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Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

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# INTRODUCTION

Amnesty International submits this briefing to the United Nations (UN) Committee against Torture (the Committee) ahead of its examination of Australia's fourth and fifth combined periodic report on the implementation of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention or UN Convention against Torture), in November 2014. This document highlights Amnesty International's ongoing concerns in relation to Australia's implementation of the Convention. In particular, Amnesty International is concerned by Australia's failure to fully comply with its obligations under articles 2, 3, 10, 11, 12, 14 and 16 of the Convention.

This submission is broadly structured around thematic concerns which respond to the List of Issues Prior to Reporting and Australia's fourth and fifth periodic reports. The first section outlines ongoing concerns relating to the treatment and detention of asylum seekers, including heightened risks of refoulement; the continuing policy of mandatory detention; the recommencement of offshore processing; indefinite detention of asylum seekers with negative security assessments; the removal of a complementary protection scheme and the lack of procedural fairness. The second section highlights concerns relating to Indigenous justice, particularly the over-representation of Indigenous people in juvenile and adult prisons, the lack of independent oversight in relation to allegations of police use of force, substantial funding cuts to legal services and the use of conducted energy devices (CEDs, also known as Tasers). Finally the report addresses additional concerns in relation to reduced funding for the Australian Human Rights Commission (AHRC) and Australia's delays in ratifying the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

## ASYLUM SEEKERS

Amnesty International has raised concerns that the Australian government's approach to asylum seekers who arrive in Australia by boat breaches international human rights standards.<sup>1</sup> Both former and current governments have maintained the harsh policies designed to deter so-called 'irregular maritime arrivals'.<sup>2</sup>

### REFOULEMENT (ARTICLE 3)

Australia's asylum seeker policies and practices fail to conform to its obligations under the Convention. Despite the Australian government's assurance that "a person will not be removed to a place where they face a real risk of harm in breach of Australia's *non-refoulement* obligations",<sup>3</sup> successive governments have introduced and maintained policies which fail to provide adequate measures to ensure the

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<sup>1</sup> 'Amnesty International's report on immigration detention conditions –October 2010,' Amnesty International, 3 November 2010, <http://www.amnesty.org.au/images/uploads/ref/Australia-immigration-detention-conditions-oct2010.pdf>; 'Submission to the UN Universal Periodic Review,' Amnesty International, January 2011,

<sup>2</sup> The Australian Government defines irregular arrivals as people who enter Australia without authority, for example with fraudulent or no documents, or who engage people smugglers to facilitate their entry to Australia. In practice this refers to those asylum seekers who arrive in Australia by boat. See p84, <http://www.immi.gov.au/media/publications/statistics/immigration-update/australian-migration-trends-2011-12.pdf>; Minister the Hon Scott Morrison, 'End of taxpayer funded immigration advice to illegal boat arrivals saves \$100 million', Minister for Immigration and Border Protection, 31 March 2014, <http://www.minister.immi.gov.au/media/sm/2014/sm213047.htm>.

<sup>3</sup> CAT/C/AUS/4-5, par 145.

principle of non-refoulement is respected.

The failure of Australia to uphold fair and thorough refugee status determination procedures has resulted in serious breaches of Australia's non-refoulement obligations under Article 3 of the Convention.

## RETURNS

Amnesty International has significant concerns that the Australian government takes insufficient measures to ensure it upholds its non-refoulement obligations when returning asylum seekers to their country of origin both involuntarily and voluntarily.

Disturbingly, a 2011 media investigation found that at least 20 Afghan asylum seekers voluntarily returned from Australia, had been killed in their homeland, others had fled again to Australia or other countries, and others remained in hiding.<sup>4</sup>

In 2013 the Australian Federal Court ruled that a government decision to deport a Hazara man to Afghanistan was unlawful, due to an inappropriate standard of proof forming the basis of the decision. Had the man been returned, his removal from Australia to Afghanistan likely would have resulted in a breach of Australia's non-refoulement obligations.<sup>5</sup>

In late August 2014, the Australian government forcibly returned for the first time, a Hazara asylum seeker to Afghanistan on the basis of a Refugee Review Tribunal (RRT) decision that the man's home district of Jaghori was safe for Hazaras.<sup>6</sup> Reports in October 2014 suggest that within a month of his deportation the man was abducted and tortured by the Taliban while travelling between Kabul and Jaghori.<sup>7</sup> After two days of torture the man escaped from his captors but has not been able to reunite with his family due to the extreme risk of recapture and further torture on the road between Kabul and Jaghori.<sup>8</sup>

Amnesty International has expressed serious concern that asylum seekers will be returned by Australian authorities to Iraq and Syria.<sup>9</sup> This follows the publication of leaked emails from Department of Immigration and Border Protection officials, strongly encouraging Syrian asylum seekers in Australia's offshore detention centres to return to Syria.<sup>10</sup> Under international law, the pressuring of asylum seekers to return to countries where their lives or freedoms are at risk constitutes constructive refoulement and can never be considered a voluntary return. Amnesty International considers that all Syrian asylum

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<sup>4</sup> Ben Doherty, 'Australia forcibly deports, for the first time, Afghan asylum seeker,' Sydney Morning Herald, 26 August 2014, <http://www.smh.com.au/national/australia-forcibly-deports-for-first-time-afghan-asylum-seeker-20140827-108oms.html>

<sup>5</sup> Minister for Immigration and Citizenship v SZQRB (includes Corrigendum dated 22 March 2013) [2013] FCAFC 33 (20 March 2013).

<sup>6</sup> Ben Doherty, 'Australia forcibly deports, for the first time, Afghan asylum seeker,' Sydney Morning Herald, 26 August 2014, <http://www.smh.com.au/national/australia-forcibly-deports-for-first-time-afghan-asylum-seeker-20140827-108oms.html>.

<sup>7</sup> Abdul Karim Hekmat, 'Taliban tortures Abbott government deportee,' The Saturday Paper, 4 October 2014, <http://www.thesaturdaypaper.com.au/news/politics/2014/10/04/taliban-tortures-abbott-government-deportee/14123448001068#.VDXHXWeSwZ>.

<sup>8</sup> Ibid.

<sup>9</sup> 'The 'choice': rights abused in warzone or Australian run detention centre,' Amnesty International Australia, 20 August 2014, <http://www.amnesty.org.au/news/comments/35337/>.

<sup>10</sup> 'Australia going to "unthinkable" lengths to return Syria detainees emails show,' The Guardian, <http://www.theguardian.com/world/2014/aug/19/australia-going-to-unthinkable-lengths-to-return-syria-detainees-emails-show>, 19 August 2014.

seekers are prima facie entitled to international protection.<sup>11</sup>

#### ENHANCED SCREENING

In October 2012 the then Australian government introduced a policy of 'enhanced screening' – used particularly for those seeking asylum by boat from Sri Lanka. This process subjects asylum seekers to an extremely brief, rudimentary screening interview immediately after disembarking their vessel. The interview poses basic questions about the reason they have travelled to Australia. Many people are 'screened out' after this short interview and face immediate involuntary return to their country of origin. This process circumvents Australia's refugee status determination and complementary protection processes – abrogating Australia's obligation to adequately assess the potential harm faced by asylum seekers on return,<sup>12</sup> and inevitably increasing the risk of refoulement.

Indeed, as a result of this process, a large number of asylum seekers have been returned to Sri Lanka, despite mounting international acknowledgement of ongoing human rights violations in that country.<sup>13</sup> There have been reports of asylum seekers returned by Australia to Sri Lanka being imprisoned and tortured.<sup>14</sup> Both the former and current Australian governments have denied that the Rajapaksa regime is engaged in any ongoing human rights violations in Sri Lanka. However, the UN High Commissioner for Human Rights, after a visit to Sri Lanka in August 2013, expressed concerns that the country is becoming increasingly authoritarian, with critics of the government routinely facing threats, intimidation and harassment.<sup>15</sup> Amnesty International submitted a briefing to the UN Human Rights Committee in October 2014 in advance of its review of Sri Lanka which describes pervasive use of torture and other ill-treatment.<sup>16</sup>

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<sup>11</sup> Since at least October 2013, UNHCR has considered that most Syrians are entitled to protection under the Refugee Convention: "UNHCR considers that most Syrians seeking international protection are likely to fulfil the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention relating to the Status of Refugees, since they will have a well-founded fear of persecution linked to one of the Convention grounds. For many civilians who have fled Syria, the nexus to a 1951 Convention ground will lie in the direct or indirect, real or perceived association with one of the parties to the conflict. In order for an individual to meet the refugee criteria there is no requirement of having been individually targeted in the sense of having been "singled out" for persecution which already took place or being at risk thereof. Syrians and habitual residents of Syria who have fled may, for example, be at risk of persecution for reason of an imputed political opinion because of who controls the neighbourhood or village where they used to live, or because they belong to a religious or ethnic minority that is associated or perceived to be associated with a particular party to the conflict." UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update II*, 22 October 2013, <http://www.refworld.org/docid/5265184f4.html>, para. 14.

<sup>12</sup> See: 'Tell me About: the 'Enhanced Screening Process,' Australian Human Rights Commission, <https://www.humanrights.gov.au/sites/default/files/document/publication/enhanced-screening.pdf>.

<sup>13</sup> '20 Sri Lankans sent home from Christmas Island,' ABC News, 4 April 2013, <http://www.abc.net.au/news/2013-04-04/20-sri-lankans-sent-home-from-christmas-island/4609034>; Ben Doherty, 'Asylum seekers return to living hell,' 24 July 2012, <http://www.smh.com.au/national/asylum-seekers-return-to-living-hell-20120723-22kq6.html>; Heather Ewart, 'Man claims rape and torture upon return to Sri Lanka,' 25 April 2013 <http://www.abc.net.au/news/2013-04-24/sri-lankan-details-claims-of-rape-and-torture-by-army/4649954>; Cassandra Hill, 'Asylum seekers: No changes after Sri Lanka detention report,' SBS News, 28 February 2013, <http://www.sbs.com.au/news/article/1741944/Government-unmoved-by-Tamil-torture-allegations>; 'Australia must not deport asylum seekers to possible torture without due process,' Human Rights Law Centre, 12 December 2012, <http://www.hrlc.org.au/australia-must-not-deport-asylum-seekers-to-possible-torture-without-due-process>.

<sup>14</sup> Ben Doherty, 'Asylum seekers return to living hell,' Sydney Morning Herald, 24 July 2012, <http://www.smh.com.au/national/asylum-seekers-return-to-living-hell-20120723-22kq6.html>; Heather Ewart, 'Man claims rape and torture upon return to Sri Lanka,' ABC News, 25 April 2013, <http://www.abc.net.au/news/2013-04-24/sri-lankan-details-claims-of-rape-and-torture-by-army/4649954>.

<sup>15</sup> Brad Adams, 'Letter to the Commonwealth Heads of Government on CHOGM meeting in Sri Lanka,' Human Rights Watch, 12 September 2013, <http://www.hrw.org/news/2013/09/12/letter-commonwealth-heads-government-chogm-meeting-sri-lanka>.

<sup>16</sup> Sri Lanka: Ensuring justice: Protecting human rights for Sri Lanka's future, ASA 37/011/2014, 7 October 2014, available at: <http://www.amnesty.org/en/library/info/ASA37/011/2014/en>

In November 2013 Amnesty International, Human Rights Watch, the Human Rights Law Centre, the Castan Centre for Human Rights and Australian Lawyers for Human Rights wrote an open letter to Australian Prime Minister Tony Abbott condemning his comments about the Sri Lankan Government's use of torture.<sup>17</sup> During a press conference in Sri Lanka, Prime Minister Abbott said that while the Australian government deplores any use of torture it "accepts that sometimes in difficult circumstances, difficult things happen".<sup>18</sup>

In July 2014 an asylum seeker vessel was intercepted at sea by Australian border protection officers who boarded the vessel to conduct an 'on water assessment' of the need for protection of the Sri Lankan asylum seekers on board. It is reported that enhanced screening interviews were conducted via telephone link with Immigration officials in Australia before all on board were returned to Colombo.<sup>19</sup> Of the 41 asylum seekers on board, only one was 'entitled to further refugee assessment' – it is reported that this person "voluntarily" returned to Sri Lanka alongside the other passengers.<sup>20</sup>

### TURNBACKS

One concerning element of the Australian government's 'Operation Sovereign Borders'<sup>21</sup> work is the turning back of asylum seeker vessels. This involves Australian Navy vessels intercepting boats carrying asylum seekers in Australian territorial waters and either escorting or towing the boats back into international waters. The purpose of the policy is to stop asylum seekers arriving in Australia by boat.

The government claims that turning back boats occurs only 'where it is safe to do so'.<sup>22</sup> However, there have been several 'turnbacks' to Indonesia where asylum seekers have been transferred onto lifeboats supplied by the Australian government when their initial vessel was deemed unsafe.<sup>23</sup> The lifeboats have then been left to return to the shores of Indonesia unaided and unmonitored.<sup>24</sup> While it is extremely difficult to know precise numbers given the government's policy not to comment of operations which occur 'on water', the Minister for Immigration and Border Protection has confirmed that 12 boats carrying 383 people were turned back at sea between 19 December 2013 and 20 May 2014 and that four of the 'turnbacks' involved the use of lifeboats.<sup>25</sup> The government is actively preventing asylum seekers who intend to claim asylum in Australia from reaching Australian shores, which is a flagrant breach of the ban on refoulement.

