



**Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**

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COMMITTEE AGAINST TORTURE
Fortieth session
28 April – 16 May 2008

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION**

Concluding observations of the Committee against Torture

AUSTRALIA

1. The Committee considered the third periodic report of Australia (CAT/C/67/Add.7) at its 812th and 815th meetings (CAT/C/SR.812 and 815) held on 29 and 30 May 2008, and adopted, at its 828th meeting (CAT/C/SR.828), the following concluding observations.

A. Introduction

2. The Committee welcomes the submission of the third periodic report of Australia as well as the detailed and thorough replies to the list of issues and the addendum, which provided additional information on the legislative, administrative, judicial and other measures taken by the State party for the implementation of the Convention. The Committee also notes with satisfaction the constructive dialogue held with a competent and multi-sectoral delegation.

3. The Committee notes with satisfaction that the State party has submitted its core document in accordance with the requirements of the common core document in the harmonized guidelines on reporting under international human rights treaties.

B. Positive aspects

4. The Committee notes with appreciation the legislative amendments adopted in 2005 related to the immigration detention. In particular, the Committee welcomes:

(a) The changes in law and in practice with respect to children in immigration detention;

(b) The closure of the offshore processing centres in Nauru and Papua New Guinea and the decision to end the so-called Pacific Strategy;

5. The Committee welcomes the Government's apology to the Aboriginal and Torres Strait Islander peoples for past policies and laws which resulted in the removal of children from their families and communities.

6. The Committee notes with appreciation the State party's commitment to become a party to the Optional Protocol to the Convention.

7. The Committee welcomes the State party's ratification of the Rome Statute of the International Criminal Court on 1 July 2002.

C. Main issues of concerns and recommendations

Article 1

8. The Committee, while noting that the Australian Government is considering the enactment in Commonwealth law of a specific offence of torture which would have extraterritorial application, is concerned that the State party does not have an offence of torture at the Federal level and that there are gaps in the criminalization of torture in certain States and Territories (arts. 1 and 4).

The State party should ensure that torture is adequately defined and specifically criminalized both at the Federal and States/ Territories levels, in accordance with article 1 of the Convention.

Article 2

9. The Committee is concerned that the Convention has been only partially incorporated into Federal law and noted that the State party does not have a constitutional or legislative protection of human rights at the Federal level, i.e. a Federal Bill or Charter of Rights protecting, inter alia, the rights contained in the Convention.

The State party should fully incorporate the Convention into domestic law, including by speeding up the process to enact a specific offence of torture at the Federal level. The State party should continue consultations with regard to the adoption of a Bill of Rights to ensure a comprehensive constitutional protection of basic human rights at the Federal level.

10. The Committee, while noting that there are a number of legislative and procedural safeguards ensuring that individuals are treated in accordance with their rights, is nonetheless concerned about the following issues related to the State party's anti-terrorism laws and practice:

(a) The increased powers provided to the Australian Security Intelligence Organization (ASIO), including the possibility of detaining a person for renewable periods of seven days for questioning, which pose some difficulties especially due to the lack of a right to a lawyer of choice to be present during the questioning and of the right to seek a judicial review of the validity of the detention;

(b) The lack of judicial review and the character of secrecy surrounding imposition of preventative detention and control orders, introduced by the Anti-Terrorism Act (No. 2) 2005;

(c) Reports concerning the harsh conditions of detention of unconvicted remand prisoners charged with terrorism-related offences, also taking into account their status of accused (and not convicted) persons.

The State party should:

- (a) Ensure that the increased powers of detention of ASIO are in compliance with the right to a fair trial and the right to take proceedings before a court to determine the lawfulness of the detention;**
- (b) Guarantee that both preventative detention and control orders are imposed in a manner that is consistent with the State party's human rights obligations, including the right to a fair trial including procedural guarantees;**
- (c) Ensure that accused remand prisoners are separated from convicted persons and are subject to separate treatment appropriate to their status as unconvicted persons.**

11. The Committee is concerned at the mandatory detention policy for those persons who enter irregularly the State party's territory. In this respect, the Committee is especially concerned at the situation of stateless persons in immigration detention who cannot be removed to any country and risk being potentially detained 'ad infinitum'.

