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Dear Human Rights Branch

Re: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Thank you for the opportunity to make this short submission on whether Australia should accede to the Optional Protocol. We strongly believe that becoming a party to the Optional Protocol will enable Australia to better fulfil its obligations under the 1984 Convention against Torture and to prevent and remedy instances of torture or cruel, inhuman or degrading treatment which may occur in Australian detention facilities.

A. The Need for Ratifying the Optional Protocol

The deprivation of liberty experienced by detainees, their submission to the exclusive control of the authorities, and the limited links of detainees to the outside world create a heightened risk of torture or cruel, inhuman or degrading treatment. Australia should adopt the Optional Protocol because the complementary regime of national and international supervision mechanisms under the Protocol, and the consequent increase in transparency, will help to prevent torture and ill-treatment in the places where it occurs most frequently and invisibly.

The Protocol is not only targeted at States where abuses in custody are flagrant, but aims to enhance supervision and oversight of detention in all States. Independent, expert, external supervision can assist every State in identifying systemic problems in detention, preventing abuse, and improving detention practices. External controls act as a deterrent, allow for interaction with the outside world (that engenders normalcy into an abnormal existence) and leads to constructive recommendations that can be implemented by the authorities.

The inspection mechanism is a non-threatening, constructive, dialogic process which does not undermine Australian sovereignty, but is rather an expression of it. Adopting the Protocol would be a signal by Australia that it is committed to the eradication of torture, even at home, in a time when the prohibition on torture has come under pressure in the 'war on terror'. The Protocol's emphasis on prevention augments the Torture Convention's remedial focus.

B The Meaning of Cruel, Inhuman or Degrading Treatment

Torture is rare in Australian detention facilities, although its occurrence can never be ruled out. More likely are cases of cruel, inhuman or degrading treatment. Whether an act constitutes ‘cruel, inhuman or degrading’ treatment is relative, as it depends on all the circumstances of the case and the nature and context of the treatment at issue.¹ The leading decision from the European Court of Human Rights elucidated the following test:

Ill treatment must attain a minimum level of severity if it is to fall within the scope of [the right]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim.²

Inhuman and degrading treatment is authoritatively explained by the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHR 1, 33, at para 52:

Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading ...

C. Areas of Possible Ill-Treatment in Australian Detention

This submission does not seek to determine whether particular factual situations in Australia, past or present, amount to cruel, inhuman or degrading treatment or punishment. However, the next section draws on the jurisprudence to suggest those areas of detention or policy which are most likely in practice to give rise to ill-treatment in individual cases.

1. Immigration Detention and Mental Illness

In the case of *C v Australia*,³ the complainant claimed that Article 7 of the International Covenant on Civil and Political Rights (ICCPR) had been violated due to his mandatory detention in Australia, which caused significant mental illness. The court held in favour of the complainant. It was determined that the mental illness suffered was a direct result of his confinement.⁴ As a result of the Minister for Immigration's failure to use his exceptional power to release him from detention on medical grounds, the author's illness reached such a level of severity that irreversible consequences followed. Accordingly, the Committee held that the continued detention of the complainant, when the State party was aware of his mental condition and failed to take appropriate steps, was a violation of Article 7 of the ICCPR.

The majority's decision was linked to the finding that the detention was also *arbitrary* contrary to Article 9 of the Convention.⁵ In the case of *Williams v Jamaica*,⁶ the failure of a State party to provide medical treatment to redress the serious mental deterioration of a death row detainee also constituted degrading treatment in breach of Article 7.

¹ *Regina v Secretary of State for the Home Department (Appellant) ex parte Adam (FC) (Respondent) Regina v Secretary of State for the Home Department (Appellant) ex parte Limbuela (FC) (Respondent)* at 54.

² *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A) [162].

³ *C v Australia*, Human Rights Committee, Communication No 900/1999.

⁴ *C v Australia*, Human Rights Committee, Communication No 900/1999 at para 8.4.

⁵ S Joseph, J Schultz and M Castan, *The ICCPR: Cases, Materials and Commentary* (2nd ed, 2003).

⁶ *Williams v Jamaica*, Human Rights Committee, Communication No 609/95.

