



4 September 2010

Mr Joao Nataf  
Secretary a.i. Committee Against Torture  
Human Rights Treaties Branch  
UN Office of the High Commissioner for Human Rights

Dear Mr Nataf

### **List of issues for Australia**

Thank you for giving the Australian Human Rights Commission (the Commission) the opportunity to provide information to the Committee Against Torture (the Committee) that is relevant to the implementation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention) in Australia.

The following comments will primarily concentrate on the issues raised by the Committee in its Concluding Observations and by the Rapporteur for Follow-Up on Concluding Observations. They also update the Committee on recent developments in Australia.

### **Issue 1: Legal protection of basic human rights**

1. The issue of legislative protection of basic human rights is relevant to the Convention because in accordance with article 2, Australia should take effective legislative measures to prevent acts of torture.
2. The 2009 National Human Rights Consultation recommended that Australia should adopt a federal Human Rights Act. The Australian Government's response to the Consultation, the Australian Human Rights Framework (the Framework), did not implement this recommendation. The Commission encourages the Australian Government to revisit the question of a Human Rights Act as part of its review of the Framework in 2014.
3. Nevertheless, the Framework contained a number of important initiatives relevant to the Convention, namely the commitment to enhanced human rights education for the community and the public sector; establishing a federal parliamentary scrutiny committee on human rights; and requiring that all new federal legislation be accompanied by a statement of compatibility with Australia's human rights obligations. Two bills which provided for the establishment of the parliamentary committee and required the production of statements of compatibility respectively

lapsed when the Parliament was dissolved for the federal election on 21 August 2010.

4. Human rights training that is provided under the Framework should include targeted training of immigration detention officials (of both the Department of Immigration and Citizenship and contracted detention service providers), military personnel and members of the Australian Federal Police, in accordance with Australia's obligations under article 10 of the Convention.

## **Issue 2: The mandate of the Commission**

5. The Australian Human Rights Commission does not have legal powers to effectively monitor Australia's compliance with the Convention. The Commission cannot investigate complaints of breaches of the Convention under the Commission's 'human rights' functions.
6. The Commission recommends that the Convention should be declared under section 47 of the *Australian Human Rights Commission Act 1986* (Cth). The effect of this declaration would be that the Commission's statutory functions under section 11 of the Act in relation to 'human rights' would include the rights set out in the Convention; and the Aboriginal and Torres Strait Island Social Justice Commissioner's functions under section 46C(1) could be exercised in relation to the Convention.

## **Issue 3: Anti-terrorism laws and practice**

7. The Australian Government has introduced more than 50 new counter-terrorism laws since 2001, often without adequate consideration of their potential impacts on human rights including Australia's obligations under the Convention.
8. In August 2009, the Attorney-General released a National Security Legislation Discussion Paper. Many of those who made submissions argued for greater human rights protection. Following this consultation, legislation was introduced in March 2010 (the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010). These bills lapsed when the Parliament was dissolved for the federal election on 21 August 2010. The Senate Legal and Constitutional Affairs Committee conducted an inquiry into these Bills, to which the Commission made a detailed submission.<sup>1</sup>
9. Issues that remain of particular concern to the Commission include:
  - a. The pre-charge detention regime. Under the current regime the Australian Federal Police (AFP) have the power to arrest and detain a person, without a warrant, for an indefinite period of time, while the AFP investigates whether the person committed a terrorism offence. The Commission recommended that the maximum length of pre-charge detention should be four days.<sup>2</sup> The Senate Committee recommended that there be a three day cap on unspecified time that may be disregarded when calculating the total period of lawful pre-charge detention. The Committee further recommended that the Australian Law Reform Commission conduct a public inquiry into the pre-charge detention regime.<sup>3</sup>

- b. Preventative detention and control orders. These issues were not discussed in the Discussion Paper and were not part of the proposed amendments. They are both proposed to be reviewed by the Council of Australian Governments (COAG).
- c. The powers of detention of the Australian Security and Intelligence Organisation (ASIO). ASIO powers to detain and question a person to collect intelligence are not due for review until 2016. The Commission recommends that these provisions be reviewed as soon as possible.