The State party should:

- (a) Consider abolishing its policy of mandatory immigration detention for those entering irregularly the State party's territory. Detention should be used as a measure of last resort only and a reasonable time limit for detention should be set; furthermore, non-custodial measures and alternatives to detention should be made available to persons in immigration detention;**
- (b) Take urgent measures to avoid the indefinite character of detention of stateless persons.**

12. The Committee welcomes information from the State party indicating the recent end of the policy of transferring asylum-seekers to offshore processing centres. Yet the Committee notes that “excised” offshore locations, notably Christmas Island, are still used for the detention of asylum-seekers who are subsequently denied the possibility of applying for a visa, except if the Minister exercises discretionary power.

The State party should end the use of “excised” offshore locations for visa processing purposes in order allow all asylum-seekers an equal opportunity to apply for a visa.

13. The Committee notes that the provision of a medical practitioner of the arrested person’s choice is not a statutory right, but rather a duty of care requirement for Australian Federal Police members undertaking custodial duties.

The State party should ensure the right to appoint a fully independent medical practitioner, preferably of the arrested person’s choice.

14. The Committee notes with appreciation the work of the Human Rights and Equal Opportunities Commission (HREOC) to protect and promote human rights in the State party, but regrets that:

(a) While HREOC is empowered to investigate complaints related to torture and other cruel, inhuman or degrading treatment arising from the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, the Convention against Torture is not included in HREOC’s complaint handling jurisdiction;

(b) HREOC can only make recommendations of an advisory nature;

(c) HREOC’s complaint handling powers do not extend to investigating the acts and practices of intelligence agencies.

The State party should consider strengthening and extending the mandate of the HREOC, inter alia, to the handling of complaints for violation of the Convention against Torture, including for acts committed by intelligence agencies officers. Furthermore, the Committee urges the State party to give adequate follow-up to the recommendations of HREOC.

Article 3

15. The Committee is concerned that the prohibition of non-refoulement is not enshrined in the State party’s legislation as an express and non-derogable provision, which may also result in practices contrary to the Convention. The Committee also notes with concern that some flaws related to the non-refoulement obligations under the Convention may depend on the exclusive use of the Minister’s discretionary powers thereto. In this respect, the Committee welcomes the information that the same Minister for Immigration and Citizenship has indicated that the high degree of discretionary authority available to him under existing legislation should be reconsidered.

The State party should explicitly incorporate into domestic legislation, both at Federal and States/Territories levels the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture (non-refoulement), and implement it in practice. The State party should also implement the Committee's previous recommendations formulated during the consideration of the State party's second periodic report to adopt a system of complementary protection ensuring that the State party no longer solely relies on the Minister's discretionary powers to meet its non-refoulement obligations under the Convention.

16. The Committee reminds States parties that under no circumstances can they resort to diplomatic assurances as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.

The State party, if resorting to diplomatic assurances in any other situation than those that must be excluded by article 3 of the Convention, should provide the Committee with information in its next report on how many cases of extradition or removal subject to receipt of diplomatic assurances or guarantees have occurred since 11 September 2001; the State party's minimum requirements for such assurances or guarantees; the measures of subsequent monitoring it has undertaken in such cases as well as the legal enforceability of the assurances or guarantees given.

17. The Committee notes that Section 198 (6) of the Migration Act provides that a person in immigration detention must be removed from Australia as soon as reasonably practicable. In this respect, while noting that the current policy of the Department of Immigration and Citizenship (DIAC) is that a protection visa applicant in immigration detention will not be removed from Australia pending the outcome of the judicial review or the Ministerial Intervention request in relation to the application, the Committee is concerned that appeals filed against a decision not to grant asylum or to deny or cancel a visa do not seem to have automatic suspensive effect.

The State party should ensure that effective remedies are available to challenge the decision not to grant asylum or to deny or cancel a visa. Such remedies should have the effect of suspending the execution of the above decision, i.e. the expulsion or removal.

Article 4

18. The Committee, underlining that the conditions that give rise to cruel, inhuman or degrading treatment or punishment frequently facilitate torture and that, therefore, the measures required to prevent torture must be applied to prevent cruel, inhuman or degrading treatment or punishment, believes that the prohibition of ill-treatment has likewise non-derogable nature under the Convention. In this respect, the Committee notes with concern that the Crimes (Torture) Act

1988 does not contain a provision criminalizing cruel, inhuman or degrading treatment (arts. 4 and 16).

