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Attention: Ms Carmen Rosa Rueda Castañón
Committee Secretary
UN Committee Against Torture

By fax: 0011 41 22 917 9022

Dear Secretary

Australia's Third Periodic Report to the UN Committee Against Torture

We refer to the List of issues to be considered during the examination of the third periodic report of Australia dated 6 June 2007 (*List of Issues*).¹

The purpose of this letter is provide further information to the Committee Against Torture (*Committee*) to assist it in its consideration of Australia's Fourth Periodic Report to the Committee (*Report*) at its next session in November 2007. This letter seeks to comment on the List of Issues developed by the Committee and, where we consider necessary, provide further information to the Committee on Australia's performance of its obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*.

The information provided may assist the Committee in considering Australia's responses to the List of Issues sent to it, as well as any further questions that the Committee may wish to ask of the Australian Government.

1. Entrenchment of Basic Human Rights

Articles 2, 4

List of Issues 13, 14, 41

Australia remains the only developed nation without a constitutional or legislative Bill of Rights at the national level. Australia's domestic law continues to fail to provide effective legislative, administrative, judicial or other protection to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment within its jurisdiction.

¹ UN Doc CAT/C/AUS/Q/4 (6 June 2007).

The governments of Victoria and the Australian Capital Territory (**ACT**) have recently introduced limited legislative protection of human rights within their jurisdictions incorporating many, but not all, of the rights contained in the *International Covenant on Civil and Political Rights (ICCPR)*. While a general prohibition on torture and other cruel, inhuman or degrading treatment or punishment is contained in both the Victorian and ACT legislation, neither act provides for an independent right to take legal action to remedy a breach and therefore falls short of providing an 'effective remedy' as required under international human rights law.

The Australian Human Rights and Equal Opportunity Commission (**HREOC**) is an independent human rights institution in accord with the Paris Principles, however its authority is limited only to enquiry into complaints. It cannot make enforceable determinations and there is no requirement on the executive government to even respond to its recommendations.

The Australian Government's failure to ratify the Optional Protocol to the CAT denies Australians an important avenue of redress where any available domestic remedies have been exhausted.

2. Immigration and Asylum Seeker Policy and Practice

(a) Mandatory Detention of Asylum Seekers

Articles 2, 11

List of Issues 6, 23, 29

Earlier this year, HREOC reiterated its call for the repeal of Australia's mandatory detention laws.² In the absence of repealing mandatory detention, HREOC recommended that there should be greater efforts to promptly release detainees and resolve visa decisions. However, as referred to above, HREOC's authority is limited to recommendations only, which may be ignored by the Australian Government.

Further, detainees have no method by which to challenge their detention. Indeed, a recent High Court decision has determined that it is constitutional and lawful under the *Migration Act 1958 (Cth)* to keep a person in immigration detention indefinitely.³ This results in a situation where someone who has committed no crime, who has requested removal from Australia and who is cooperating with the government could be detained for the rest of their life because they are effectively stateless and cannot be removed.

² Human Rights and Equal Opportunity Commission, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities*, January 2007.

³ *Al-Kateb v Godwin* [2004] HCA 37

(b) Mental Health Care Facilities in Immigration Detention

Article 11

List of Issues 27, 28, 34

The effects of arbitrary, indefinite and prolonged immigration detention raise serious concerns in relation to the CAT. In most cases it is not possible to properly treat the mental health problems suffered by detainees because the main way to treat a mental health concern is to remove the primary cause of the problem, which would be detention itself. Indeed, a recent report of the Commonwealth Ombudsman is very critical of the health care treatment provided to detainees.⁴ Among other issues, the report identified that:

- detention is often the first response when a person is identified as suffering from a mental illness;
- immigration officials often fail to recognise that mentally ill people may lack the capacity to consent to actions or sign documentation; and
- there is inadequate documentation of medical treatment provided to people in immigration detention, which often leads to issues with assessment, management and review of a person's condition.

Possible Further Questions:

1. Please provide details of any consideration being given to any alternative mechanisms to Australia's policy of mandatory detention of "unlawful non-citizens" in order to maintain an orderly immigration process?
2. In light of the link between indefinite and protracted immigration detention and the deterioration of the mental health and well-being of detainees, please provide details of the steps being taken to ensure the adequate treatment of people with mental illness in detention centres or, more importantly, to treat them in the community.