2. *Children in Immigration Detention*

A HREOC report in 2004 argued that the process of detaining child asylum seekers contravened Article 37 of the 1989 Convention on the Rights of the Child.⁷ Detaining children for long periods of time places them at high risk of mental harm, particularly if unaccompanied minors are not housed appropriately (for example, where they are not segregated from adult detainees or not housed in gender appropriate conditions). A failure to remove children in these circumstances may amount to ‘cruel, inhuman or degrading treatment’.⁸ The incorporation of the principle of ‘last resort’ in the Migration Act amendments of 2005 in relation to child detainment has arguably not halted this problem.⁹

It should also be noted that the detention of adult immigration detainees in police remand centres or police stations, in circumstances where they are not separated from suspected criminals, may constitute cruel, inhuman or degrading treatment in certain circumstances.

3. *Prison Conditions*

The problem of overcrowding in Australian prisons remains salient along with the issues of physical restraint causing pain and humiliation, use of force in a degrading manner and intimidation of inmates.¹⁰ These issues are currently unmonitored by HREOC and thus may benefit significantly from an independent monitoring mechanism. Another concern relates to the conditions in “super-maximum” prisons where detainees are subjected to isolation periods, which may have a detrimental effect on their mental health.

4. *Adequate medical care/Mental health issues*

Other circumstances that may be deemed ‘cruel, inhuman or degrading treatment’ include a failure to provide adequate medical care or psychiatric care in the case of mental illness.¹¹ The protection of the rights of mentally ill persons whilst incarcerated may also prove to be an issue, given that they may be subjected to segregation from other inmates. The use of solitary confinement leads to the increased risk of suicide attempts. Prolonged solitary confinement itself may amount to ‘cruel, inhuman or degrading treatment’. Monitoring through routine assessments is a crucial part of providing adequate health and mental health care to detainees.

5. *Disproportionate incarceration of Indigenous Australians*

Socio-economic factors have led to a disproportionate representation of indigenous Australians in the criminal justice system.¹² There has also been an increase in the number of indigenous women and children in custody. In order to lower the levels of Aboriginal deaths in custody, it would be necessary to reduce the rates of arrest, detention and imprisonment of indigenous Australians. A large number of Aboriginal deaths in custody remain unexplained, and some cases may involve cruel, inhuman or degrading treatment.

⁷ HREOC, *A Last Resort? The Report of the National Inquiry into Children in Immigration Detention* (2004).

⁸ HREOC, *Comments on Australia’s Compliance with the Convention against Torture and Cruel, Inhuman and Degrading Treatment*, February 2007.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

6. Remand for terror-related offences

Reports have indicated that harsh conditions have been experienced by those unconvicted remand prisoners in detention who have been charged with terror-related offences. Under the regime, an individual can be held for up to 48 hours on virtually untested information, with limited outside contact and no avenue of appeal. Given their status of ‘accused’ as opposed to ‘convicted’, this treatment may be seen as degrading without appropriate segregation and treatment suitable to their status.¹³

7. Increased powers of ASIO

The increased powers of ASIO, which allow for prolonged periods of renewable detention, pose difficulties of adequate representation and access to recourse mechanisms in relation the legality of the detention,¹⁴ and the secrecy of detention may encourage ill-treatment.

8. Anti-Terrorism Act (No 2) 2005 (Cth)

The inability to access an appropriate recourse mechanism such as judicial review and the covert nature of preventive detention and control orders may infringe on human rights such as the right to a fair trial and other procedural guarantees.¹⁵ Such measures are conducive to creating conditions of abuse in detention unless stronger safeguards are put in place.

9. Training of enforcement/military personnel

A lack of understanding by personnel of the Convention against Torture as well as cognisance of their obligations may contribute to the occurrence of torture and ill-treatment.¹⁶ This may also be exacerbated by inadequate or a lack of *regular* training. In order for such training to be successful, monitoring and evaluation is a crucial step in the process.

10. Women in prison

Women in prison present a number of health issues. Mental health in particular is most prominent, with women labelled as having an intellectual, psychiatric or learning disability more likely to be classified as maximum-security prisoners. The systemic discrimination may also constitute ‘cruel, inhuman or degrading treatment’.¹⁷ Women experience a lack of access to health care, routine strip searches, detention of low security offenders in high security facilities, oppressive discipline, restrictive visitation and an overrepresentation of women from cultural, ethnic and religious minorities as well as indigenous women.¹⁸

¹³ Committee against Torture, 40th Session, 28 April-16 May 2008: *Consideration of Reports submitted by States and Parties under Article 19 of the Convention: Concluding observations of the Committee against Torture*.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Human Rights Law Resource Centre, *Australia’s Compliance with the Convention against Torture: Report to the UN Committee against Torture*, April 2008.

¹⁸ Ibid.