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<sup>17</sup> 'Re: Australia's commitment to the absolute prohibition against torture,' 26 November 2013, [http://www.hrlc.org.au/wp-content/uploads/2013/11/JointLettertoPMAbbottreTorture\\_26Nov2013.pdf](http://www.hrlc.org.au/wp-content/uploads/2013/11/JointLettertoPMAbbottreTorture_26Nov2013.pdf).

<sup>18</sup> 'Torture is never acceptable' Amnesty International Australia, 26 November 2013, <http://www.amnesty.org.au/news/comments/33473/>.

<sup>19</sup> Jared Owens, 'Asylum-seekers returned to Sri Lanka, Scott Morrison says,' The Australian, 7 July 2014, <http://www.theaustralian.com.au/national-affairs/immigration/asylumseekers-returned-to-sri-lanka-scott-morrison-says/story-fn9hm1gu-1226979966747>.

<sup>20</sup> 'Australian Government returns Sri Lankan people smuggling venture,' Minister for Immigration and Border Protection, 7 July 2014, <http://www.minister.immi.gov.au/media/sm/2014/sm216152.htm>.

<sup>21</sup> Operation Sovereign Borders is the government's 'military-led, border security operation supported and assisted by a wide range of federal government agencies. The OSB Joint Agency Task Force (JATF) has been established to ensure a whole-of-government effort to combat people smuggling and protect Australia's borders.' See: <http://www.customs.gov.au/site/operation-sovereign-borders.asp>.

<sup>22</sup> Latika Bourke & George Roberts, 'Immigration Minister Scott Morrison acknowledges asylum boat turn-backs as UN interviews asylum seekers,' ABC News, 18 March 2014, <http://www.abc.net.au/news/2014-03-18/morrison-acknowledges-asylum-boat-turn-backs/5327802>.

<sup>23</sup> James Glenday & Karen Barlow, 'Tamil Asylum Seekers instructed to drive lifeboats,' ABC News, 2 August 2014, <http://www.abc.net.au/news/2014-08-04/tamil-asylum-seekers-instructed-to-drive-lifeboats/5644602>.

<sup>24</sup> George Roberts, 'Another orange lifeboat carrying asylum seekers arrives on Indonesia's Java coast: military source,' ABC News, 25 February 2014, <http://www.abc.net.au/news/2014-02-25/another-orange-lifeboat-carrying-asylum-seekers-arrives-in-indo/5281484>.

<sup>25</sup> Minister for Immigration and Border Protection, 'A Year of Stronger Borders', <http://www.minister.immi.gov.au/media/sm/2014/sm217927.htm>, 18 September 2014.



## FAST-TRACK PROCESSING

On 25 September 2014 the Australian government introduced legislation which amends a range of elements of the refugee status determination process and the visas available to refugees. The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 seeks to establish a 'fast track' refugee status determination process.<sup>26</sup> This will apply to asylum seekers who are currently onshore and who arrived on or after 13 August 2012. The proposed system involves rudimentary administrative assessment of claims for protection. Timeframes for decision-making are extremely short, and merits review is strictly limited for asylum seekers who have their protection visa application rejected. For those applicants who lodge protection claims that the government considers to be 'unfounded', there will be no access to any form of merits review. It is expected that this fast track process, including basic screening and merits review will take place over approximately one month, at which point rapid deportation will occur.

The fast track process is a clear example of the erosion of due process and procedural fairness in Australian asylum seeker policy. Amnesty International holds grave concerns that the speed and lack of rigor of the proposed fast track process will result in incorrect decisions, insufficient merits review, arbitrary deportation, and ultimately, refoulement. Human Rights Watch reports that a similar system in place in the UK has led to severe adverse outcomes for women victims of abuse who struggle to articulate their claims for protection. It has also led to expert advice, medical reports and additional evidence being ignored.<sup>27</sup> In July 2014, UK's High Court found that the way the UK Government operates its Detained Fast Track asylum system is unlawful and 'carries an unacceptably high risk of unfairness'.<sup>28</sup>

## COMPLEMENTARY PROTECTION (ARTICLE 3 – LOIPR § 15(A) & (B)):

The *Migration Amendment (Complementary Protection) Act 2011* was passed in 2012, introducing, for the first time, a statutory process in Australia for the consideration of complementary protection claims. Amnesty International welcomed the legislation; although not representing international best practice for complementary protection, particularly in relation to stateless people, the law brought Australia closer in line with the international trend toward legislative frameworks for the consideration of complementary protection obligations. However, the *Migration Amendment (Regaining Control of Protection Obligations) Bill 2013* introduced to Parliament in December 2013 seeks to repeal the statutory complementary protection process. The bill passed the House of Representatives on 11 December 2013, and despite having entered the Senate on the same date, has not yet been voted on in the Senate chamber.

In addition, the *Migration Amendment (Protection and other Measures) Bill 2014*, introduced in June 2014 and currently before the Australian Senate, seeks to amend the 'test' for complementary protection to require any person who seeks protection to demonstrate that there is more than a 50% chance they will face harm.<sup>29</sup> On introducing the legislation, the Minister for Immigration and Border Protection said:

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<sup>26</sup> Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Australian Parliament,

[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5346](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5346).

<sup>27</sup> Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK, Human Rights Watch, 2010, p. 1, <http://www.hrw.org/sites/default/files/reports/uk0210webwcover.pdf>.

<sup>28</sup> 'Detention Action V Secretary of State for the Home Department: Summary of Judgement,' Detention Action, p1, <http://detentionaction.org.uk/wordpress/wp-content/uploads/2014/07/Detention-Action-DFT-Press-Summary.pdf>.

<sup>29</sup> Migration Amendment (Protection and Other Measures) Bill 2014: Explanatory Memorandum, Parliament of Australia, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5303\\_ems\\_6ab8fffb-a1dd-4ffa-b95a-2f5852a17590%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5303_ems_6ab8fffb-a1dd-4ffa-b95a-2f5852a17590%22).

"It is the government's position that the risk threshold applicable to the non-refoulement obligations under the Convention against Torture and the ICCPR is 'more likely than not.' 'More likely than not' means that there would be a greater than 50% chance that a person would suffer significant harm in the country they are returned to. Accordingly, this bill inserts a new section 6A into the Migration Act which makes it clear that this higher threshold is required to engage Australia's non-refoulement obligations. This is an acceptable position which is open to Australia under international law and reflects the government's interpretation of Australia's obligations."<sup>30</sup>

Amnesty International has serious concerns about both bills, which compromise Australia's complementary protection framework. Amnesty International has raised these concerns, as well as concerns about other measures, during the Senate Committee inquiries into both bills.<sup>31</sup>

Should the *Migration Amendment (Protection and other Measures) Bill 2014* pass the parliament, the Australian government will return any person who cannot meet the unfairly high standard of proof. Given the grave and potentially irreparable effects of torture, as well as the absolute and non-derogable nature of the international ban on torture, the correct standard of proof for refoulement to torture should be lower than the proposed threshold of "more likely than not." Numerous authoritative bodies, including the Committee Against Torture<sup>32</sup> and the Human Rights Committee<sup>33</sup> have specified that there must be "substantial grounds for believing" that the person would face a "real risk" of torture. As the Committee against Torture has explained, "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. The risk need not be highly probable, but it must be personal and present. In this regard, in its jurisprudence the Committee has determined that the risk of torture must be foreseeable, real and personal."<sup>34</sup> The real risk standard, as set out in international law, is lower than what has been proposed by the Australian government.

Additionally, Amnesty International takes issue with the Australian government's 'Human Rights Implications' analysis of this legislation, which is required to be included in the Explanatory Memorandum to any legislation introduced in parliament. This section, designed to provide a safeguard that all legislation complies with Australia's human rights obligations, appears to ignore clear issues of concern in order to allow the government to progress its deterrent policy agenda. It reads:

"The 'more likely than not' threshold reflects the Government's interpretation of Australia's obligations.

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<sup>30</sup> Minister the Hon Scott Morrison, Second Reading Speech: Migration Amendment (Protection and other Measures) Bill 2014, Parliament of Australia, 25 June 2014, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F0b40817f-a75a-4ce9-b4bd-0a2dcd932168%2F0021%22>.

<sup>31</sup> Amnesty International Submission to the Inquiry into Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, Senate Legal and Constitutional Affairs Committee, January 2014, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Migration\\_Amendment\\_bill/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Migration_Amendment_bill/Submissions); Submission to the inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, Amnesty International, 31 July 2014, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Protection\\_and\\_other\\_measures\\_bill/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Protection_and_other_measures_bill/Submissions).

<sup>32</sup> Committee Against Torture, General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22), U.N. Doc. A/53/44, annex IX at 52 (1998), [https://www1.umn.edu/humanrts/cat/general\\_comments/CAT\\_C1XX\\_Misc1\\_1997.html](https://www1.umn.edu/humanrts/cat/general_comments/CAT_C1XX_Misc1_1997.html), para. 6.

<sup>33</sup> Human Rights Committee, A.R.J. v. Australia, Communication No. 692/1996, 11 August 1997, U.N. Doc. CCPR/C/60/D/692/1996, para. 6.9; Human Rights Committee, G.T. v. Australia, Communication No. 7061/1996, 4 December 1997, U.N. Doc. CCPR/C/61/D/706/1996, para. 8.2.

<sup>34</sup> Committee Against Torture, C.T. and K.M. v. Sweden, Communication No. 279/2005, 17 November 2006, UN Doc. CAT/C/37/D/279/2005, para. 7.3.

As courts have applied a lower risk threshold that is inconsistent with this interpretation of Australia's obligations, it is necessary to give express legislative effect to this interpretation....While these amendments engage with Australia's non-refoulement obligations in relation to Article 3 of the CAT and Articles 6 and 7 of the ICCPR, the amendments seek only to clarify Australia's interpretation of these obligations in light of judicial decisions which interpreted the applicable risk threshold in a different manner. The amendments will not operate to deny Australia's protection to any person who engages Australia's non-refoulement obligations under international law."<sup>35</sup>

Amnesty International is concerned that the Australian government is distorting the 'Human Rights Implications' process in an attempt to justify amendments which clearly fail to meet Australia's international human rights obligations.

### **EFFECTIVE AND UNIFORM LEGAL SAFEGUARDS (ARTICLE 2 – LOIPR § 7(A))**

As of 31 March 2014, the Australian government removed access to the Immigration Advice and Application Assistance Scheme (IAAAS) for those asylum seekers who arrive by 'irregular' means. This removed all free professional assistance for the completion and submission of visa applications and claims for protection for asylum seekers who arrived by boat. This removal of service discriminates against those asylum seekers based on method of arrival and will undoubtedly affect the ability of asylum seekers to present their asylum claims comprehensively and accurately, thereby increasing risk of refoulement.

### **MANDATORY DETENTION FOR IRREGULAR MIGRANTS (ARTICLE 16 - LOIPR § 39):**

Australia's immigration detention regime for those asylum seekers who arrive in Australia by boat means is mandatory. Mandatory detention is arbitrary per se, because all such arrivals are detained, regardless of any individual considerations. While visa options are available to allow certain onshore asylum seekers to live in the community while their claims are processed, these visas are available only by Ministerial discretion.

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has specifically addressed the issue of Australia's obligation to asylum seekers, beyond preventing refoulement, in the following statement:

"international law requires that states entertain asylum claims and particularly not return anybody to a place where he or she could be tortured. But that doesn't mean that in the meantime they have to stay a long time in prison. Especially [sic] the physical and treatment conditions in the detention centres is [sic] not up to international standards."<sup>36</sup>

There are several 'cohorts' of boat arrivals who are subject to different treatment based on the time period in which they arrived.

Since 19 July 2013, with the exception of those cases where asylum seeker vessels are turned back at sea, all those who attempt to arrive in Australia by boat are detained initially in detention centres on Christmas Island before transfer to Manus Island, in Papua New Guinea or to Nauru. Under regional resettlement arrangements with those countries, these asylum seekers are then detained for the duration

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<sup>35</sup> Migration Amendment (Protection and Other Measures) Bill 2014: Explanatory Memorandum, Parliament of Australia, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5303\\_ems\\_6ab8fffb-a1dd-4ffa-b95a-2f5852a17590%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5303_ems_6ab8fffb-a1dd-4ffa-b95a-2f5852a17590%22).

