about their mental health<sup>67</sup>.*

Amnesty International takes the view that where the Australian Government arranges for persons to be compulsorily placed in another country for the purposes of processing their applications for refugee status, it has a moral, if not legal obligation, similar to that under Article 3 (non-refoulement). It should therefore ensure that those persons are not at real risk of torture or other ill-treatment. It is not clear that the Australian Government has taken steps to this effect.

Papua New Guinea is a party to the United Nations Convention Relating to the Status of Refugees,<sup>68</sup> but Nauru has not yet ratified it. Neither state has ratified the Convention against Torture.<sup>69</sup> In 2000, in its concluding observations on Australia's second and third reports the Committee recommended that:

*The State party consider the desirability of providing a mechanism for independent review of ministerial decisions in respect of cases coming under article 3 of the Convention<sup>70</sup>.*

In rejecting this recommendation, the Australian Government has adduced a range of review rights available to onshore asylum seekers in support of its position that its obligations are being met.<sup>71</sup>

The Australian Government has a policy which has seen many rejected asylum seekers deported to the countries from which they have fled. Not all of those who have been forcibly returned have had access to full review rights. Some, referred to as 'voluntary returnees,' have been given a financial payment to return to places such as Afghanistan and Iran, in some

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<sup>67</sup> Figures provided in response to Questions on Notice, Senate Legal and Constitutional Committee hearings into the Migration Amendment (Designated Unauthorized Arrivals) Bill 2006, 26 May 2006, cited in Oxfam and A Just Australia 2007, p 17, footnote 65 supra.

<sup>68</sup> Office of the High Commissioner of Human Rights, at [www.unhchr.ch/html/menu3/b/treaty2ref.htm](http://www.unhchr.ch/html/menu3/b/treaty2ref.htm) (as at 18/10/2007).

<sup>69</sup> Office of the United Nations High Commissioner for Human Rights, [www.ohchr.org/english/law/cat-ratify.htm](http://www.ohchr.org/english/law/cat-ratify.htm) (18/10/2007), United Nations Human Rights Website lists Nauru's status as Signatory Only in relation to the CAT at [www.unhchr.ch/tbs/doc.nsf/887ff7374eb89574c1256a2a0027ba1f/80256404004ff315c125638b005e791d?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/887ff7374eb89574c1256a2a0027ba1f/80256404004ff315c125638b005e791d?OpenDocument) (as at 18/10/2007).

<sup>70</sup> Concluding observations of the Committee against Torture: Australia, UN Doc. A/56/44, 21 November 2000, at [www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/426c1339fcf62c56c125699f00340669?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/426c1339fcf62c56c125699f00340669?Opendocument) (as at 18/10/2007).

<sup>71</sup> Third periodic report of Australia, UN Doc. CAT/C/67/Add.7, 25 May 2005, para. 38.

cases without waiting for the processing of their claim. The options available to those who seek asylum after an “unauthorised arrival” may encourage the acceptance of a payment for return. They are: prolonged or indefinite detention; attempting to gain (at best) temporary protection<sup>72</sup> in Australia; or forced deportation. The Edmund Rice Centre reports that some of those ‘voluntary returnees’ fled their country of origin again shortly after return, and that others had simply disappeared<sup>73</sup>. This might indicate that the Australian system has not provided the necessary standard of protection against refoulement required under Article 3 of the Convention against Torture.

On 12 March 2003, the Australian Government and the Government of the Islamic Republic of Iran agreed that rejected Iranian asylum seekers would be returned to Iran from Australia. The agreement established arrangements to promote the voluntary return of Iranian nationals who are illegally in Australia. The agreement also allows for the involuntary removal of Iranians in detention who have no outstanding protection applications<sup>74</sup>. Amnesty International continues to receive accounts of ill treatment and torture in Iran. Students, minority rights activists and human rights defenders have been systematically targeted for intimidation, ill treatment and torture. Amnesty International has repeatedly drawn attention to the practice of delay or denial of medical treatment of detainees. For example Amnesty International’s 2007 Report said of Iran that:

*The human rights situation deteriorated, with civil society facing increasing restrictions on fundamental freedom of expression and association. [...] Torture, especially during periods of pre-trial detention remained commonplace*<sup>75</sup>.