10. In 2010, the Commission welcomed the Australian Government's commitment to appoint an Independent National Security Legislation Monitor. Importantly, the Monitor will review whether national security legislation is consistent with Australia's international human rights obligations as well as review and report on the operation and effectiveness of national security legislation. The Commission looks forward to the prompt appointment of the Monitor.

#### **Issue 4: Immigration detention**

11. The Commission has a number of ongoing concerns about aspects of Australia's immigration law and policy which are relevant to the Convention.

12. While the Commission has welcomed recent reforms such as the Australian Government's 'New Directions in Detention' policy,<sup>4</sup> key aspects of this policy have not been implemented in legislation. The Commission welcomed the introduction of the Migration Amendment (Immigration Detention Reform) Bill 2009. While the Commission expressed some concerns about the bill and suggested amendments, the Commission is disappointed that the bill lapsed when the Parliament was dissolved prior to the 21 August federal election.<sup>5</sup>

13. The Commission has repeatedly recommended that Australia's system of mandatory detention of 'unlawful non-citizens' should be abolished,<sup>6</sup> and that the *Migration Act 1958* (Cth) should be amended to accord with international law by requiring that a decision to detain a person, or a decision to continue a person's detention, is subject to prompt review by a court.

14. The Commission is concerned about the high number of people currently in immigration detention facilities in Australia, and the increasing length of time many people are being held in detention.<sup>7</sup> The prolonged detention of asylum seekers can have serious detrimental impacts on their mental health – particularly when their detention is combined with the uncertainty of not knowing what the outcome of their refugee claim will be.

15. The Commission has serious concerns about the impacts of mandatory detention on families with children and unaccompanied minors. The Minister for Immigration and Citizenship has stated that 'while there will be occasions when children will be accommodated in low security facilities within the immigration detention framework...the priority will always be that children and their families will be promptly accommodated in community detention'.<sup>8</sup> However, families with children and unaccompanied minors are predominantly detained in low security immigration detention facilities. Community Detention is no longer available on Christmas Island and is barely being used on the Australian mainland.<sup>9</sup>

16. The Commission is also concerned about the impacts of detaining asylum seekers in remote locations such as Christmas Island, Curtin and Leonora (in Western Australia). The remoteness of these locations restricts asylum seekers' access to legal assistance, health and mental health services, religious and community support and limits the transparency of their detention arrangements. The Commission has repeatedly recommended that the Australian Government should stop using Christmas Island as a place in which to hold people in immigration detention.<sup>10</sup>
17. The Commission remains of the view that the Australian Government should codify in legislation minimum standards for conditions and treatment of people in immigration detention, with content guided by international human rights law.
18. Asylum seekers who arrive in excised offshore places are barred from the refugee status determination system under the Migration Act, and instead go through a non-statutory refugee status assessment process. The Commission has significant concerns about this process, particularly the failure to provide sufficient legal safeguards for asylum seekers and the consequent increased risk of *refoulement*. The Commission has consistently recommended that the Australian Government should repeal the provisions of the Migration Act relating to excised offshore places, and that all claims for asylum should be assessed through the refugee status determination system that applies under the Migration Act.
19. Finally, on 9 April 2010, the Australian Government suspended processing of new refugee claims by asylum seekers from Sri Lanka and Afghanistan for three and six months respectively.<sup>11</sup> The Commission expressed serious concern that the suspension could lead to the prolonged or indefinite detention of asylum seekers, and that this could have detrimental impacts on their mental health. The Commission welcomed the lifting of the suspension for Sri Lankan asylum seekers on 6 July 2010. The Commission has urged the Australian Government to lift the suspension for Afghan asylum seekers as a matter of urgency.