<sup>36</sup> 'UN Torture Rapporteur concerned by Australia's treatment of asylum seekers,' Radio New Zealand International, 13 March 2013, <http://www.rnzi.com/pages/news.php?op=read&id=74638>.

of their processing, with no possibility of being settled in Australia.<sup>37</sup> In the 15 months since the first asylum seekers were sent to Manus Island under this arrangement, no one has been released from detention on Manus Island. This is despite completion of processing for many, and 'recommendations' having been made by Immigration officials that a number are refugees and entitled to protection and settlement.<sup>38</sup>

In August 2012, the then Australian government put in place the 'no-advantage' policy, which saw the deliberate halting of processing of all asylum claims for those who had arrived by boat means and were onshore in Australia.<sup>39</sup> Those detained onshore could be released from closed detention either into 'community detention' by Ministerial discretion or could apply for a 'bridging visa' which would allow for release into the community. Neither option allows a person to travel abroad or work. Those sent offshore were eligible for settlement in Australia if found to be refugees.

For those who arrived from 13 August 2012 to 19 July 2013, the majority were transferred from Christmas Island to either Australia's onshore detention network, or to Manus Island or Nauru where they faced mandatory detention.<sup>40</sup>

Australia's mandatory detention regime has been criticized by the UN High Commissioner for Human Rights who stated that "when detention is mandatory and does not take into account individual circumstances, it can be considered arbitrary, and therefore in breach of international law."<sup>41</sup> The UNHCR supported this statement when it found, after a visit to Manus Island, "that the current policy and practice of detaining all asylum-seekers on a mandatory and indefinite basis, without an individual assessment or possibility for review, amounts to arbitrary detention which is inconsistent with the obligations of both Australia and PNG under international human rights law."<sup>42</sup>

## TRAINING OF IMMIGRATION DETENTION OFFICIALS (ARTICLE 10 – LOIPR § 25)

Amnesty International has significant concerns relating to the conduct of staff in Australia's offshore immigration detention centres. The most extreme and significant case is that of the killing of Iranian detainee Reza Barati inside the Manus Island offshore detention centre – allegedly perpetrated by

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<sup>37</sup> Regional resettlement arrangement between Australia and Papua New Guinea, Australian Government Department of Foreign Affairs and Trade, 19 July 2013, <https://www.dfat.gov.au/geo/png/regional-resettlement-arrangement-20130719.html>; Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues, Australian Government Department of Foreign Affairs and Trade, 3 August 2013, <https://www.dfat.gov.au/issues/people-smuggling-mou.html>.

<sup>38</sup> Scott Morrison, 'A new force protecting Australia's borders,' 9 May 2014, <http://www.minister.immi.gov.au/media/sm/2014/sm214247.htm>.

<sup>39</sup> Transcript of Joint Press Conference, the Hon Julia Gillard PM, the Hon Chris Bowen MP, 13 August 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2280021%22>

<sup>40</sup> Alison Rourke, 'Australia to deport boat asylum seekers to Pacific islands,' The Guardian Australia, 13 August 2012, <http://www.theguardian.com/world/2012/aug/13/australia-asylum-seekers-pacific-islands>. After the 19 July 2013 announcement of the regional resettlement agreement, the majority of those held offshore prior to that we subsequently transferred back to Australia, to allow room for the post-19 July 2013 cohort in offshore detention centres.

<sup>41</sup> Navi Pillay, 'Statement by the United Nations High Commissioner for Human Rights, Navi Pillay,' United Nations Office of the High Commissioner for Human Rights, 25 May 2011, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11062&LangID=E>.

<sup>42</sup> 'UNHCR finds significant legal and operational inadequacies at Manus Island,' UNHCR Regional Office Canberra, 4 February 2013, [http://unhcr.org.au/unhcr/index.php?option=com\\_content&view=article&id=284&catid=35&Itemid=63](http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=284&catid=35&Itemid=63).

guards and welfare workers employed by contractors at the centre.<sup>43</sup> Evidence has been provided to a Senate Committee inquiry into the incident that the training delivered to contracted welfare staff is grossly inadequate.<sup>44</sup> A report commissioned by the Secretary of the Department of Immigration and Border Protection into the incident which led to Mr Barati's death recommended that the new security contract provider put in place comprehensive and on-going training for domestic PNG staff employed at the centre.<sup>45</sup>

A second tragic death of an asylum seeker detained at Manus Island detention centre, Iranian Hamid Kehazaei, occurred in September 2014. Mr Kehazaei contracted septicaemia at the Manus Island centre after cutting his foot.<sup>46</sup> After his condition deteriorated he was transferred initially to Port Moresby and then on to Australia on 27 August 2014, before passing away in Brisbane on 5 September 2014. Reports have indicated that Mr Kehazaei had been suffering with the infection for a week before he was transferred from Manus Island to Port Moresby.<sup>47</sup> The Queensland Coroner is investigating the causes of the death, with contributing factors reportedly including lack of specialist medical care for treatment of septicaemia, delays in transfer, a failure to adequately respond to the urgency of the situation and poor hygiene conditions in the Manus Island centre.<sup>48</sup>

The recent media reports of allegations of sexual abuse of women and children at the Nauru offshore detention centre are of serious concern to Amnesty International.<sup>49</sup> The Minister for Immigration and Border Protection has launched a departmental review into these allegations, while also announcing that the inquiry will investigate whether allegations were fabricated by asylum seekers and staff.<sup>50</sup> Amnesty International does not believe that these investigations should be held concurrently, and indeed the Minister's focus on undermining the credibility of those who have raised the allegations, rather than on the allegations themselves, is deeply worrying.<sup>51</sup>

## HUMAN RIGHTS PROTECTION OF STATELESS PERSONS (ARTICLE 2 – LOIPR § 11)

Australia's policy approach to stateless persons who seek protection in Australia does not offer adequate protection. Durable protection for stateless people can only be achieved at the sole discretion of the Minister for Immigration and Border Protection.

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<sup>43</sup> 'Head of global human rights movement calls on Australian, PNG governments to bring justice,' Amnesty International Australia, 14 March 2014, <http://www.amnesty.org.au/news/comments/34127/>.

<sup>44</sup> Committee Hansard, Senate Legal and Constitutional Affairs Committee inquiry into the Incident at the Manus Island Detention Centre from 16 to 18 February 2014, 12 June 2014, p. 36, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/ManuM\\_Island/Public\\_Hearings](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ManuM_Island/Public_Hearings).

<sup>45</sup> Robert Cornall AO, Review into the Events of 16-18 February 2014 at the Manus Regional Processing Centre, p.102, <https://www.immi.gov.au/about/dept-info/files/review-robert-cornall.pdf>

<sup>46</sup> 'Iranian asylum seeker Hamid Kehazaei died from rare bacterial infection from Manus Island: report', Sydney Morning Herald, 4 October 2014, <http://www.smh.com.au/nsw/iranian-asylum-seeker-hamid-kehazaei-died-from-rare-bacterial-infection-from-manus-island-report-20141004-10qa9h.html>

<sup>47</sup> 'Critically ill asylum seeker held on Manus for week: witness accounts', Sydney Morning Herald, 20 September 2014, <http://www.smh.com.au/federal-politics/political-news/critically-ill-asylum-seeker-held-on-manus-for-week-witness-accounts-20140919-10jgnx.html>

<sup>48</sup> 'Qld coroner to hold asylum seeker inquest', Courier Mail, 8 September 2014, <http://www.couriermail.com.au/news/breaking-news/qld-coroner-to-hold-asylum-seeker-inquest/story-fnihsfrf-1227051015813>

<sup>49</sup> 'Sexual abuse, rape threats alleged by Nauru asylum seekers', Sydney Morning Herald, 29 September 2014, <http://www.smh.com.au/federal-politics/political-news/sexual-abuse-rape-threats-alleged-by-nauru-asylum-seekers-20140929-10nlun.html#ixzz3FhHXWk00>.

<sup>50</sup> 'Independent Inquiry into 'Nauru allegations'', Minister for Immigration and Border Protection, 3 October 2014, <http://www.minister.immi.gov.au/media/sm/2014/sm218327.htm>

<sup>51</sup> 'Urgent investigation needed into claims of abuse of asylum seekers on Nauru', Amnesty International, 9 October 2014, <http://www.amnesty.org.au/news/comments/35744/>.

In 2012, in response to pressure to address this situation, the Department of Immigration released guidelines for officials assessing claims of statelessness. The guidelines acknowledge the unique circumstances faced by those who are stateless, but are non-binding and have done little in practice to resolve the situation of these refugees.

The creation of the Removal Pending Bridging Visa class does provide an avenue for *some* refugees in this situation to be released into the community and to work. However this visa does not offer a pathway to permanent protection, and does not include specific rights including family reunion. In reality there are still stateless people being detained indefinitely.

Legislation currently before the Australian Parliament may also have further negative implications for stateless people seeking protection in Australia. The *Migration Amendment (Protection and Other Measures) Bill 2014*<sup>52</sup> includes amendments to the Migration Act to the effect that asylum seekers who do not provide valid state-issued identification documents will receive an automatic rejection of their protection visa claim. The bill does acknowledge that some people may have a 'reasonable explanation' for their lack of original documentation, including statelessness. However no more details are provided in this legislation about what would ultimately be considered a 'reasonable' explanation and no specific protections are afforded stateless people.

Furthermore the government continues to indefinitely detain people who have been assessed to be refugees but who are unable to be released into community detention following a security assessment. These people have essentially been rendered stateless by the Australian government - unable to be returned to their country of origin yet not given protection in Australia. These individuals can remain in detention indefinitely because their refugee status determination (RSD) is never resolved. Further examination of those with adverse security assessment from ASIO is below.

#### EXCISED OFFSHORE PLACES (ARTICLE 16 – LOIPR § 40(A))

Christmas Island remains excised from the Australian migration zone under the *Migration Amendment (Excision from Migration Zone) Act 2001*. Asylum seekers who reach Australian territorial waters by boat are initially detained (often for long periods) at the detention centres on Christmas Island.

Further to this, on 16 May 2013, the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* passed the Australian parliament, expanding the excision zone to include the entire mainland. This removed any domestic legal impediment to transferring all asylum seekers offshore to Nauru, Manus Island or any other country designated for detention and refugee processing.<sup>53</sup>

#### “UNLAWFUL NON-CITIZENS” TO RESOLVE IMMIGRATION STATUS IN COMMUNITY RATHER THAN IN IMMIGRATION DETENTION (ARTICLE 16 – LOIPR § 42)

In October 2011, the then Australian government announced that it would begin to expand the use of bridging visas for asylum seekers who had arrived by boat.<sup>54</sup> Asylum seekers in detention who have passed initial health, identity and security checks are considered for release on bridging visas which allows them to live in the community while their applications are processed. While initially used for

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<sup>52</sup> Migration Amendment (Protection and other Measures) Bill 2014, [http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5303\\_first\\_reps/toc\\_pdf/14158b01.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5303_first_reps/toc_pdf/14158b01.pdf;fileType=application%2Fpdf)

<sup>53</sup> Karen Barlow, 'Parliament excises mainland from migration zone,' ABC News, 16 May 2013, <http://www.abc.net.au/news/2013-05-16/parliament-excises-mainland-from-migration-zone/4693940>.

<sup>54</sup> 'Government reverts to interim onshore processing,' ABC News, 13 October 2011, <http://www.abc.net.au/news/2011-10-13/government-to-process-asylum-seekers-onshore/3570236>.

single men, increasingly families are also being released on these visas. While the release of these individuals is clearly welcome, bridging visas of this kind do not allow the holder to work, and allow minimal financial support.<sup>55</sup>

Subsequent to this, as explored above, the then Australian government introduced the 'no advantage' rule, which saw the halting of processing of asylum claims – resulting in people living for extended periods in the community without permission to work and with extremely limited financial support. Currently there are approximately 24000 asylum seekers in the community on bridging visas whose claims are not being processed.<sup>56</sup>

## MINIMUM STANDARDS FOR THE CONDITIONS IN IMMIGRATION DETENTION (ARTICLE 11 – LOIPR § 32)

Amnesty International is deeply concerned about the wellbeing of those in detention both on and offshore, with recent reports of inadequate protection and support provided to those detained.

While Amnesty International welcomed the introduction in 2005 of Alternative Places of Detention (APODs) for children in immigration detention, a number of so-called APODs are in fact detention centres under a different name, and serious risks to children's mental and physical health remain. Serious recent concerns relate specifically to the APODs on Christmas Island, about which evidence of severe human rights violations has been delivered to AHRC inquiry. Reports highlight inadequate provision of medical and mental health services at these APODs resulting in significant harm to children.<sup>57</sup>

The MoUs establishing Australia's offshore detention centres and regional resettlement arrangements with Nauru and PNG include the commitment to "treat Transferees with dignity and respect and in accordance with relevant human rights standards."<sup>58</sup> However, evidence obtained by Amnesty International during the organization's inspection of the PNG OPC in November 2013 found that elements of detention in the centre violate the obligation to treat all persons in detention humanely. The combined effect of the conditions in detention, the open-ended nature of that detention, and uncertainty about their fates, amounts to cruel, inhuman, and degrading treatment or punishment of these asylum seekers. Moreover, some conditions of detention, particularly the housing of detainees in P Dorm, on their own violate the prohibition on torture and other ill-treatment.<sup>59</sup> Further, as highlighted above, the death of Reza Barati, a Faili Kurd from Iran, allegedly at the hands of those contracted to provide security and welfare support at the centre, demonstrates a clear breach of the obligation to treat detainees in accordance with human rights standards and a failure to adhere to minimum standards for

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<sup>55</sup> 'Fact Sheet 65 – Bridging Visas for Illegal Maritime Arrivals,' Department of Immigration and Border Protection, <https://www.immi.gov.au/media/fact-sheets/65onshore-processing-illegal-maritime-arrivals.htm>.