(c) Refoulement, Expulsion and Extradition

Article 3

List of Issues 7, 8, 10, 11

In 2000, a Senate Legal and Constitutional References Committee tabled its report on Australia's refugee and humanitarian determination processes.⁵ The Senate Committee recommended that Australia 'explicitly incorporate' the *non-refoulement*

⁴ Commonwealth Ombudsman, *Mental Health and Incapacity* (Report No 07-2006), December 2006.

⁵ Senate Legal and Constitutional References Committee, *A sanctuary under review: An examination of Australia's refugee and humanitarian determination processes* (The Parliament of the Commonwealth of Australia, Canberra, June 2000).

obligations of the CAT and ICCPR into domestic law'.⁶ However, the fundamental principle of non-return to face torture or death is still not present in Australian domestic law or subject to the rule of law. Section 22(3) of the *Extradition Act 1988* (Cth) allows a person to be extradited once the Attorney-General is content that a person will not be tortured in the country to which they are extradited. However, asylum-seekers are not protected by this provision and the Australian Government has repeatedly disclaimed any responsibility for the subsequent torture or cruel treatment of persons who are removed.⁷

3. Australia's Criminal Justice System

(a) Incarcerations Rates of Indigenous Australians

Article 11

List of Issues 23

Indigenous peoples in Australia are among the most highly incarcerated peoples in the world. Despite Indigenous Australians representing approximately 2% of the Australian population, around 22% of the prison population is Indigenous.⁸ Over the last six years, the rate of Indigenous imprisonment in Australia has risen by 23%.⁹ The incarceration rate for Indigenous Australians is more than 16 times higher than for non-Indigenous Australians and in 2003 Indigenous women were incarcerated at a rate 19.3 times that of non-Indigenous women.¹⁰

The treatment of many Indigenous Australians in the criminal justice system, particularly in relation to the disproportionate impact of certain criminal laws and the incidence and impacts of incarceration, in many situations may amount to torture or other cruel, inhuman or degrading treatment or punishment.

(b) Mandatory Sentencing Laws

Article 11

List of Issues 23, 25

While mandatory sentencing provisions for minor property offences in the Northern Territory were repealed in 2001, mandatory sentencing laws for many offences remain in the Northern Territory as well as in the Criminal Code in Western Australia. Indigenous Australians continue to be disproportionately affected by that legislation.

⁶ Ibid [60].

⁷ A Chinese man deported from Australia earlier this year has claimed that he was interrogated and tortured immediately on his return to China. See ABC, 'Chinese deportee claims torture', *AM*, 29 June 2007 at <<http://www.abc.net.au/am/content/2007/s1965335.htm>>.

⁸ Australian Bureau of Statistics, *Prisoners in Australia 2005* (2005), 5.

⁹ Ibid.

¹⁰ Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2004).

Young Indigenous people, who are a small fraction of the youth population of Western Australia, comprise three quarters of mandatory sentencing cases.¹¹

The Human Rights Committee and Committee on the Rights of the Child have both expressed their concern about the over-representation of Indigenous Australians in prison, as well as the number of Indigenous deaths in custody (see below) and the lack of fair treatment of Indigenous Australians within the criminal justice system.¹²

(c) 1991 Royal Commission into Aboriginal Deaths in Custody

Article 11

List of Issues 23, 24

The deaths of Indigenous Australians in custody also continues to be of serious concern, despite the recommendations of the *Royal Commission into Aboriginal Deaths in Custody* over 15 years ago.¹³ Many of these recommendations still have not been implemented by the Australian Government or state and territory governments. More than half of the Aboriginal deaths in custody are of individuals detained for no more than public order offences.¹⁴ The striking over-representation of Indigenous Australians in prison, as well as the percentage of Indigenous deaths in custody and the lack of fair treatment under the criminal justice system, all raise serious concerns in relation to the CAT.

(d) Conditions of Prisons

Articles 11

List of Issues 23

In Western Australia, an Ombudsman's report released in 2000 cited the existence of chronic over-crowding, a lack of basic medical supplies and substandard physical and psychological health care existing in the Western Australian prison system.¹⁵

Overcrowding in Australian prisons, particularly in Western Australia which has the highest imprisonment rates in Australia, will not end until alternatives to detention, such as restorative justice and therapeutic jurisprudence, are introduced.