#### **Issue 5: Complementary protection**

20. Complementary protection and diplomatic assurances are relevant to article 3 of the Convention.
21. In Australia, the claims of people who may not fall within the definition of 'refugee' under the Refugee Convention, but who nonetheless must be protected from *refoulement* can only be considered after they have been rejected at each stage of the refugee status determination process. They can then request that the Minister for Immigration and Citizenship exercise his or her discretionary power to grant them a visa on public interest grounds.
22. The Minister may consider Australia's *non-refoulement* obligations under international treaties in making decisions based on such requests. However, the Minister's power is discretionary and non-compellable. In addition, the Minister is not obliged to give reasons for the decision and the decisions are not reviewable.
23. The Commission has previously recommended that a legislated system of

complementary protection be adopted by the Australian Government in order fully to implement Australia's *non-refoulement* obligations under the Convention, the ICCPR and the CRC.

24. In September 2009, the Australian Government introduced into Parliament the Migration Amendment (Complementary Protection) Bill 2009 (Cth). The Commission welcomed the introduction of the Bill. If passed, it would have enacted a complementary protection system in the Migration Act, under which a person entitled to complementary protection would be granted a visa with the same conditions and entitlements as visas granted to refugees.
25. However, the Commission expressed some concerns about the scope of the statutory complementary protection system proposed by the Bill, including that:
  - a. it would not apply to asylum seekers who arrive in excised offshore places
  - b. it would not offer adequate protection for people who are stateless
  - c. it should be broadened to provide that Australia has protection obligations where a child would suffer serious harm because of a breach of his or her rights under the CRC
  - d. it should be broadened to provide that Australia has protection obligations where a non-citizen would suffer serious harm because of a breach of his or her rights under the ICCPR.
26. The Commission is disappointed that the bill lapsed when the Parliament was dissolved prior to the 21 August federal election.

#### **Issue 6: Diplomatic assurances**

27. The Commission is of the view that Australia is not relieved of its human rights obligations to people who are returned to their country of origin simply by obtaining diplomatic assurances from the receiving country. This is particularly the case where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.
28. Australia should ensure that follow-up mechanisms, such as the monitoring of treatment of returnees, are put in place to ensure that diplomatic assurances are honoured. Australia should also take into account the receiving country's record of honouring its assurances in deciding whether or not to remove an individual from Australia. The Commission is particularly concerned that the Australian Government should take appropriate precautions regarding the return of failed asylum seekers to Sri Lanka and Afghanistan.

#### **Issue 7: Extradition and mutual assistance**

29. The Commission is concerned that there is no requirement in the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (Mutual Assistance Act) to consider the human rights record of a country requesting mutual assistance. Concern about a country's human rights record does not, of itself, provide a reason to refuse a request for mutual assistance. However, it is important that the Mutual Assistance Act contains strong safeguards to ensure that a request for mutual assistance is refused if granting the request may result in a violation of a person's human rights in the requesting country.

30. The Australian Government has proposed to amend the Mutual Assistance Act to include a mandatory ground for refusal of mutual assistance where there are substantial grounds to believe the provision of the assistance would result in a person being subject to torture.<sup>12</sup> While the Commission supports this proposal, it is concerned that there is no similar proposal for situations that may potentially involve cruel, inhuman or degrading treatment or punishment. The Commission recommends that a new mandatory ground for refusal be introduced which states that mutual assistance must be refused if, in the Attorney-General's opinion there are substantial grounds for believing that granting the request may result in a breach of the prohibition against torture or cruel, inhuman or degrading treatment or punishment.
31. The Commission is also concerned that the grounds for refusing extradition under the *Extradition Act 1988* (Cth) do not extend to situations where extradition would result in cruel, inhuman or degrading treatment or punishment. The Commission recommends that a new ground of refusal be introduced to ensure that extradition is refused in situations where it would result in human rights violations including cruel, inhuman or degrading treatment or punishment.