<sup>56</sup> 'Immigration Detention and Community Statistics Summary,' Department of Immigration and Border Protection, 30 April 2014, p.3, [http://www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-apr2014.pdf](http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-apr2014.pdf).

<sup>57</sup> Oliver Laughland, 'Christmas Island detainees stripped of basic medication, inquiry told,' Guardian Australia, 31 July 2014, <http://www.theguardian.com/world/2014/jul/31/immigration-department-detention-child-mental-health-inquiry>.

<sup>58</sup> Governments of Nauru and Australia, Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues, Department of Foreign Affairs and Trade, 3 August 2013, <https://www.dfat.gov.au/issues/people-smuggling-mou.html>; Governments of PNG and Australia, Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues, Department of Foreign Affairs and Trade, 6 August 2013, <https://www.dfat.gov.au/geo/png/joint-mou-20130806.html>.

<sup>59</sup> This is Breaking People: Human Rights Violations at Australia's asylum seeker processing centre on Manus Island PNG, Amnesty International, December 2013, p.3, [http://www.amnesty.org.au/images/uploads/about/Amnesty\\_International\\_Manus\\_Island\\_report.pdf](http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf).



treatment of detainees.<sup>60</sup>

Although Amnesty International has been denied access to the Nauru offshore detention centre, media reports including a leaked report of the 'Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Centre,' raise grave concerns. The leaked report highlights the complete absence of adequate protection from sexual abuse and communicable diseases in the Nauru detention centre, as well as an absence of pediatricians employed in the centre and no pediatric life support available on Nauru.<sup>61</sup> Further evidence provided to the AHRC Children in Immigration Detention inquiry highlighted that there are no *working with children* checks available on Nauru— meaning that none of the local staff employed at the centre have been assessed for appropriateness to work with minors.<sup>62</sup>

## DETENTION AS A LAST RESORT INCLUDING AND FOR THE SHORTEST PRACTICABLE TIME POSSIBLE (ARTICLE 16 – LOIPR § 41)

There are no legislated maximum time periods in Australia for immigration detention.

All people who have sought asylum in Australia by boat after 19 July 2013 have been transferred to Australian-run offshore detention centres on Nauru and Manus Island. While a number of detainees at the Nauru detention centre have been found to be refugees and released into the community; after more than a year, no one has been released from the centre on Manus Island.

Of particular concern are those individuals who have been found to be refugees, and who have received an 'adverse security assessment' from the Australian Security Intelligence Organisation (ASIO). In these cases, there is no statutory process for review of the national security allegations against them, nor any ability for them or their lawyers to access information relating to the assessment or to challenge it. These individuals are held in high security immigration detention indefinitely. There are 44 individuals currently in this situation and recent reports have shown that one in four of these cases has attempted or threatened suicide.<sup>63</sup> The United Nations Human Rights Committee has repeatedly found Australia to be in breach of its human rights obligations due to the indefinite detention of refugees with adverse security assessments.<sup>64</sup>

In 2012 the then Australian government established an Independent Review of Adverse Security Assessments, led by the Hon Margaret Stone, to "review ASIO adverse security assessments (ASAs) given to the Department of Immigration and Border Protection in relation to people who remain in immigration detention and have been found to:

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<sup>60</sup> This is Still Breaking People: Update on human rights violations at Australia's asylum seeker processing centre on Manus Island, Amnesty International Australia, May 2014, <http://www.amnesty.org/en/library/asset/ASA12/002/2014/en/29b79285-69ab-4c50-ba2d-14537452974f/asa120022014en.pdf>.

<sup>61</sup> Nauru Site Visit Report: 16-19 February 2014, Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Centre, <http://www.theguardian.com/world/interactive/2014/may/29/nauru-family-health-risks-report-in-full>.

<sup>62</sup> Rebecca Barret and Karen Barlow, 'Immigration detention inquiry: Government tried to cover up asylum seekers' mental health problems, inquiry told,' ABC News, 31 July 2014, <http://www.abc.net.au/news/2014-07-31/detention-centre-inquiry-hears-claims-of-immigration-cover-up/5637654>.

<sup>63</sup> Daniel Flitton & Marc Moncrief, 'Refugees' Mental Anguish in Australia's 'Guantanamo,' The Age, 25 August 2014, <http://www.theage.com.au/Federal-Politics/Political-News/Refugees-Mental-Anguish-In-Australias-Guantanamo-20140824-107dal.html>.

<sup>64</sup> 'Australia guilty of 143 human rights violations says UN body,' Amnesty International Australia, 22 August 2013, <http://www.amnesty.org.au/news/comments/32569/>.



- engage Australia's protection obligations under international law, and
- not be eligible for a permanent protection visa, or who have had their permanent protection visa cancelled."<sup>65</sup>

Amnesty International supports this reviewing mechanism which has led to a number of asylum seekers having their adverse security assessments overturned and being released from detention.<sup>66</sup> Amnesty International, the AHRC and other human rights and refugee advocates have urged the government to introduce statutory processes for the assessment and review of all cases such as these.

## LACK OF TRANSPARENCY

Amnesty International is concerned about the general lack of transparency around the Australian immigration detention policies. The organization was granted access to the Manus Island offshore detention centre in November 2013, but was only able to enter again in March 2014 after the death of Reza Barati with representatives from the PNG Court. Amnesty International has otherwise been denied all access to the Nauru offshore detention centre.<sup>67</sup>

The legislation which establishes the AHRC does not give the Commission jurisdiction outside of Australian territory. Therefore the Human Rights Commissioner, Gillian Triggs has been barred from travelling to either of the Australian-run OPCs on Nauru or Manus Island.

Amnesty International notes that the Australian government highlights 'visits by federal parliamentarians' as a method of maintaining transparency and adhering to human rights standards.<sup>68</sup> The organization further notes the recent denial of access to the Curtin Detention Centre of an Australian Greens Senator.<sup>69</sup>

## SHIRKING LEGAL RESPONSIBILITY

Successive Australian governments have made the argument that they hold no legal responsibility over asylum seekers detained offshore. It has been stated that "Australia does not see itself as having any legal responsibilities under the Convention after an asylum-seeker has been physically transferred to the territory of Nauru".<sup>70</sup> However, the UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment has specifically stated – while addressing the issue of countries like Australia declaring parts of their territory "international zones" – that "it is not decisive where the refoulement of an alien takes place but only whether it takes place in the exercise of effective control over the concerned person or territory."<sup>71</sup> The UNHCR explains that, "Australia may choose to transfer

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<sup>65</sup> 'Independent Reviewer of Adverse Security Assessments', Australian Attorney-General's Department, <http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx>

<sup>66</sup> 'Good news: Refugee family released after four years in detention,' Amnesty International Australia, 24 June 2013 <http://www.amnesty.org.au/refugees/comments/32132/>.

<sup>67</sup> 'Nauru's refusal of access to detention centre another attempt to hide conditions', Amnesty International Australia, 29 April 2014, <http://www.amnesty.org.au/news/comments/34423/>

<sup>68</sup> Australian CAT Report, Par 262.

<sup>69</sup> Karen Barlow, 'Greens Senator Sarah Hanson-Young denied access to Curtin Detention Centre to visit asylum seekers,' ABC News, 30 July 2014, <http://www.abc.net.au/news/2014-07-30/sarah-hanson-young-denied-access-to-curtin-detention-centre/5635690>.

<sup>70</sup> 'Response to Minister Bowen,' United Nations High Commissioner for Refugees, 2012, <http://unhcr.org.au/unhcr/images/120905%20response%20to%20minister%20bowen.pdf>.

<sup>71</sup> A/HRC/13/39/Add.5: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, UN Human Rights Council, 5 February 2010, <http://www.unhcr.org/refworld/docid/4d8726712.html>.

physically people to other jurisdictions, but we believe that under international law very clearly Australia is not absolved of its legal responsibilities to protect people through all aspects of the processing and solutions.<sup>72</sup>

## MENTAL HEALTH AND PSYCHIATRIC SERVICES IMMIGRATION FOR IMMIGRATION DETAINEES (ARTICLE 11 - LOIPR § 31)

Amnesty International has consistently voiced serious concerns about the detrimental effects of immigration detention on the mental health of detainees, including children in immigration detention.

Recent reports from Christmas Island have demonstrated that the incidence and severity of mental health issues amongst children in detention are disproportionately high.<sup>73</sup> Statistics published during the recent national Inquiry into Children in Immigration Detention have shown that of the 128 incidents of self-harm involving children Australia-wide, between January 2013 and March 2014, 62% of these incidents occurred in immigration detention.<sup>74</sup>

Additionally, Amnesty International has serious concerns about Australia's ability to fulfill its commitment to provide detainees with medical care commensurate with that available in the Australian community, particularly in offshore detention centres.<sup>75</sup> The leaked report of the 'Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Centre' showed a total absence of pediatricians at the centre and no pediatric life support throughout Nauru – despite all children who arrived in Australia by boat after 19 July 2013 being sent to that centre.<sup>76</sup> Amnesty International, when visiting the Manus Island offshore detention centre in November 2013, found that the medical services were extremely overstretched, with long delays for medical appointments.<sup>77</sup> On a return visit it was discovered that detainees had no access to a psychiatrist, and patients with severe mental health issues were being held in windowless shipping container accommodation and were observed at all times by security guards without clinical training.<sup>78</sup>

## CHILDREN HELD IN IMMIGRATION DETENTION (ARTICLE 16 - LOIPR § 43)

As at June 2014, there were 193 children in Nauru OPC and a further 169 on Christmas Island. The total number of children in immigration detention (or APOD) facilities both on and offshore was 573.

Amnesty International welcomed the announcement in August 2014 by the Minister for Immigration and Border Protection that all children under the age of 10 in onshore detention facilities would be

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<sup>72</sup> Alexandra Kirk, 'UN to play no part in Nauru, Manus Island centres,' ABC News, 24 August 2012, <http://www.abc.net.au/news/2012-08-24/unhcr-wont-play-part-in-offshore-processing/4220966>.

<sup>73</sup> Oliver Laughland, 'Christmas Island detainees stripped of basic medication, inquiry told,' Guardian Australia, 31 July 2014, <http://www.theguardian.com/world/2014/jul/31/immigration-department-detention-child-mental-health-inquiry>.

<sup>74</sup> Ibid.

<sup>75</sup> The contract between the Department of Immigration and Border Protection and the medical contractor at immigration detention centres onshore and offshore, IHMS, requires a level of medical care commensurate to that in the Australian community. See: 'Fact sheet 82: Immigration detention,' Department of Immigration and Border Protection, <https://www.immi.gov.au/media/fact-sheets/82detention.htm>.

<sup>76</sup> Nauru Site Visit Report: 16-19 February 2014, Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Centre, <http://www.theguardian.com/world/interactive/2014/may/29/nauru-family-health-risks-report-in-full>.

<sup>77</sup> This is Breaking People, p.52.

<sup>78</sup> This is Still Breaking People, p7.

released into the community on bridging visas.<sup>79</sup> This is a welcome first step in removing children from immigration detention. However, the omission of children over the age of ten in this announcement and those in Christmas Island or on Nauru means the vast majority of children who are currently in Australia's immigration detention centres will remain so.<sup>80</sup>

Amnesty International welcomed the AHRC National Inquiry into Children in Immigration Detention, which has highlighted some of the serious and long term impacts of immigration detention on children. The organization has made a submission to the inquiry, calling for the immediate cessation of any policy which places a child in immigration detention.

### ACCESS TO LEGAL ASSISTANCE AND JUDICIAL REVIEW FOR OFFSHORE DETAINEES (ARTICLE 3 – LOIPR § 16(C))

While some limited administrative assistance is provided to those seeking asylum in Offshore Processing Centres (OPCs) on Manus Island (Papua New Guinea – PNG) and Nauru, there is no reliable access to lawyers for detainees in offshore detention centres. Asylum seekers are transferred from Christmas Island to offshore centres on Manus Island and Nauru and have no access to legal assistance during that process.<sup>81</sup>

### CODE OF CONDUCT

Amnesty International is concerned that those asylum seekers who have been released into the community on bridging visas are required to sign a 'code of behavior'<sup>82</sup> that imposes limits on behaviour beyond laws that apply to normal Australian citizens. The code carries a threat that if an asylum seeker deviates from its requirements they can be sent to an offshore detention centre. Amnesty International is concerned that the code of behavior is being used by the Department of Immigration to dissuade any asylum seeker from speaking publicly about their situation.