Amnesty International is concerned that Australia is not adequately addressing the issues of safeguards against refoulement of asylum seekers and other individuals who would be at risk of torture and other ill treatment if returned, and is thus failing to comply with its obligations under the Convention. The Edmund Rice Centre’s reports: *Deported to Danger* and *Deported*

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<sup>72</sup> “Under the TPV regime introduced in 1999, unauthorised arrivals found to be refugees are able to access only a three-year temporary visa, in the first instance. Those still wanting protection after three years are able to apply for a further protection visa.” Department of Immigration and Citizenship, Fact Sheet 64, Temporary Protection Visas at [www.immi.gov.au/media/fact-sheets/64protection.htm](http://www.immi.gov.au/media/fact-sheets/64protection.htm) (as at 18/10/2007).

<sup>73</sup> Edmund Rice Centre, *Deported to Danger*, September 2004, [www.erc.org.au/research/pdf/1096416029.pdf](http://www.erc.org.au/research/pdf/1096416029.pdf) (as 18/10/2007).

<sup>74</sup> Letter of offer of voluntary return to Iranian, IMMI, 2 May 2003, [www.immi.gov.au/media/media-releases/2003/d03031.htm#link1](http://www.immi.gov.au/media/media-releases/2003/d03031.htm#link1) (as at 18/10/2007).

<sup>75</sup> Amnesty International Report 2007, *The State of the World’s Human Rights* p 139.

to *Danger II*<sup>76</sup> highlight the realities and dangers faced by asylum seekers returned by the Australian Government.

***Indefinite detention as cruel, inhuman or degrading treatment (Article 16)***

The mandatory detention policy has been explicitly defended on the grounds that it discourages the trafficking and smuggling of people into Australia<sup>77</sup>. Australian case law on the application of the *Migration Act* has had the effect of legitimising long periods of detention for persons in need of international protection - a substantial proportion of asylum seekers are eventually recognised as refugees<sup>78</sup>. The results of this policy have included delaying, or severely limiting, asylum seeker access to specialist support services, including torture and trauma services. For those detainees not recognised as refugees and not able to be returned to their country of origin or sent to a third country to which they had legal attachment, mandatory detention can be both protracted and punitive in effect: such individuals have no definite date of release, no legal remedy, and are forced to remain for extended periods in an institution that is not designed to accommodate inmates for long periods<sup>79</sup>.

According to the Human Rights and Equal Opportunity Commissioner:

*Immigration detention per se is not prohibited under international human rights instruments provided that it is lawful and not arbitrary. Detention will not be arbitrary where it is for a minimal time and it is reasonable and a proportionate means of achieving a legitimate aim. For example, the United Nations High*

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<sup>76</sup> Edmund Rice Centre, *Deported to Danger*, September 2004, [www.erc.org.au/research/pdf/1096416029.pdf](http://www.erc.org.au/research/pdf/1096416029.pdf) (as 18/10/2007).

<sup>77</sup> See for example transcript of ABC Television interview 10 April 2005 with then Minister for Immigration and Multicultural and Indigenous Affairs, Senator Amanda Vanstone, who said: "So, for example last year we were able to say because mandatory detention and offshore processing have pretty much stopped the boats, we were able to say to temporary protection visa holders, 'Look, when you're reassessed, if you don't get permanent protection we will allow you to apply for mainstream visas into Australia from on shore. Now if we hadn't been successful, if the boats were still coming, we wouldn't have been able to do that'", at [www.abc.net.au/sundayprofile/stories/s1340219.htm](http://www.abc.net.au/sundayprofile/stories/s1340219.htm) (18/10/2007).