## **Issue 8: Prisoners**

32. The Commission has no power to compel entry to prisons and no jurisdiction to receive complaints from state prisoners. Pursuant to article 11 of the Convention, the Commission is concerned about human rights conditions in Australian prisons, including prisoner transport, disproportionate incarceration of Indigenous Australians and prison conditions.

### *Prisoner transport*

#### Case study: Mr Ward's Death

33. The death of an Aboriginal elder in a transport van in Western Australia in 2007, and the subsequent coronial investigation, highlighted a range of systemic failures with prisoner transport in Western Australia.
34. Mr Ward, aged 46, was arrested for allegedly drink-driving. He was charged with one count of drink-driving and then driven 570 kilometres to a courthouse, remanded in custody and driven a further 353 kilometres to a prison. The journey from Laverton to Kalgoorlie on 27 January 2008 lasted approximately four hours and outside temperatures were in the mid 40s. There was no functioning air conditioning or ventilation in the van. Mr Ward died from heat stroke and also suffered third degree burns.
35. The Commission made a submission to the Inquest into the Death of Mr Ward in the Coroners Court of Western Australia. The Commission submitted that the transportation was cruel, inhuman and degrading. The key systemic deficiencies with the system of prisoner transport in Western Australia that preceded and contributed to Mr Ward's death were the design and condition of the vehicle fleet, particularly the relevant Mazda van, compounded by inadequate policies and procedures relating to prisoner transport and the standard of training and instruction. The failure of the officers to exercise adequate care on the day –

namely the failure to perform adequate pre-departure checks, particularly of the air-conditioning; the failure to provide Mr Ward with adequate water; and the failure to adequately monitor Mr Ward during the journey or conduct welfare stops – were inconsistent with Mr Ward’s human rights. The Commission further submitted that Mr Ward’s death was the direct result of the failure to take adequate care to protect his life.

36. The Coroner found that the contractor and the Department of Corrective Services, as well as the two prison officers all contributed to his death. He said that the van was ‘not fit for humans’, the death was ‘wholly unnecessary and unavoidable’ and made a number of recommendations urging extensive changes to the system of prisoner transport.<sup>13</sup>

37. The State Government has said that it supports all of the Coroner’s recommendations and has granted an ex-gratia payment to Mr Ward’s family of \$3.2 million. Criminal charges have not been brought against the transport company.

#### *Disproportionate incarceration of Indigenous Australians*

38. The issues of the over-representation of Indigenous women and men in the criminal justice system, and the overrepresentation of Indigenous young people in the juvenile justice system, are matters of great concern to the Commission and are relevant to Article 11 of the Convention. Nationally, Indigenous adults are 13 times more likely to be imprisoned than non-indigenous people and Indigenous juveniles are 28 times more likely to be placed in juvenile detention than their non-indigenous counterparts.<sup>14</sup>

39. This overrepresentation has been dealt with extensively by the Social Justice Commissioner in his yearly *Social Justice Report*. In the 2009 Report, the Commission argued that the Australian Government should consider an approach known as ‘justice reinvestment’, whereby a portion of the funds planned to spent on imprisonment is diverted to programs and services in local communities where there is a high concentration of offenders. This approach attempts to address the underlying causes of crime in communities where the issue is most acute.

40. The Commission recommends that the Government commit to specific targets and timelines for reducing the disproportionate rates of Indigenous peoples in juvenile detention and adult prisons, including through a greater focus on preventative measures such as justice reinvestment strategies.