### RECOMMENDATIONS

Amnesty International recommends that the Australian authorities:

Non-refoulement:

- Provide proper and effective assessment of all asylum claims, ensuring due process and procedural fairness, so as to guarantee non-refoulement, including ceasing 'enhanced screening'.
- Do not exercise any pressure on asylum seekers to return to their country of origin, in contradiction to the principle of non-refoulement, particularly asylum seekers from Iraq and Syria.
- Remove the Migration Amendment (Regaining Control of Protection Obligations) Bill 2013 and recommit to the statutory process for consideration of complementary protection claims.
- Remove the Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill

<sup>79</sup> The Hon Scott Morrison, 'Getting children safely out of detention,' Minister for Immigration and Border Protection, 19 August 2014, <http://www.minister.immi.gov.au/media/sm/2014/sm217171.htm>.

<sup>80</sup> 'Children in detention: Government takes a step in the right direction,' Amnesty International Australia, 19 August 2014, <http://www.amnesty.org.au/news/comments/35322/>.

<sup>81</sup> Amnesty International Australia, This Is Breaking People, November 2013, [http://www.amnesty.org.au/images/uploads/about/Amnesty\\_International\\_Manus\\_Island\\_report.pdf](http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf), pp. 63-64.

<sup>82</sup> Code of Behaviour for Bridging Visa E holders, Department of Immigration and Border Protection, <http://www.asrc.org.au/wp-content/uploads/2014/01/Code-of-Behaviour-Draft-29.01.14.pdf>.

2014 from the parliament and cease any plan to introduce a less rigorous refugee status determination process.

Remove the Migration Amendment (Protection and Other Measures) Bill 2014 from the parliament, and ensure no degradation of the test for harm under Australia's complementary protection obligations.

Legal safeguards:

- Restore the Immigration Advice and Application Assistance Scheme (IAAAS) for asylum seekers who arrive by boat, to provide adequate support for submission of claims.

Mandatory detention:

- Ensure that all laws, policies, practices, or agreements in Australia and regional processing countries do not undermine the obligation of all states to respect the principle of non-refoulement and the right not to be subjected to indefinite and/or mandatory detention.

Training for staff:

- Ensure and uphold quality training relating to all relevant human rights obligations for all staff and contractors at Australia's immigration detention facilities, both onshore and offshore.

Statelessness:

- Introduce a statutory process for the assessment of stateless persons that includes pathways to durable protection.
- Ensure that a person's statelessness does not adversely affect their asylum claim.
- End all practices which effectively sees the Australian authorities render those refugees who receive adverse security assessments from ASIO stateless and implement effective and humane alternative policies.

Excision:

- Rescind the policy of excision and reinstate Christmas Island and the Australian mainland to Australia's migration zone.

Length/conditions of detention:

- End the arbitrary detention of refugees with adverse security assessments and establish a statutory process for review of adverse security assessments of refugees by ASIO.
- Begin assessing the claims of asylum seekers onshore immediately and facilitate asylum seekers to reside in the community with permission to work while their claims are being processed.

Offshore processing:

- End offshore processing of asylum seekers and immediately close the Manus Island offshore detention centre and Nauru offshore detention centre.
- Transfer all asylum seekers detained in offshore detention centres to the Australian mainland for

processing.

- Commission independent investigations of all allegations of abuse in offshore detention centres.
- Until such time as offshore processing is ended, review the MOUs to ensure respect for human rights standards including independent oversight.

Legal avenues:

- Immediately ensure that all persons deprived of their liberty have access to an effective mechanism to challenge the lawfulness of their detention.
- Ensure that asylum-seekers and refugees – including those held offshore – have access to an effective remedy in Australian courts for any human rights violations they may have suffered while under the effective authority or control of Australian officials
- Facilitate, in collaboration with the Nauruan and PNG governments, visits of Offshore Processing Centres by domestic and international organizations with expertise in human rights.

# THE JUSTICE SYSTEM

## INDIGENOUS INCARCERATION (ARTICLE 11 – LOIPR § 28)

Statistics continue to demonstrate the disproportionate, increasing contact between Indigenous people and the criminal justice system in Australia. Indigenous people represent 2% of Australia's population, but Indigenous prisoners represent 27% of Australia's total prison population.<sup>83</sup> The figures are significantly higher for Indigenous youth who, in 2013 accounted for 51% of the national juvenile detention population,<sup>84</sup> making the rate of Indigenous juvenile incarceration 32 times the non-Indigenous rate, up from 27 times in 2008.<sup>85</sup> The Northern Territory is the Australian jurisdiction with the highest proportion of Indigenous prisoners, accounting for 89% of the total prison population.<sup>86</sup>

More than two decades have passed since the 1991 Royal Commission into Aboriginal Deaths in Custody which recommended diversionary tactics and changes in policing practices as measures to decrease the rate of Indigenous incarceration in Australia.<sup>87</sup> Though the rate of Indigenous deaths in custody has fallen since the report, increased incarceration of Indigenous people has meant that the absolute number of deaths has risen.<sup>88</sup> The inadequate implementation of recommendations from the 1991 Royal Commission, as well as from subsequent reports and findings, is contributing to the high

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<sup>83</sup> Prisoners in Australia, 2013, Australian Bureau of Statistics, 5 December 2013, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4517.0main+features62013>

<sup>84</sup> Youth detention population in Australia, Australian Institute of Health and Welfare 2013, p 5, <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393>

<sup>85</sup> Ibid, p 4.

<sup>86</sup> Ibid, p 51.

<sup>87</sup> Recommendations included (Rec 88): The examination, in collaboration with Aboriginal organisations, whether there is a sufficient emphasis on community policing. Including consideration of whether there is over-policing or inappropriate policing of Aboriginal people in any city or regional centre or country town; the policing provided to more remote communities is adequate and appropriate to meet the needs of those communities and, in particular, to meet the needs of women in those communities; and if there is sufficient emphasis on crime prevention and liaison work and training directed to such work. See: National Report: Royal Commission into Aboriginal Deaths in Custody, Commissioner Elliot Johnston 1991, Australia. <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/>

<sup>88</sup> Will Ockenden, "Growing number of Indigenous deaths in custody alarms Aboriginal leaders," ABC News, 24 May 2013, <http://www.abc.net.au/news/2013-05-24/death-in-custody-report-alarms-indigenous-leaders/4712056>.

contact rate between Indigenous people, particularly youth, and the justice system.

In 2009 the National Indigenous Law and Justice Framework was jointly released by Federal, State and Territory governments.<sup>89</sup> The Framework's goals included: improving all Australian justice systems to deliver on the needs of Aboriginal and Torres Strait Islander Peoples in a fair and equitable manner; reducing the over-representation of Indigenous offenders, defendants and victims in the criminal justice system; ensuring Indigenous people feel safe and are safe within their communities; increasing safety and reducing offending within Indigenous communities by addressing alcohol and substance abuse, and strengthening Indigenous communities through working in partnership with government and other stakeholders to achieve sustained improvements in justice and community safety.<sup>90</sup>

While each goal was accompanied by recommended strategies and actions for implementation, the Framework contained only non-binding principles of action, thereby acting as a guide or reference for jurisdictions, but with little power to implement its goals. Furthermore, the Framework was not accompanied by a budget or a program for implementation and as such little progress has been made.

The Western Australian government has been criticized for its policy requiring people to serve prison time for unpaid fines, with reports suggesting that one in seven admissions to Western Australian prisons are people who are paying off fines.<sup>91</sup> Given the high rates of poverty amongst Indigenous communities, this measure has had a disproportionate impact on Indigenous people.<sup>92</sup> In August 2014 a 22-year old Indigenous woman died in police custody in Port Hedland, Western Australia after spending four days in jail for an unpaid \$1000 fine.<sup>93</sup> The WA Coroner has confirmed that an inquest and internal police investigation will be conducted into the death of 'Ms Dhu', who died in hospital after complaining of extreme pain and vomiting. It is not yet known whether the cause of death was linked to incarceration; however the 1991 Royal Commission into Aboriginal Deaths in Custody specifically recommended that unpaid fines should be waived after five years and alternative sanctions should be identified rather than imposing custodial sentences.<sup>94</sup>

## OVERCROWDING IN CORRECTION FACILITIES (ARTICLE 11 – LOIPR § 29)

A 'tough on crime' approach by Australian jurisdictions has led to a drastic increase in the number of inmates in Australia's prisons. The Australian Bureau of Statistics has reported that prisoner populations increased across all jurisdictions (apart from Tasmania and Western Australia) between 2012 and 2013.<sup>95</sup>

Measures taken by governments to address prison overcrowding have varied slightly across jurisdictions however expansion of capacity has tended to be the first step taken to tackle the problem. In Western Australia, while there has not been an increase in prisoner population, the number of people in prison

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<sup>89</sup> National Indigenous Law and Justice Framework, Australian Government Attorney-General's Department, 2010, <http://www.ag.gov.au/LegalSystem/Legalaidprogrammes/NationalIndigenousLawandJusticeFramework/Documents/National%20Indigenous%20Law%20and%20Justice%20Framework.pdf>.

<sup>90</sup> Ibid.

<sup>91</sup> Amanda Banks, 'Thousands jailed to pay fines,' The West Australian, 14 June 2013, <https://au.news.yahoo.com/thewest/a/17597032/thousands-jailed-to-pay-fines/>.

<sup>92</sup> Gerry Georgatos, 'Unpaid fines destroy lives with jail time,' The Stinger Independent News, 26 August 2014, [http://thestringer.com.au/unpaid-fines-destroy-lives-with-jail-time-8337#.U\\_66a8WSx2Q](http://thestringer.com.au/unpaid-fines-destroy-lives-with-jail-time-8337#.U_66a8WSx2Q).

<sup>93</sup> 'Aboriginal woman who died in WA jail was there for an unpaid fine,' SBS News, 27 August 2014, <http://www.sbs.com.au/news/article/2014/08/26/aboriginal-woman-who-dies-wa-jail-was-there-unpaid-fine-0>

<sup>94</sup> Recommendations of the Royal Commission into Aboriginal Deaths in Custody, <http://www.alm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf>.

<sup>95</sup> Prisoners in Australia, 2013, Australian Bureau of Statistics, 5 December 2013, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0-2013-Main%20Features~Changes%20in%20the%20Prisoner%20Population~23#>.

remains high enough to result in overcrowding. To address this problem, the Western Australian government has committed to spending \$655 million on a prison infrastructure program which has added 640 places to three prisons: Hakea, Casuarina and Albany. A new prison costing \$150 million has been developed near Derby and two prison work facilities will be developed near Warburton and Wyndham at a cost of \$15.6 million and \$9.4 million respectively, housing a total of 27 prisoners'.<sup>96</sup>

Victoria has the fastest growing prison population in Australia with an increase of 9% in just one year.<sup>97</sup> The state government has been unable to accommodate this increase within existing facilities. As such, Victorian prisons have begun purchasing shipping containers in order to house prisoners. The Victorian state government has also designated funding for an additional 1400 male spaces. In 2012, 108 new medium-security prison spaces and 84 women's spaces were opened in the Dame Philips Frost Centre, as well as a new 118 space unit at Port Philip Prison. Planning and development is underway for a new men's prison in Melbourne West which will open in 2017.<sup>98</sup>

Further implementation of non-custodial detention programs would significantly aid a decrease in prison overpopulation across Australian jurisdictions. Rather than implementing penal sanctions that isolate individuals from the community, non-custodial sanctions such as community service orders (CSOs) would decrease prison populations whilst facilitating rehabilitation. However, such measures have been declining over the past 16 years; for example in New South Wales, where in 1997 5.44% of offenders received a CSO as a penalty, a figure which had decreased to 3.50% by 2012.<sup>99</sup>

With no specified timeframes for an individual to be tried, many of Australia's prisoners are in fact on remand. In June 2012, 23% of prisoners nationally were on remand awaiting trial.<sup>100</sup>

## MANDATORY SENTENCING (ARTICLE 11 - LOIPR § 30)

Despite repeated recommendations by the Committee, mandatory sentencing measures in Western Australia and the Northern Territory have not been abolished, but rather have been expanded.

In Western Australia the passing of the *Sentencing Legislation Amendment Bill 2013* further reinforced mandatory sentences for prescribed offences (notably assaults against police or other public officers) by legislating that the minimum mandatory sentence must be served before an individual is eligible for parole.<sup>101</sup> The introduction of the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* before the Western Australian parliament proposes further mandatory sentencing measures for certain serious offences committed in the course of an aggravated home burglary, including for juvenile offenders. Amnesty International is closely monitoring the progress of this Bill, which would expand mandatory sentencing to juvenile offenders and directly contradict the Western Australian government's

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<sup>96</sup> Justice and Community Safety in Western Australia: A call for efficient investment in effective outcomes, Western Australian Association for Mental Health (WAAMH), Western Australian Council of Social Service Inc (WACOSS) & Western Australian Network of Alcohol & other Drug Agencies (WANADA), February 2013, [http://www.wacoss.org.au/Libraries/z\\_eNews\\_304/Justice\\_and\\_Community\\_Safety\\_Report.sflb.ashx](http://www.wacoss.org.au/Libraries/z_eNews_304/Justice_and_Community_Safety_Report.sflb.ashx).