The State party should introduce a specific offence covering the acts included in article 16 of the Convention; this offence could be also introduced in the State party's legislation in the context of the possible new offence of torture to be included at the Federal level.

Article 5

19. The Committee is concerned that the State party might have failed to establish its jurisdiction in some cases where Australian nationals have been victims of acts of torture abroad.

The State party should consider establishing its jurisdiction over the offences referred to in article 4 of the Convention in all cases listed in article 5 of the Convention, including when the victim is a national of the State party.

Articles 3, 6, 7, 8 and 9

20. The Committee is concerned that under the Mutual Assistance in Criminal Matters Act it is not mandatory (representing only discretionary power) to refuse extradition when there are substantial grounds to believe that this extradition may be in breach of the persons' rights under the Convention.

The State party should ensure that extradition is refused in all cases where extradition would be towards a State where there are substantial grounds to believe that the person would be in danger of being subjected to torture.

Article 10

21. The Committee notes the State party's reply indicating that all law enforcement and military personnel, including contractors, are provided with training on their obligations under the Convention against Torture prior to overseas deployment, but is concerned that this training is not systematic.

The State party should ensure that education and training of all law enforcement or military personnel, including contractors, are conducted on a regular basis, in particular for personnel deployed overseas. This should include training on interrogation rules, instructions and methods, and specific training on how to identify signs of torture and cruel, inhuman or degrading treatment. Such personnel should also be instructed to report such incidents.

The State party should also regularly evaluate the training provided to its law enforcement and military personnel and contractors, as well as ensure regular and independent monitoring of their conduct.

22. The Committee notes that training on human rights obligations is provided for immigration officials and personnel employed at immigration detention centres; however it is concerned over reports that such training is inadequate.

The State party should ensure that education and training of all immigration officials and personnel, including health service providers, employed at immigration detention centres, are conducted on a regular basis. The State party should also regularly evaluate the training provided.

Article 11

23. The Committee is concerned about the arrangements for the custody of persons deprived of their liberty. In particular, the Committee notes with concern:

(a) Overcrowding in prisons, in particular in Western Australia;

(b) The insufficient provision of mental health care in prisons and reports indicating that mentally ill inmates are subjected to extensive use of solitary confinement and subsequent increased risks of suicide attempts;

(c) The disproportionately high numbers of indigenous Australians incarcerated, notably among them the increasingly high rates of children and women;

(d) The continued reports of indigenous deaths in custody due to causes that are not clearly determined.

In order to improve the arrangements for the custody of persons deprived of their liberty, the State party should;

(a) Undertake measures to reduce overcrowding, including consideration of non-custodial forms of detention, and in the case of children in conflict with the law ensure that detention is only used as a measure of last resort;

(b) Provide adequate mental health care for all persons deprived of their liberty;

(c) Abolish mandatory sentencing due to its disproportionate and discriminatory impact on the indigenous population;

(d) Seek to prevent and investigate any deaths in custody promptly. Furthermore, the State party should continue implementation of pending recommendations from the Royal Commission into Aboriginal Deaths in Custody of 1991.

24. The Committee is concerned over the harsh regime imposed on detainees in “super-maximum prisons”. In particular, the Committee is concerned about the prolonged isolation periods to which detainees, including those pending trial, are subjected and the effect such treatment may have on their mental health.

The State party should review the regime imposed on detainees in “super-maximum prisons”, in particular the practice of prolonged isolation.

25. The Committee welcomes the amendment to the Migration Act in 2005 and the commitment of the new Government that children will no longer be housed in immigration detention centres under any circumstances. However, the Committee regrets that children may still be kept in alternative forms of detention and that during the reporting period a considerable number of children spent long periods of time in detention centres. Furthermore the Committee is concerned about the inadequate mental health care for detained asylum-seekers.

The State party should;

- (a) **Abide by the commitment that children no longer be held in immigration detention centres under any circumstances. Furthermore, it should ensure that any kind of detention of children is always used as a measure of last resort and for a minimum period of time;**
- (b) **As a matter of priority, ensure that asylum-seekers who have been detained are provided with adequate physical and mental health care, including routine assessments.**

26. The Committee notes , as a positive step, the mention of human rights obligations in the Immigration Detention Standards, yet notes that they are not legally binding and lack the provision of an independent monitoring mechanism.