#### *Prison conditions*

41. The Commission is concerned about conditions in some Australian prisons, particularly due to overcrowding.

42. The Inspector of Custodial Services in Western Australia recently commented that overcrowding had ‘reached unprecedented proportions across the entire Western Australian prison system.’<sup>15</sup> The Western Australia Equal Opportunity Commission notes that the state of Western Australia has a growing prison population as a result of (a) tougher penalties (b) withdrawal of automatic parole

with a dramatic escalation in the numbers of prisoners refused parole and (c) mandatory sentencing.<sup>16</sup>

#### Case study: Overcrowding in Hakea Prison

43. The Inspector of Custodial Services in Western Australia recently conducted an inspection and released a report on Hakea Prison, a maximum security prison.
44. In 2006, when the prisoner population at Hakea Prison was 670, the Inspector described the prison as 'significantly overcrowded'. From 2006 to 2008 the West Australian total prison population grew steadily but comparatively little new capacity was added to the system. During the 2009 inspection of Hakea Prison, the prisoner population peaked at over 900.
45. The Inspector found that overcrowding across the entire prison system in Western Australia is to blame for the bottleneck of sentenced prisoners clogging up bed space at Hakea Prison.<sup>17</sup> A massive expansion program is currently underway across the State's prison system.

#### Issue 9: Trafficking

46. Trafficking is an issue of concern under the Convention because Australia must undertake to prevent any act of cruel, inhuman or degrading treatment or punishment pursuant to Article 16.
47. There have been some recent positive developments in addressing trafficking issues, in changes to the *People Trafficking Visa Framework* and the *Support for Victims of People Trafficking Program*. The changes make victim support available on the basis of need, instead of conditional on whether a trafficked person can assist police. The changes also abolish temporary witness protection visas and speed up the process for granting permanent witness protection visas to trafficked people who have contributed to a criminal investigation, as well as their immediate family members.
48. Nevertheless, the Commission remains concerned about cases of trafficking, as well as cases of forced labour and exploitation of migrant workers on business (long stay) visas subclass 457. There have been limited legal actions to address trafficking in Australia and the Commission is only aware of one award of compensation to a person who was trafficked to Australia.<sup>18</sup>
49. The Commission recommends that laws on trafficking and related offences be reviewed and that the Government ensure access to effective remedies for people who have been trafficked. Trafficking in persons offences in the Criminal Code should comprehensively cover all aspects of the definition of 'trafficking' in the Trafficking Protocol.<sup>19</sup> In particular, people who have been trafficked into both sex and non-sex industries should have access compensation.<sup>20</sup>

#### Issue 10: Optional Protocol to the Convention Against Torture

50. The Commission welcomed Australia's signing of the *Optional Protocol to the Convention against Torture* (OPCAT). The implementation of OPCAT would



improve Australia's ability to prevent torture and other acts of cruel, inhuman or degrading treatment or punishment in places of detention. The Commission encourages the Government to promptly ratify OPCAT.

51. In 2008, the Commission commissioned research regarding the options for implementation of OPCAT in Australia. The report, written by Professors Richard Harding and Neil Morgan, suggests that Australia should establish a mixed model National Preventive Mechanism (NPM), with separate NPMs in each state and territory and a national coordinating NPM. The report recommends that, given its focus on Australia's international human rights obligations, the Commission is the most appropriate body to be the national coordinating NPM.<sup>21</sup>

Thank you once again for giving the Commission the opportunity to contribute information for the preparation of the list of issues for Australia.

Should you wish to obtain any additional information about any of the issues raised in this letter, please do not hesitate to contact the Human Rights Unit at the Commission.

Yours sincerely

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<sup>1</sup> Reference submission

<sup>2</sup> Australian Human Rights Commission, Submission to the Senate Constitutional and Legal Affairs Committee Inquiry into the National Security Legislation Amendment Bill 2010 (the Bill) and the Parliamentary Joint Committee on Law Enforcement Bill 2010 at [http://www.humanrights.gov.au/legal/submissions/2010/20100506\\_law\\_enforcement\\_bill.html#Heading136an](http://www.humanrights.gov.au/legal/submissions/2010/20100506_law_enforcement_bill.html#Heading136an)

<sup>3</sup> The Committee said that this review by the ALRC should examine, among other things, what period of pre-charge detention is 'reasonably necessary' to balance the competing interests of criminal investigations and individuals' right to liberty, as well as a straightforward legislative framework for a pre-charge detention regime.