<sup>97</sup> Prisoners in Australia, 2013, Australian Bureau of Statistics, 5 December 2013, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4517.0main+features402013>.

<sup>98</sup> Department of Justice: Annual Report 2012-13, Government of Victoria, October 2013, <https://assets.justice.vic.gov.au/justice/resources/282ef677-f0b2-4aa5-a10a-2d1102fdcf0a/dojannualreport2013.pdf>.

<sup>99</sup> Sentencing - Patterns and Statistics: Companion Report 139-A, New South Wales Law Reform Commission, July 2013, <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/assets/lrc/m731654110/report%20139-a.pdf>.

<sup>100</sup> Value of a Justice Reinvestment Approach to Criminal Justice in Australia, Senate Legal and Constitutional Affairs References Committee, June 2013,

<http://www.alsnswact.org.au/media/BAhbBIsHOgZmSSiBezIwMTMvMDYvMjMvMTIfMzZfMTdfNtc4X2h0dHBfX193d3cuYXBocmVmLmFwaC5nb3YuYXVfc2VuYXRlX2NvbW1pdHRlZV9sZWdjb25fY3R0ZV9qdXN0aWNlX3JlaW52ZXN0bWVudF9yZXBvcnRfcmVwb3J0XzFfLnBkZgY6BkVU>

<sup>101</sup> Sentencing Legislation Amendment Bill 2013, Parliament of Western Australia, [http://www.parliament.wa.gov.au/Parliament/Bills.nsf/21FCEE8EA4542EC548257C37000EF518/\\$File/Bill056-1.pdf](http://www.parliament.wa.gov.au/Parliament/Bills.nsf/21FCEE8EA4542EC548257C37000EF518/$File/Bill056-1.pdf).

commitment to reduce youth incarceration.

The Northern Territory's *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* inserted five levels of violent offences and corresponding mandatory sentences into existing legislation, with minimum sentences ranging from 3-12 months. The Northern Territory has also introduced the *Alcohol Mandatory Treatment Act* which allows detention of an individual for mandatory rehabilitation rather than working to address alcoholism through voluntary, preventative and community based mechanisms. The Act has been identified as infringing on personal liberty and freedom of movement, and exceeding reasonable limits for health intervention while providing no measurable health outcomes.<sup>102</sup> The scheme has a disproportionate impact on Indigenous people and amounts to an alternative method of mandatory detention.<sup>103</sup>

High rates of recidivism in both Western Australia and the Northern Territory strongly indicate that mandatory sentencing and imprisonment are not functioning as effective deterrence measures, nor providing opportunities for rehabilitation.

## OVERREPRESENTATION OF INDIVIDUALS SUFFERING MENTAL ILLNESS IN PRISONS (ARTICLE 11 – LOIPR § 31)

Queensland, the Northern Territory and Western Australia continue to detain people with cognitive impairments in jails despite being assessed as unfit to plead. A significant number of these individuals are Indigenous and are detained, sometimes indefinitely, in prisons or psychiatric hospitals despite not having been convicted of or sentenced for a crime.<sup>104</sup> In the Northern Territory these individuals are detained in maximum security prisons.<sup>105</sup>

Indigenous disability advocates have argued that disability is being further criminalized as no government in Australia has addressed the implications of Foetal Alcohol Spectrum Disorder (FASD) for justice systems.<sup>106</sup> Advocates warn that many young people living with undetected or undiagnosed FASD will have early encounters with the criminal justice system and without prior intervention risk high rates of recidivism.<sup>107</sup> Indigenous children represent 65.2 % of all diagnosed cases of FASD in Australia.<sup>108</sup>

Two recent cases exemplify the issue of mentally impaired people being detained indefinitely without being found guilty. Rosie Fulton, a 24 year-old intellectually impaired Indigenous woman with FASD was incarcerated in Western Australia despite having no conviction recorded against her.<sup>109</sup> She was arrested after crashing a stolen car and spent 21 months in prison after a magistrate declared her unfit to stand trial. No alternative accommodation arrangement exists for cases such as Rosie Fulton's in Western Australia.

Marlon Noble, a mentally impaired Indigenous man, also from Western Australia, spent over a decade in

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<sup>102</sup> Six Month Review of the Alcohol Mandatory Treatment Act, Law Society Northern Territory, <http://lawsocietynt.asn.au/index.php/Latest-News/six-month-review-of-the-alcohol-mandatory-treatment-act.html>.

<sup>103</sup> Ibid.

<sup>104</sup> Aboriginal Disability Justice Campaign, People with Disability Australia, <http://www.pwd.org.au/what-we-do/aboriginal-disability-justice-campaign.html>.

<sup>105</sup> Ibid.

<sup>106</sup> Bridie Jabour, 'Disability 'criminalized' by treatment of foetal alcohol spectrum disorders,' The Guardian Australia, 13 August 2014, <http://www.theguardian.com/politics/2014/aug/13/disability-criminalised-treatment-foetal-alcohol-spectrum-disorders-australia>.

<sup>107</sup> Aboriginal Disability Justice Campaign: Issues in the Northern Territory, People with Disability Australia, <http://www.pwd.org.au/adjc/issues-in-the-northern-territory-adjc.html>.

<sup>108</sup> Ibid.

<sup>109</sup> John Stewart, 'Intellectually impaired Aboriginal woman Rosie Fulton to be freed after 21 months in jail with no conviction,' ABC News, 26 June 2014, <http://www.abc.net.au/news/2014-06-25/aboriginal-woman-in-jail-without-conviction-to-be-freed/5550790>.



prison for alleged sex crimes despite being assessed as unfit to stand trial.<sup>110</sup> Had he been prosecuted and sentenced he likely would have been eligible for parole after five years.<sup>111</sup> As a result of public pressure he was released in 2012 under strict conditions including being forced to undergo random drug tests and needing permission to spend one night away from his home.<sup>112</sup>

## DEATHS IN CUSTODY AND EXCESSIVE USE OF FORCE BY LAW ENFORCEMENT OFFICIALS (ARTICLES 12-14 – LOIPR § 35)

In January 2012 Terrence Briscoe, a 27-year old Indigenous man, was arrested in Alice Springs in the Northern Territory for being intoxicated. He died five hours later in the Alice Springs Watch House. Mr Briscoe was the fourth person to die in the Alice Springs Watch House in the last 15 years.<sup>113</sup>

A coronial inquest into Mr Briscoe's death found that he had most likely died from a combination of acute alcohol intoxication and asphyxiation.<sup>114</sup> CCTV footage from the Watch House showed Mr Briscoe falling over and being dragged across the floor of the Watch House reception area by police officers, who then left Mr Briscoe lying in the middle of the room while officers walked around him seemingly unconcerned.<sup>115</sup> The Watch House Commander cleaned up a blood smear on the floor from a laceration to Mr Briscoe's eye but did not provide him with first aid or direct junior staff to tend to him. Mr Briscoe was then carried face down, with blood dripping from the gash above his eye, and was placed face down on a mattress in a cell.<sup>116</sup>

In the moments before his death, the Coroner found that a number of prisoners in the cell diagonally opposite had heard him choking and gasping for air and had tried to attract the attention of police officers.<sup>117</sup> CCTV footage from the cell shows what the Coroner described as Mr Briscoe's 'harrowing to watch' attempts to move himself into a more comfortable position during which he fell several times and hit his head again. A police officer dismissed requests by prisoners in the opposite cell for him to be taken to hospital saying "you all carry on like this when youse are drunk" before walking off.<sup>118</sup>

The Coroner identified multiple failings on the part of individual officers, as well systemic failures which had been identified in previous inquests and therefore should have been remedied long before Mr Briscoe's death.<sup>119</sup> The Coroner acknowledged that a comprehensive review and a suite of reforms have been instituted by the Northern Territory Police following Mr Briscoe's death.<sup>120</sup>

Amnesty International was among many organizations to call for the Department of Public Prosecutions to investigate the death of Mr Briscoe and the officers involved after the Coroner's report was

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<sup>110</sup> Michael Brull, 'The sad story of Marlon Noble,' ABC Ramp Up, 9 December 2011, <http://www.abc.net.au/rampup/articles/2011/12/09/3387845.htm>.

<sup>111</sup> 'Marlon Noble,' ABC Radio National Law Report, 22 March 2011, <http://www.abc.net.au/radionational/programs/lawreport/marlon-noble/3007682#transcript>.

<sup>112</sup> Hayley Roman, 'Marlon Noble continues campaign for freedom,' ABC News, 8 May 2013, <http://www.abc.net.au/news/2013-05-08/marlon-noble-attends-film-of-incarceration/4676620>.

<sup>113</sup> Eric Tlozek, 'Coroner says NT Police failed to stop death in custody,' ABC News 13 June 2012, <http://www.abc.net.au/pm/content/2012/s3524531.htm?source=rss>.

<sup>114</sup> Ibid.

<sup>115</sup> Inquest into the death of Terrence Daniel Briscoe [2012], Northern Territory Department of Attorney-General and Justice, 17 December 2012,

[http://www.nt.gov.au/justice/courtsupp/coroner/documents/2012\\_findings/A00052012\\_Briscoe.pdf](http://www.nt.gov.au/justice/courtsupp/coroner/documents/2012_findings/A00052012_Briscoe.pdf).

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

released.<sup>121</sup>

In April 2012 Amnesty International expressed concern at the violent arrest of teenagers suspected of stealing a car in New South Wales.<sup>122</sup> Video footage of the incident, captured by onlookers, showed a police officer repeatedly beating an already restrained and wounded teenager who was bleeding profusely.<sup>123</sup> This followed a number of serious incidents involving use of force by the New South Wales Police which all need to be subject to independent investigations.

By May 2013 the New South Wales Ombudsman had completed its monitoring of the critical incident investigation. In accordance with the *Ombudsman Act 1974* the report could not be made public without prior consent from the Minister or head of the relevant authority, in this case the Minister for Police or Police Commissioner. Amnesty International wrote to the Premier, Police Minister and Police Commissioner requesting the report be made public, however it has not been published to date. This case is emblematic of the broader issue of a lack of systematic independent oversight for allegations of police brutality or failure to provide necessary duty of care.

### ACCESS TO JUSTICE AND LEGAL AID (ARTICLES 12-14 - LOIPR § 37)

Amnesty International joined other human rights and Indigenous organizations in criticizing the Federal government for cutting funding to Aboriginal Legal Services, Community Legal Centres, Legal Aid and Family Violence Legal Services.<sup>124</sup> In December 2013 the Federal government cut \$43.1 million in funding over four years to the four legal services, including \$13.4 million to Aboriginal and Torres Strait Islander Legal Services around the country.<sup>125</sup> Indigenous and legal advocates have expressed concern that the cuts will further impede access to justice for Indigenous people living in remote areas and dealing with serious criminal and family legal issues, and will also exacerbate the rate of Indigenous over-imprisonment.<sup>126</sup> The cuts come despite repeated parliamentary inquiries concluding that Indigenous legal services are significantly underfunded.

As part of these funding cuts, the National Aboriginal and Torres Strait Islander Legal Services, the national peak body for Aboriginal and Torres Strait Islander Legal Services will be completely defunded from 2015 onwards as well as all Law Reform and Policy Officer positions within each State and Territory.<sup>127</sup> The defunding of the national peak body and of state and territory based law reform and policy positions means governments and organizations across Australia will no longer have access to informed, evidence based frontline advice about how the Australian justice system impacts on Indigenous people.<sup>128</sup>

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<sup>121</sup> 'DPP's failure to investigate Briscoe's death: a blight on the justice system,' Amnesty International Australia, 10 January 2013, <http://www.amnesty.org.au/news/comments/30817/>; 'NT Minister's decision not to discipline officers a disgrace,' Australian Lawyers Alliance, 5 October 2012, <http://www.lawyersalliance.com.au/news/nt-ministers-decision-not-to-discipline-officers-a-disgrace-ala>.

<sup>122</sup> 'Urgent independent investigation needed for Kings Cross incident,' Amnesty International Australia, 23 April 2012, <http://www.amnesty.org.au/news/comments/28462/>.

<sup>123</sup> News.com.au, 'Video shows bloody ending to teen joyride in Kings Cross', 22 April 2012, <http://www.news.com.au/national/bloody-ending-to-teen-joyride-in-kings-cross/story-e6frkvr-1226335294511>.

<sup>124</sup> 'Legal cuts a massive blow for Indigenous Australians,' Amnesty International Australia, 17 December 2013, <http://www.amnesty.org.au/news/comments/33627/>.

<sup>125</sup> 'An update on our services,' Aboriginal Legal Services (NSW/ACT), 14 May 2014, [http://www.alsnswact.org.au/news\\_items/110](http://www.alsnswact.org.au/news_items/110)

<sup>126</sup> Carolyn Bond, 'Funding cut for Aboriginal and Torres Strait Islander legal services should be reconsidered,' Human Rights Law Centre, 17 October 2013, <http://hrlc.org.au/funding-cut-for-aboriginal-and-torres-strait-islander-legal-services-should-be-reconsidered/>.