<sup>78</sup> For example, as at 30 June 2007, of the 1547 asylum seekers processed on Nauru and PNG, 63.7% had been found to be refugees and resettled. From Bem K, Field N, Maclellan N, Meyer S & Morris T (2007) *A Price Too High: The Cost of Australia's Approach to Asylum Seekers* A Just Australia and Oxfam, Table 9, Appendix 3, Sourced from DIMA Annual report 2005-06, Output 1.5 figure 44 and DIAC report 2006-07 at [www.oxfam.org.au/media/files/APriceTooHigh.pdf](http://www.oxfam.org.au/media/files/APriceTooHigh.pdf) (18/10/2007)

<sup>79</sup> See for example, the ill-effects of protracted detention in off-shore processing centres documented in Bem K, Field N, Maclellan N, Meyer S & Morris T (2007) *A Price Too High: The Cost of Australia's Approach to Asylum Seekers* A Just Australia and Oxfam at [www.oxfam.org.au/media/files/APriceTooHigh.pdf](http://www.oxfam.org.au/media/files/APriceTooHigh.pdf) (18/10/2007).

*Commissioner for Refugees (UNHCR) has determined that, due to the hardship involved, detention should normally be avoided*<sup>80</sup>.

The UNHCR's Guidelines on Detention state explicitly that in the view of that agency, the detention of asylum seekers is, "inherently undesirable" and that, "as a general principle, asylum seekers should not be detained." In addition, detention should not be, "used as punitive or disciplinary measures for illegal entry or presence in the country"<sup>81</sup>.

The Office of the UN High Commissioner for Human Rights (OHCHR) Special Rapporteur on Migrant Workers expressed the view that:

*Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should never be indefinite*<sup>82</sup>.

In *A v Australia* the Human Rights Committee found that:

*Detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal*<sup>83</sup>.

The UN Working Group on Arbitrary Detention considered that a maximum period for administrative detention should be set by law, and that detention should in no case be unlimited or of excessive length<sup>84</sup>. Following its visit to Australia, the UN Working Group on

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<sup>80</sup> A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001, [www.hreoc.gov.au/human\\_rights/idc/idc2001.html](http://www.hreoc.gov.au/human_rights/idc/idc2001.html) (as at 18/10/2007).

<sup>81</sup> UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999, at [www.unhcr.org.au/pdfs/detentionguidelines.pdf](http://www.unhcr.org.au/pdfs/detentionguidelines.pdf) (as at 18/10/2007).

<sup>82</sup> Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62, Economic and Social Council E/CN.4/2003/85, 30 December 2002, para 35 at [www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/\\$FILE/G0216255.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf) (as at 18/10/2007).

<sup>83</sup> Communication No. 560/1993, Human Rights Committee, 59<sup>th</sup> Session, 24 March – 11 April 1997 UN Doc CCPR/C/59/D/560/1993 dated 30 April 1997, at [www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument) (as at 18/10/2007).

<sup>84</sup> Opinions adopted by the Working Group on Arbitrary Detention, cited in Report of the Special Rapporteur, See document, para 35, cited in footnote 83, supra.

Arbitrary Detention reported that it found particularly worrying the lengthy detention of unlawful non-citizens, especially those whose application for asylum or for permission to remain in Australia had been refused by a final decision and who were awaiting removal or deportation<sup>85</sup>. It recommended to the Australian Government that it review the mandatory, automatic and indeterminate character of immigration detention and examine the lack of adequate judicial review<sup>86</sup>.

After their visits to Australia in 2003, representatives of the OHCHR were reported to have described the conditions in Australia's detention centres as, "offensive to human dignity" and the detention centres as, "worse than prisons" where, "alarming levels of self-harm" had been observed<sup>87</sup>.

Amnesty International is concerned that the indefinite detention of asylum seekers in Australia amounts to a violation of Convention against Torture Article 16.

### ***Lack of redress***

Complaints about violations of human rights that fall within the jurisdiction of HREOC can be directed to it. If, after its investigation, the Commission finds a breach of human rights, it must serve a notice on the person whose actions form the subject of the complaint setting out the findings and the reasons for those findings. The Commission may make recommendations for preventing a repetition of the act or practice, the payment of compensation or any other action or remedy for the loss or damage suffered as a result of the breach of a person's human rights, but cannot enforce remedies<sup>88</sup>.