<sup>4</sup> Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Seminar – Centre for International and Public Law (29 July 2008).

<sup>5</sup> See Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Migration Amendment (Immigration Detention Reform) Bill 2009* (2009). At [http://humanrights.gov.au/legal/submissions/2009/20090731\\_migration.html](http://humanrights.gov.au/legal/submissions/2009/20090731_migration.html) (viewed 2 September 2010).

<sup>6</sup> See *Migration Act 1958* (Cth), s 189.

<sup>7</sup> As of 25 June 2010, there were 4116 people in immigration detention, including 1662 in immigration detention on the mainland and 2454 in immigration detention on Christmas Island. See Department of Immigration and Citizenship, *Immigration Detention Statistics Summary* (25 June 2010). At

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<http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 2 September 2010).

<sup>8</sup> Australian Government Response: Follow Up to the Concluding Observations of the UN Committee Against Torture, May 2009.

<sup>9</sup> For example, as of 25 June 2010, there were 566 children in immigration detention in Australia. Of these, only eight were in Community Detention. See Department of Immigration and Citizenship, *Immigration Detention Statistics Summary* (25 June 2010). At <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 2 September 2010).

<sup>10</sup> See, for example Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island* (2009). At [http://humanrights.gov.au/human\\_rights/immigration/idc2009\\_xmas\\_island.html](http://humanrights.gov.au/human_rights/immigration/idc2009_xmas_island.html) (viewed 2 September 2010).

<sup>11</sup> See Chris Evans, Minister for Immigration and Citizenship, 'Changes to Australia's Immigration Processing System' (Joint Media Release with Stephen Smith, Minister for Foreign Affairs and Brendan O'Connor, Minister for Home Affairs, 9 April 2010). At <http://www.minister.immi.gov.au/media/media-releases/2010/ce10029.htm> (viewed 2 September 2010).

<sup>12</sup> In 2009 the Government released exposure draft legislation on proposed reforms to Australia's extradition and mutual assistance in criminal matters laws. The *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill* proposed a number of amendments to the *Extradition Act 1988* (Cth) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

<sup>13</sup> Coroner of Western Australia, *Record of Investigation into Death of Ian Ward*, 9/09, p 5 and 130.

<sup>14</sup> Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2006-2007*. At <http://aihw.gov.au/publications/juv/jjia06-07/jjia06-07.pdf> (viewed 27 May 2009), quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009*, p 6.

<sup>15</sup> Western Australia Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Hakea Prison*, Report No. 63, April 2010, p vii. At <http://www.custodialinspector.wa.gov.au/download.cfm?downloadfile=43C3FA9D-E7F2-2F96-39A0B471AB909696> (viewed 13 August 2010).

<sup>16</sup> Australian Human Rights Commission, *Taking stock of Australia's human rights record - Submission by the Australian Human Rights Commission under the Universal Periodic Review process*, fn [54]. At [http://www.humanrights.gov.au/upr/upr\\_submission2010.html](http://www.humanrights.gov.au/upr/upr_submission2010.html) (viewed 13 August 2010).

<sup>17</sup> Western Australia Office of the Inspector of Custodial Services, note 15, p 6.

<sup>18</sup> Natalie Craig, 'Sex slave victim wins abuse claim', *The Age*, 29 May 2007.

<sup>19</sup> E Broderick and B Byrnes, *Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's international human rights obligations?* (Speech delivered at Workshop on Legal and Criminal Justice Responses to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University, 9 November 2009), 74.

<sup>20</sup> See Elizabeth Broderick, 'Slavery in the 21<sup>st</sup> Century, A human Rights Challenge' (Speech presented at the Australian Human Rights Commission, 16 October 2008).

<sup>21</sup> Professors Richard Harding and Neil Morgan, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, 2008.