With the objective of improving protection of asylum-seekers, the State party should ensure that the Immigration Detention Standards be codified into legislation and provide for an independent monitoring mechanism.

Articles 12, 13 and 14

27. The Committee is concerned about allegations against law enforcement personnel in respect of acts of torture and other cruel, inhuman or degrading treatment or punishment and notes a lack of investigations and prosecutions.

The State party should ensure that all allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement officials, and in particular any deaths in detention, are investigated promptly, independently and impartially and, if necessary, prosecuted and sanctioned. Furthermore, the State party should also ensure the right of victims of police misconduct to obtain redress and fair and adequate compensation, as provided for in article 14 of the Convention.

28. The Committee is concerned about information indicating that Australian defence officials who were advising the Coalition Provisional Authority had knowledge of abuses committed in Abu Ghraib in 2003, yet did not call for prompt and impartial investigations.

The State party should call for prompt and impartial investigations, including if appropriate, a public inquiry, should it receive information indicating that there are reasonable grounds to believe that acts of torture have been committed in a jurisdiction where it advises or has advised on the exercise of interim authority.

29. The Committee, while noting the significant efforts undertaken by the State party to provide rehabilitation services to refugees who have suffered torture, regrets that certain victims, such as those on bridging visas, are not guaranteed equal access to these services.

The State party should extend the right to rehabilitation services to all victims of torture, including those on bridging visas, and ensure that there is effective access to such services in all States and Territories.

Article 15

30. The Committee is concerned that the State party lacks uniform legislation to exclude admission of evidence made as a result of torture. Furthermore, the Committee is concerned over reports indicating that confessional evidence obtained under ill-treatment in other countries has been used in criminal proceedings in Australia.

The State party shall ensure compliance with article 15 of the Convention by the application of uniform and precise legislation in all States and Territories excluding the admission of statements as evidence if made as a result of torture.

Article 16

31. The Committee notes that corporal punishment of children is not explicitly prohibited in all States and Territories and may still be applied as “reasonable chastisement”.

The State party should adopt and implement legislation banning corporal punishment at home and in public and private schools, detention centres, and all alternative care settings in all States and Territories.

32. The Committee recognizes the efforts undertaken at the Federal level to combat human trafficking, yet notes the low level of prosecutions and is concerned over the lack of measures undertaken by the States and Territories. While noting the establishment of recovery programmes for trafficking victims, the Committee regrets that access is restricted to victims who collaborate with investigations.

The State party should take effective measures to prosecute and punish trafficking in persons and provide recovery services to victims on a needs basis, unrelated to whether they collaborate with investigations..

33. The Committee, while noting efforts to criminalize female genital mutilation at the State and Territory level, remains concerned over the absence of a Federal provision and the overall lack of investigations and prosecutions.

The State party should ensure that the prohibition of female genital mutilation is introduced into the Federal Criminal Code. The State party should also increase prevention measures and detection and investigation efforts, as well as, prosecutions as appropriate.

34. The Committee encourages the State party to speedily conclude its internal consultation and ratify the Optional Protocol to the Convention in order to strengthen the prevention against torture.

35. The Committee notes with appreciation the State party's previous contributions to the United Nations Voluntary Fund for Victims of Torture and encourages it to resume its support.

36. The Committee requests the State party to provide in its next periodic report detailed statistical data, disaggregated by crime, ethnicity, age and sex, on complaints relating to torture and ill-treatment allegedly committed by law enforcement officials and on the related investigations, prosecutions, and penal or disciplinary sanctions. The report should also include statistics on pre-trial detainees and convicted prisoners, disaggregated by crime, ethnicity, age and sex. Information is further requested on compensation and rehabilitation provided to the victims.

37. The Committee requests the State party to provide, within one year, information on its response to the Committee's recommendations contained in paragraphs 9, 10, 11 and 25 above.

38. The State party is encouraged to disseminate widely the reports submitted to the Committee and the concluding observations and summary records of the Committee to the media and non-governmental organizations, through official websites..

39. The State party is invited to submit its next periodic report, which will be considered as the fifth periodic report, by 30 June 2012 at the latest.