<sup>127</sup> 'Government to defund Aboriginal Legal Services Peak Body and all Law Reform and Policy Positions,' National Aboriginal and Torres Strait Islander Legal Services, 17 December 2013, <http://www.natsils.org.au/portals/natsils/Media%20Releases/17-12-13%20NATSILS%20MR%20Govt%20to%20defund%20NATSILS%20and%20all%20ATSILS%20Law%20Reform%20and%20Policy%20Positions.pdf>.

<sup>128</sup> Ibid.

Amnesty International is particularly concerned about the defunding of the Family Violence Prevention Legal Services (FVPLS) program in the 2014-15 federal budget. FVPLS is a national program that has provided legal assistance to Aboriginal and Torres Strait Islander victims and survivors of family violence for 15 years.<sup>129</sup>

## RIGHTS AND PROTECTION OF CHILDREN IN PLACES OF DETENTION (ARTICLE 16 – LOIPR § 45)

### WESTERN AUSTRALIA

In 2013 a group of over 140 teenagers spent 10 months in an adult prison following a disturbance at the Banksia Hill Detention Centre which resulted in damage to cells. In the 18 months leading up to the incident, child advocates and union officials representing centre staff had warned of overcrowding at the Banksia Hill Detention Centre and that the atmosphere at the facility was becoming increasingly volatile.<sup>130</sup> An inquiry into the disturbance found that excessive detainee lockdowns, with young people locked in their cells for up to 23 hours a day, as well as short staffing at the facility were the primary contributing factors.<sup>131</sup>

Upon transfer to the adult prison, the juvenile detainees were separated from adult prisoners by a wire fence only and were subjected to verbal harassment and threats, in a clear violation of juvenile justice standards.<sup>132</sup> The UN Standard Minimum Rules for the Administration of Juvenile Justice clause 13.4 states that juveniles “*shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults*”.<sup>133</sup> The Special Rapporteur on torture has also criticised the detention of minors together with adults because juveniles are “*vulnerable to physical and sexual exploitation and may experience severe physical and mental suffering*”.<sup>134</sup>

Amnesty International has welcomed establishment of the Western Australian Youth Justice Board set up to advise the government on strategies to reduce youth incarceration rates with a particular focus on people from Indigenous backgrounds.<sup>135</sup> The Board has announced a \$2 million innovation fund for programs to steer young people away from crime.<sup>136</sup> However, there is currently no application process or guidelines as to how it will be decided.

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<sup>129</sup> ‘New threat for Family Violence Prevention Legal Services’, National Family Violence Legal Services, 18 August 2014, [http://www.nationalfvpls.org/images/files/MR\\_18082014\\_National\\_Forum\\_Response\\_to\\_Indigenous\\_Advancement\\_Strategy.pdf](http://www.nationalfvpls.org/images/files/MR_18082014_National_Forum_Response_to_Indigenous_Advancement_Strategy.pdf).

<sup>130</sup> ABC News online, 21 January 2013, ‘Juvenile detention centre riot raises questions about overcrowding and staffing’ Available at: <http://www.abc.net.au/pm/content/2013/s3673566.htm>

<sup>131</sup> Office of the Inspector of Custodial Services, August 2013, Management, Staffing and Amalgamation Review Paper Banksia Hill Directed Review. Available at: <http://www.oics.wa.gov.au/wp-content/uploads/2013/12/Management-Staffing-and-Amalgamation-Paper-22072013-Formatted-Final1.pdf>

<sup>132</sup> Oliver Laughland, ‘Hakea prison’s inmates ‘in regular contact with the juveniles held there,’ The Guardian Australia, 2 October 2013, <http://www.theguardian.com/world/2013/oct/02/hakea-prisons-adult-inmates-in-regular-contact-with-juvenile-held-there>.

<sup>133</sup> 40/33. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), United Nations, 29 November 1985, <http://www.un.org/documents/ga/res/40/a40r033.htm>.

<sup>134</sup> E/CN.4/1988/17: Report on the UN Special Rapporteur on Torture, United Nations Office of the High Commissioner for Human Rights, 12 January 1988, [http://ap.ohchr.org/documents/E/CHR/report/E-CN\\_4-1988-17.pdf](http://ap.ohchr.org/documents/E/CHR/report/E-CN_4-1988-17.pdf).

<sup>135</sup> ‘WA: Promising moves to reduce youth incarceration rates,’ Amnesty International Australia, 9 April 2014, [http://www.amnesty.org.au/news/comments/34304/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+AmnestyInternationalAustraliaNews+Amnesty+International+Australia+News](http://www.amnesty.org.au/news/comments/34304/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+AmnestyInternationalAustraliaNews+Amnesty+International+Australia+News).

<sup>136</sup> WA Department of Corrective Services, ‘Innovation fund to target youth crime’, 13 August 2014. [http://www.correctiveservices.wa.gov.au/\\_news/default.aspx?id=1113&page=1](http://www.correctiveservices.wa.gov.au/_news/default.aspx?id=1113&page=1)

## QUEENSLAND

In 2014 the Queensland government introduced an amendment to the *Youth Justice Act 1982*, contravening the best interests of the child principle and numerous human rights standards. The amendment included the removal from sentencing protocols of the principle that detention should only be used as a last resort for children; mandatory guidelines to 'name and shame' repeat young offenders; the admissibility of childhood findings of guilt in adult proceedings; the automatic transfer of all 17-year olds to adult corrective services facilities; and the creation of a new additional offence for committing a crime while on bail.<sup>137</sup> Amnesty International has criticized these new legislative measures which breach the fundamental rights of the child and which will disproportionately impact Indigenous youth who represent over 63% of Queensland's juvenile detention population.<sup>138</sup>

The Explanatory Notes accompanying the amendment acknowledged that the new measures breached human rights standards but states that they "will give the courts greater scope to impose sentences which properly reflect the severity of the offending for which the sentences are being imposed, deter future offending and protect the community from the impact of youth offending".<sup>139</sup> The document also contains the acknowledgement that amendments in the Bill would likely see an increase in the detention of young people.<sup>140</sup> The amendments came into force in March 2014.<sup>141</sup>

The Queensland government has also begun trialing two types of youth "boot camps". One is aimed at early intervention for at-risk teenagers and the other is a 'sentenced boot camp' to which a judge may sentence a child.<sup>142</sup> Both involve strict routines and intense physical activity. In order to fund these boot camps, the Queensland government has cut significant funding from other front-line youth justice services.<sup>143</sup> Child advocates have criticized these trials stating a lack of evidence that boot camps are effective in preventing crime or reducing recidivism.<sup>144</sup>

The changes make it compulsory for judges to send children living in the city of Townsville, North Queensland, to 'sentence boot camps' if they have committed three or more motor vehicle offences in a 12 month period.<sup>145</sup> Amnesty International considers this a form of mandatory sentencing and is also concerned by the newly created law which makes it an offence to abscond from boot camps.

Another disappointing development in Queensland was the closure of the specially tailored Indigenous courts, known as the Murri Courts, as part of budget savings.<sup>146</sup> A comprehensive assessment by the

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<sup>137</sup> Youth Justice and Other Legislation Amendment Bill 2014, Queensland Parliament, <https://www.legislation.qld.gov.au/Bills/54PDF/2014/YouthJusticeOLAB14.pdf>; Youth Justice and Other Legislation Amendment Bill 2014: Explanatory Notes, Queensland Parliament, <https://www.legislation.qld.gov.au/Bills/54PDF/2014/YouthJusticeOLAB14E.pdf>.

<sup>138</sup> Submission to Queensland Parliament Legal Affairs and Community Safety Committee Inquiry into Youth Justice and Other Legislation Amendment, Amnesty International Australia, 26 February 2014.

<sup>139</sup> Youth Justice and Other Legislation Amendment Bill 2014: Explanatory Notes, p. 5-6.

<sup>140</sup> Ibid.

<sup>141</sup> Bills Register – Bills 54<sup>th</sup> Parliament, Queensland Parliament, <http://www.parliament.qld.gov.au/work-of-assembly/bills-and-legislation/current-bills-register?p=1>.

<sup>142</sup> Youth boot camps in Queensland, Queensland Government, 7 May 2014, <https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-boot-camps/youth-boot-camps-in-queensland/>.

<sup>143</sup> 'State Budget cuts another \$5M from youth services,' Youth Affairs Network Queensland, 4 June 2013, <http://www.yanq.org.au/media-releases>.

<sup>144</sup> 'LNP Bootcamp inappropriate for Qld's young people,' Youth Affairs Network Queensland, 13 March 2012, <http://www.yanq.org.au/media-releases/lnp-bootcamps-inappropriate-for-qlds-young-people>.

<sup>145</sup> 'Youth Boot camps in Queensland', Queensland Government, 7 May 2014, <https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-boot-camps/youth-boot-camps-in-queensland/>.

<sup>146</sup> Kate Lemmon, 'Murri Court axed to save millions,' The Queensland Times, 15 September 2012, <http://www.qt.com.au/news/murri-court-is-axed-to-save-35-million-closure/1545357/>.

Australian Institute of Criminology in 2010 found that Murri Courts are successfully meeting the objective to 'reduce the over-representation of Indigenous offenders in prison and juvenile detention, improve court appearance rates, reduce reoffending and strengthen the partnership between the court and Indigenous community in dealing with Indigenous justice issues'.<sup>147</sup>

Queensland continues to deem 17-year olds to be adults in its criminal justice system. The detention of 17-year olds in adult prisons leaves them vulnerable and susceptible to the negative influences of adult offenders. In 2012 the Committee on the Rights of the Child again called on Queensland to remove 17-year olds from the adult justice system.<sup>148</sup>

## VICTORIA

In October 2012 two 17-year olds and a 16-year old Indigenous boy, were held for several months in solitary confinement at an adult maximum security prison in Victoria.<sup>149</sup> They were reportedly confined to their cells for 22 hours a day and only allowed access to the recreation yard for two hours at a time while handcuffed. In response, the Victorian Ombudsman undertook an investigation and provided recommendations to the government. In response the Victorian government has stated: "the Department of Human Services (DHS) advised it had redoubled its efforts to ensure that transfers to adult prisons would be a last resort. Corrections Victoria agreed to implement a process of verification of birth dates in certain circumstances; the Department of Justice advised that the Minister will give consideration to the recommendation for independent prison oversight."<sup>150</sup>

In a positive development the County Koori Court, which started as a trial in 2009, transitioned to an established court in 2013. Indigenous Elders and community leaders contribute to court hearings and participate in sentencing process to ensure sentencing orders are appropriate to the cultural needs of Indigenous offenders and to assist them in addressing issues relating to their offending behavior.<sup>151</sup> The Koori Court has resulted in a dramatic drop in reoffending rates amongst its clients since its commencement.<sup>152</sup>

## NORTHERN TERRITORY

The introduction of the aforementioned *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* will have an impact on certain juvenile offenders in the Northern Territory. While youths are generally sentenced under the *Youth Justice Act 2005*, a youth can be sentenced as an adult under the *Sentencing Act 1995* and would be subject to mandatory sentencing unless the court considers there are exceptional circumstances. While the mandatory minimum sentences will not apply to the youth in these circumstances, the court must still sentence the youth to actual imprisonment.<sup>153</sup>

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<sup>147</sup> Evaluation of the Queensland Murri Court: Final Report, Australian Institute of Criminology, 2010, <http://www.aic.gov.au/documents/9/c/3/%7B9c3ff400-3995-472b-b442-789f892cfc36%7Dtbp039.pdf>.

<sup>148</sup> CRC/C/AUS/CO/4: Consideration of reports submitted by States parties under article 44 of the Convention, United Nations Committee on the Rights of the Child, 28 August 2012, [http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf).

<sup>149</sup> 'Amnesty International outraged by treatment of teenagers held in solitary confinement', Amnesty International Australia, 30 October 2012, <http://www.amnesty.org.au/news/comments/30180/>.

<sup>150</sup> Victorian Equal Opportunity and Human Rights Commission, '2013 Report on the operation of the Charter of Human Rights and Responsibilities', p. 20.

<sup>151</sup> Koori Court, Magistrates Court of Victoria, <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/koori-court>.

<sup>152</sup> Jenni Henderson, 'Changing the 'white man's court' perception: the Latrobe Valley County Koori Court,' ABC Gippsland, 31 October 2013, <http://www.abc.net.au/local/stories/2013/10/30/3880364.htm>.