11. *Conditions of Detention Generally*

In *Vuolanne v Finland*, the HRC stated that ‘degrading treatment’ must entail more than the mere deprivation of liberty.¹⁹ In *Diedrick v Jamaica*, the complainant was locked in his cell for twenty-three hour days, without mattress or bedding, natural light, recreational facilities or adequate medical care.²⁰ The HRC found this treatment was ‘cruel and inhuman’.

However, in *Jensen v Australia*²¹ the UNHRC responded to the complainant’s contention of violation of Article 7 stating that conduct must demonstrate an additional exacerbating factor beyond the usual incidents of detention. The complainant failed to show that he had been treated in a way which departed from the normal treatment accorded to a prisoner.²²

As noted in *C v Australia*, violations have been found in the following detention situations: direct assaults on persons, harsh conditions of detention, imposition of extended solitary confinement and inadequate medical and psychiatric treatment for detainees, with examples being administering severe corporal punishments (amputation, castration, sterilization, blinding and so forth), systematic beatings, electro shocks, burns, extended hanging from hand and/or leg chains, standing for great lengths of time, threats, detaining people bound and blindfolded, subjecting detainees to cold, giving detainees little to eat, detaining people *incommunicado*, as well as aggravated forms of carrying out a death sentence.²³ Denying prisoners the most basic necessities would also be cruel, inhuman or degrading.²⁴ In cases of alleged degrading treatment the subjective intention of those responsible for the treatment (whether by action or inaction) will often be relevant.²⁵

In *Limbuela*, the UK House of Lords noted that degrading treatment was also found by the ECHR in *Iwanczuk v Poland* (2001) 38 EHRR 148, where a remand prisoner, wishing to exercise his right to vote in parliamentary elections, was made to strip naked in front of a group of prison guards so as to cause him feelings of humiliation and inferiority (a finding to be contrasted with the court’s rejection of the article 3 complaint in *Raninen v Finland* (1997) 26 EHRR 563, where the complainant had been handcuffed unjustifiably and in public but not with the intention of debasing or humiliating him and not so as to affect him sufficiently to attain the minimum level of severity).²⁶

12. *Incommunicado Detention*

The issue of *incommunicado* detention is deemed to be an aggravated form of detention whereby a detainee may not necessarily be in solitary confinement, yet is denied access to family and friends. In *Polay v Peru*, detention *incommunicado* for one year constituted ‘inhuman treatment’.²⁷ In the case of *Shaw v Jamaica* eight months of detention *incommunicado* in overcrowded, damp conditions constituted ‘inhuman and degrading treatment’.²⁸ In Australia, ASIO detention may verge upon *incommunicado* detention.

¹⁹ *Vuolanne v Finland*, Human Rights Committee, Communication No 265/87 at para 9.2.

²⁰ *Diedrick v Jamaica*, Human Rights Committee, Communication No 619/95 at para 9.3.

²¹ *Jensen v Australia*, Human Rights Committee, Communication No 762/97.

²² *Jensen v Australia*, Human Rights Committee, Communication No 762/97 at para 6.2.

²³ See *Carballal v. Uruguay* No. 33/1978; *Massiotti v. Uruguay* No. 25/1978; *Bequio v. Uruguay* No. 88/1981; *Cariboni v. Uruguay* No. 159/1983; and *Portorreal v. Dominican Republic* No. 188/1984.

²⁴ *Regina v Secretary of State for the Home Department (Appellant) ex parte Adam (FC) (Respondent) Regina v. Secretary of State for the Home Department (Appellant) ex parte Limbuela (FC) (Respondent)* at para 7.

²⁵ *Ibid* at para 94.

²⁶ *Ibid* at para 95.

²⁷ *Polay v Peru*, Human Rights Committee, Communication No 577/94 at para 8.6

²⁸ *Shaw v Jamaica*, Human Rights Committee, Communication No 704/97 at para 7.1.

13. Extraterritorial Detention


Obligations under the Optional Protocol apply wherever Australian authorities exercise 'jurisdiction and control' (article 4), which would include the exercise of control over persons in Australian custody or detention facilities overseas.

This would, for instance, include persons detained by Australian forces in security operations in (for instance) Iraq, Afghanistan, and the Solomon Islands, and on board Australia warships including outside Australian territorial waters.

Control is a question of degree; but ordinarily the fact of Australian custody of a person would be sufficient to ground jurisdiction and control, and Australian detention practices abroad should be considered subject to the Optional Protocol regime.

Please be in touch if you require any further information.

Yours sincerely



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