If the Commission finds a breach of human rights it must report on the matter to the Commonwealth Attorney-General. The Commission is to include in the report to the Attorney-General particulars of any recommendations made in the notice, details of any actions that the person is taking as a result of the findings and recommendations of the

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<sup>85</sup>Report of the Working Group on Arbitrary Detention, Addendum Visit to Australia, E/CN.4/2003/8/Add.2 24 October 2002 p 28 et seq. at [www.unhcr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19/\\$FILE/G0215391.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19/$FILE/G0215391.pdf) (as at 18/10/2007).

<sup>86</sup> *Ibid.* para 64.

<sup>87</sup> Burnside, J, "Australia's treatment of asylum seekers: The view from outside," *The Sydney Morning Herald*, July 8 2003, [www.smh.com.au/articles/2003/07/17/1058035124325.html](http://www.smh.com.au/articles/2003/07/17/1058035124325.html) (as at 18/10/07).

<sup>88</sup> Human Rights and Equal Opportunity Commission, *Those who've come across the seas*, [www.hreoc.gov.au/pdf/human\\_rights/asylum\\_seekers/h5\\_2\\_2.pdf](http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf) (as at 18/10/2007).

Commission. The Attorney-General must table the report in both Houses of Federal Parliament in accordance with section 46 of the HREOC Act.<sup>89</sup>

The case of *Chu Kheng Lim*, involves a consideration of the Australian Government's amendment of the *Migration Act* to retrospectively legitimize the detention of a group of Cambodians. The group had arrived by boat, some in late 1989, some in early 1990. Their primary applications for refugee status were rejected by Ministerial delegates in mid 1992, after which they appealed to the Federal Court, and asked that they be released pending review of their asylum claims<sup>90</sup>. The group had been detained since their arrival – over three years.

When the Federal Court set aside the rejection of the refugee applications, the then Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) agreed to reassess the cases. Before a court had time to hear the application for release, emergency amendments to the *Migration Act* had been passed. A challenge to this legislation was made to the High Court of Australia on the grounds that the legislature had usurped judicial power under Chapter III of the Constitution by passing the amendments which legitimized the detention. The challenge did not succeed but the High Court of Australia did concede that detention prior to the legislation being passed had been unlawful. Further legislation was then introduced to ensure that any compensation awarded in respect of the unlawful detention was capped at \$1 per day of detention<sup>91</sup>.

This case demonstrates the lack of an effective remedy or redress for asylum seekers and migrants who have been subjected to indefinite detention. Amnesty International is concerned that this represents a violation of Article 14 of the Convention.

### **Conclusion**

The Australian Government should revise its regime of immigration detention to ensure that it complies with international human rights standards, and that there are effective mechanisms

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<sup>89</sup> *Human Rights and Equal Opportunity Commission Act 1986*, at [www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/11D1074EA7D19F6FCA2571400019FE19?OpenDocument](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/11D1074EA7D19F6FCA2571400019FE19?OpenDocument) (as at 18/10/2007).

<sup>90</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR, at [www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1992/64.html?query=title\(Chu%20Kheng%20Lim%20and%20Minister%20for%20Immigration\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1992/64.html?query=title(Chu%20Kheng%20Lim%20and%20Minister%20for%20Immigration)) (as at 18/10/2007).

<sup>91</sup> “Staring into the abyss – confronting the absence of decency in Australian refugee law and policy development” Jane Stratton & Siobhan McCann, *Australian Journal of Human Rights*, at [www.austlii.edu.au/au/journals/AJHR/2002/10.html](http://www.austlii.edu.au/au/journals/AJHR/2002/10.html) (as at 18/10/2007).

for investigating complaints of rights violations and for providing compensation in those cases where violations can be substantiated.

## Annex 1- Convention-related offences in Australian Jurisdictions

Jurisdiction	Torture	Other cruel, inhuman, degrading
Commonwealth	#	#
New South Wales	--	#
Victoria	+	+
Queensland	+	#
South Australia	+	+
Western Australia	--	#
Tasmania	^	#
Northern Territory	+	+
Australian Capital Territory	+	--
Christmas/Cocos (Keeling) Islands	-- *	-- *
Nauru/Papua New Guinea	?	?

### Legend

# Partial

+ Specifically covered by legislation

^ Uncertain definitions and penalties

-- Specific legislation not found

\* Western Australian legislation applies

Actions of Defence Force personnel covered by ACT legislation