<sup>153</sup> Fact Sheet: Sentencing Amendment (Mandatory Minimum Sentences) Act 2013, Northern Territory Government, 22 March 2013,

Section 50 of the *Youth Justice Act 2005* permits the naming of a juvenile involved in court proceedings unless the court specifically directs that the information remain confidential. This practice violates the privacy of child offenders and has been noted to jeopardize the young person's rehabilitation and their capacity to reintegrate into their community.<sup>154</sup> The practice does not contribute to reducing recidivism amongst youth offenders but rather damages their reputation and future prospects. The naming and shaming of juvenile offenders contravenes the United Nations Convention on the Rights of the Child and the Beijing Rules which point to the young person's right to privacy throughout justice proceedings.<sup>155</sup>

In August 2014 the Don Dale Juvenile Detention Centre in Darwin was closed after staff used tear gas on youth during a disturbance.<sup>156</sup> The police dog squad and members of the Immediate Action Team (the police riot squad) were deployed to the juvenile facility when centre staff could not regain control of the situation.<sup>157</sup> The incident will be investigated by the Northern Territory Children's Commissioner.<sup>158</sup> Six youths involved in the incident were transferred to the Complex Behavior Unit in the new adult Darwin Correctional precinct, with the remaining 13 detainees, including two girls, subsequently transferred to the same facility.<sup>159</sup> Amnesty International understands that these children will be held temporarily at this facility before transfer to Berrimah prison, a former adult facility which is not purpose built to house juveniles and was recommended for demolition by a 2011 coronial inquiry due to its run down state.<sup>160</sup>

## STEPS TAKEN TO RELINQUISH USE OF TASER DEVICES (ARTICLE 16 – LOIPR § 44)

The Committee's recommendation that Australia consider relinquishing the use of conducted energy devices (CEDs, also known as Tasers) has not been heeded; in fact the use of excessive and sometimes lethal force in the deployment of CEDs remains far too common. Serious incidents include:

- The death of 21 year old Brazilian student Roberto Laudisio Curti in May 2013 after he was restrained by New South Wales police officers and 'tasered' 14 times.<sup>161</sup>
- Within a six month period between 2009-2010, two Western Australian men caught on fire after being 'tasered'. One man had been sniffing petrol, the other had doused a building in fuel.<sup>162</sup>

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[http://www.nt.gov.au/justice/policycoord/documents/lawmake/2013/Fact\\_sheet\\_Sentencing\\_Amendment\\_\(Mandatory\\_minimum\\_sentences\)\\_Act\\_2013.pdf](http://www.nt.gov.au/justice/policycoord/documents/lawmake/2013/Fact_sheet_Sentencing_Amendment_(Mandatory_minimum_sentences)_Act_2013.pdf).

<sup>154</sup> Submission to the Youth Justice Review Panel: A Review of the Northern Territory Youth Justice System, North Australian Aboriginal Justice Agency, July 2011, <http://www.naaja.org.au/wp-content/uploads/2014/05/Youth-Justice-Review-Submission.pdf>.

<sup>155</sup> Naming and Shaming Young Offenders, Balanced Justice, <http://www.balancedjustice.org/naming-and-shaming-young-offenders.html>.

<sup>156</sup> James Purtill, 'Don Dale Juvenile Detention Centre to shut within days after tear gas riot,' ABC News, 25 August 2014, <http://www.abc.net.au/news/2014-08-25/don-dale-detainees-to-be-housed-at-mental-health-facility/5694616>.

<sup>157</sup> Zach Hope, 'Tear gas used to end riot at Don Dale Juvenile Detention Centre in Darwin,' Northern Territory News, 22 August 2014, <http://www.ntnews.com.au/news/northern-territory/tear-gas-used-to-end-riot-at-don-dale-juvenile-detention-centre-in-darwin/story-fnk0b1zt-1227034027609>.

<sup>158</sup> Helen Davidson, 'NT children's commissioner looks into use of tear gas at youth prison', Guardian Australia, 3 September 2014, <http://www.theguardian.com/world/2014/sep/03/nt-childrens-commissioner-looks-into-use-of-tear-gas-at-youth-prison>.

<sup>159</sup> James Purtill 'Don Dale Juvenile Detention Centre to shut within days after tear gas riot', ABC News, 25 August 2014, <http://www.abc.net.au/news/2014-08-25/don-dale-detainees-to-be-housed-at-mental-health-facility/5694616>.

<sup>160</sup> 'Answers urgently needed about the teargassing of children in Darwin,' Amnesty International, 2 September 2014, <http://www.amnesty.org.au/news/comments/35449/>.

<sup>161</sup> 'Inquest findings and brutal taser cam footage highlight gross abuse,' Amnesty International Australia, 14 November 2012, <http://www.amnesty.org.au/news/comments/30414>.

<sup>162</sup> Joseph Sapienza, 'Man set on fire after police Taser shot,' WA Today, 21 July 2009,

- In 2012 a 14 year old Aboriginal boy was repeatedly 'tasered' by police in the New South Wales town of Crescent Head. Once restrained, he was threatened with further 'taserings'.<sup>163</sup>
- In June 2013 New South Wales police 'tasered' an unarmed teenage boy at Blacktown train station. The boy, who had fallen down stairs and knocked himself unconscious, had been handcuffed by police and was 'tasered' as he regained consciousness. This use of force was in clear violation of the NSW standards communicated in Australia's response to the Committee against Torture which stated that 'a conducted energy weapon must not be used on individuals who are already compliant or passive'.<sup>164</sup>
- In February 2014 a Queensland Indigenous woman was partially blinded after being shot in the eye with a CED.<sup>165</sup>

There is no consistency in policies for deployment of CEDs across jurisdictions in Australia.

## RECOMMENDATIONS

Amnesty International recommends that the Australian authorities:

Indigenous incarceration rates:

- Fully implement the 339 recommendations of the 1991 Royal Commission report across Australian jurisdictions.<sup>166</sup>
- Respond to calls made by the National Congress of Australia's First Peoples for Federal, State and Territory governments to jointly agree on national justice targets to reduce the over-representation of Indigenous people in Australian prisons and youth detention centres.<sup>167</sup>
- Utilise existing diversionary and non custodial detention programs and establish a Justice Reinvestment framework to provide an alternative to imprisonment and reduce increasing prisoner numbers.

Mandatory sentencing:

- Repeal mandatory sentencing legislation to enable sentencing judges to apply their discretion and consider individual circumstances.

Detention of people with mental illness:

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<http://www.watoday.com.au/wa-news/man-set-on-fire-after-police-taser-shot-20090721-drcj.html>; 'Police defend Tasers after second man catches fire,' The Australian, 2 February 2010, <http://www.theaustralian.com.au/news/nation/police-defend-tasers-after-second-man-catches-fire/story-e6frg6nf-1225825986760>.

<sup>163</sup> 'Lawyer slams police who tasered 14yo boy,' ABC News, 14 November 2012, <http://www.abc.net.au/news/2012-11-13/lawyer-slams-police-for-tasering-14yo/4369976>.

<sup>164</sup> 'Tasered teenage boy excessive use of force,' Amnesty International Australia, 22 November 2013, <http://www.amnesty.org.au/news/comments/33472/>.

<sup>165</sup> Francis Tapim & Andree Withey, 'Woman blinded in one eye after being tasered by police officer,' ABC News, 7 February 2014, <http://www.abc.net.au/news/2014-02-07/queensland-police-taser-woman-in-eye/5244490>.

<sup>166</sup> 'How many more Indigenous deaths until we address our failings?' Amnesty International Australia, 25 September 2013, <http://www.amnesty.org.au/news/comments/32798/>.

<sup>167</sup> 'Justice Targets: Crucial drivers of change,' National Congress of Australia's First Peoples, 3 March 2014, <http://nationalcongress.com.au/justice-targets-crucial-drivers-of-change/>.



- End the practice of detaining people assessed as unfit to stand trial and instead establish alternative places of accommodation which address the specific needs of people who are cognitively impaired.

Use of force:

- Establish independent and transparent mechanisms to investigate all instances of allegations of excessive use of force by police and mandate public release of the reports of such investigations.

Access to justice:

- Ensure Aboriginal Legal Services and their peak bodies are adequately funded, including for policy and law reform work.
- Restore direct allocation of funding for Family Violence Prevention Legal Services (FVPLS).

Youth incarceration:

- Fully implement the 2011 recommendations from the Parliamentary House Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry report into the high level of interaction of Indigenous youth with the criminal justice system.
- Reinstate the principle of detention as a last resort in all jurisdictions and take all necessary measures to end the practice of detaining young offenders in adult correctional facilities.

Conducted energy devices:

- Adopt nationally uniform policies for the deployment of CEDs only in life threatening situations by properly trained senior officers and for all instances of deployment to be thoroughly and independently investigated and publicly reported.

# AUSTRALIAN HUMAN RIGHTS COMMISSION

## POWERS, FUNCTIONS AND FUNDING OF THE AHRC (ARTICLE 2 – LOIPR § 5)

Despite some expansions to the work of the AHRC, it is of concern to Amnesty International that funding to the Commission has been reduced. In recent years the AHRC has seen the restoration of the Race Discrimination Commissioner,<sup>168</sup> the creation and appointments of an Age Discrimination Commissioner,<sup>169</sup> a National Children's Commissioner<sup>170</sup> and Human Rights Commissioner.<sup>171</sup> However,

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<sup>168</sup> 'Race Discrimination Commissioner appointed,' Australian Human Rights Commission, 3 August 2011, <https://www.humanrights.gov.au/news/stories/2011-news-race-discrimination-commissioner-appointed>.

<sup>169</sup> 'Age Discrimination Commissioner appointed,' Australian Human Rights Commission, 1 August 2011, <https://www.humanrights.gov.au/news/stories/2011-news-age-discrimination-commissioner-appointed>.

<sup>170</sup> 'Inaugural Children's Commissioner Appointed,' Australian Human Rights Commission, 25 February 2013,



\$1.7 million in funding cuts over four years to the AHRC was announced in the 2014-15 Federal budget, reducing the number of Human Rights Commissioners by one.<sup>172</sup> The Age Discrimination Commissioner has assumed the additional role of Disability Discrimination Commissioner.<sup>173</sup>

## RECOMMENDATIONS

Amnesty International recommends that the Australian authorities

- Ensure the AHRC remains adequately funded to ensure it can continue to function in a sustainable manner as Australia's National Human Rights Institution as per the 1993 Paris Principles.

# RATIFICATION OF OPCAT

## PROGRESS TOWARDS RATIFICATION OF THE OPTIONAL PROTOCOL TO THE CONVENTION (OPCAT) (ARTICLE 2 – LOIPR § 8)

Australia signed OPCAT in 2009 and the then government stated its commitment to ratify the Protocol.<sup>174</sup> In 2012 the Parliamentary Joint Standing Committee on Treaties recommended that Australia ratify OPCAT and establish a National Preventative Mechanism (NPM) as soon as possible without deferral under Article 24.<sup>175</sup> A National Interest Analysis (NIA) into Australia's ratification of OPCAT was also conducted in 2012. Despite these processes Australia has not yet followed through on its intention to ratify OPCAT.

In reporting to the Committee Australia has noted that it will not ratify any treaty until domestic law and policy meets compliance obligations and that Federal, State and Territory governments are working to prepare legislation that would facilitate compliance with the requirements of the OPCAT in relation to a NPM. It is worth noting in this regard that the mandate of the Subcommittee on Prevention of Torture (SPT) includes the provision of technical assistance in setting up a NPM and could therefore provide useful support to the government upon ratification of the OPCAT.

Furthermore, Annexure A to Australia's report to the Committee against Torture details the substantive bodies already in existence across Federal, State and Territory jurisdictions which currently undertake monitoring and inspection of places where people are deprived of their liberty. With these bodies already fulfilling some of the functions of the NPM, Australia may put interim arrangements in place

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<https://www.humanrights.gov.au/news/stories/inaugural-children-s-commissioner-appointed>.

<sup>171</sup> Attorney General Senator George Brandis, 'Appointment of Mr Tim Wilson as Human Rights Commissioner,' Attorney-General's Department, 17 December 2013,

<http://www.attorneygeneral.gov.au/MediaReleases/Pages/2013/Fourth%20quarter/17December2013-AppointmentofMrTimothyWilsonasHumanRightsCommissioner.aspx>.

<sup>172</sup> Part 2: Expense Measures (Continued), Attorney-General's, Budget 2014-2015, [http://www.budget.gov.au/2014-15/content/bp2/html/bp2\\_expense-05.htm](http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-05.htm).

<sup>173</sup> 'Susan Ryan appointed Disability Discrimination Commissioner' Australian Human Rights Commission. 2 July 2014, <https://www.humanrights.gov.au/news/stories/susan-ryan-appointed-disability-discrimination-commissioner>.

<sup>174</sup> 'Gillard Government moves to ratify OPCAT,' Foreign Minister (Archived), 28 February 2012, [http://foreignminister.gov.au/releases/Pages/2012/ce\\_mr\\_120228.aspx?ministerid=3](http://foreignminister.gov.au/releases/Pages/2012/ce_mr_120228.aspx?ministerid=3).

<sup>175</sup> Report 125, Joint Standing Committee on Treaties, 21 June 2012, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jsct/28february2012/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/28february2012/report.htm)

upon ratification of the OPCAT pending the establishment of the NPM. Postponement under Article 24 of OPCAT would cause significant delays at the expense of human rights.

## RECOMMENDATIONS

Amnesty International recommends that the Australian authorities:

- Ratify OPCAT without further delay and refrain from enacting the postponement of their obligations under Article 24 of OPCAT.
- Create an independent NPM under the guidance of the SPT to ensure full compliance with the requirements of OPCAT.
- Allow the SPT and NPM access to all places where people are deprived of their liberty, including those offshore and under Australian responsibility regionally.



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