¹¹ The UN Committee on the Rights of the Child expressed its concern about the over-representation of Indigenous children in the juvenile justice system. See UN Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005), [73-74].

¹² *Concluding observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000); *Concluding observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.268 (2005).

¹³ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

¹⁴ Australian Institute of Criminology, *Trends & issues in crime and criminal justice: Deaths in custody in Australia 1990-2004*, April 2006.

¹⁵ Ombudsman Western Australia, *Report on Deaths in Prisons* (2000).

Similarly, the Victorian Ombudsman has described some Victorian prisons as 'not fit for human habitation due to the age, condition, lack of basic facilities or a combination of all these factors'.¹⁶ Much criticism has also been made of the lack of access to health care in prisons, such as the imprisonment in Victoria of an individual who had been found not guilty on the ground of mental impairment due to a lack of access to a bed in a mental health facility.¹⁷ Concerns about the adequacy of mental health treatment for individuals in detention were also expressed by the Human Rights Committee.¹⁸

Unacceptable conditions in prison, including overcrowding and lack of access to adequate health care treatment, raises issues in relation to the prohibition against torture or constitute cruel, inhuman or degrading treatment or punishment.

(e) Women in Prison

Articles 2, 11

List of Issues 4, 23

The systemic discrimination faced by women in prison may constitute torture or cruel, inhuman or degrading treatment or punishment. Fundamental breaches of the right may arise in relation to one or a combination of the following issues:

- lack of access to health care;
- routine strip searches;
- the detention of low security prisoners in high security facilities;
- oppressive disciplinary regimes;
- restrictive visitation rules;
- limited access to educational and employment programs; and
- the significant overrepresentation of Indigenous women and women from cultural, ethnic and religious minorities.

Possible Further Questions:

3. Please provide information on the steps being taking, such as the introduction of diversionary programs, to rectify the striking over-representation of Indigenous Australians in prison.
4. Does Australia consider that the disproportionately high percentage of Indigenous deaths in custody raises any issues with its obligations under the CAT?

¹⁶ Ombudsman Victoria, *Conditions for Persons in Custody* (2006).

¹⁷ *R v White* [2007] VSC 142 (7 May 2007).

¹⁸ See *Brough v Australia*, UN Doc CCPR/C/86/D/1184/2003.

5. Please provide details of what training is provided to police officers and law enforcement agencies on the prevention of Aboriginal deaths in custody.
6. Please provide details of the treatment provided to persons suffering from a mental illness who have been deprived of their liberty.

4. Education and Training of Immigration Officers

Articles 10, 11

List of Issues 20, 21, 26

In July 2005, the Minister for Immigration commissioned an inquiry into the circumstances of the mistaken immigration detention of two Australian citizens.¹⁹ The main findings of the inquiry, published in the 'Palmer Report',²⁰ included the following:

- there are 'serious problems with the handling of immigration detention cases [that] stem from deep-seated cultural and attitudinal problems' within the Department's immigration compliance and detention areas;²¹
- immigration officials are exercising extraordinary powers 'without adequate training, without proper management and oversight, with poor information systems, and with no genuine quality assurance and constraints on the exercise of these powers';²²
- many immigration officials have received 'little or no relevant formal training and seem to have a poor understanding of the legislation they are responsible for enforcing, the powers they are authorised to exercise, and the implications of the exercise of those powers';²³ and
- officers responsible for detaining people suspected of being unlawful non-citizens 'often lack even basic investigative and management skills'.²⁴

¹⁹ Cornelia Rau was suspected of being an 'unlawful non-citizen' in Australia and was kept in detention unidentified for 10 months. Vivian Alvarez was deported from Australia in July 2001. It became public knowledge in 2005, however the Department of Immigration and Multicultural Affairs (as it then was) was aware of her wrongful deportation in 2003 and 2004.

²⁰ Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, July 2005.

²¹ Ibid [17]. Ms Rau 'was not a prisoner, had done nothing wrong, and was put there simply for administrative convenience': Ibid [12].

²² Ibid [9].

²³ Ibid [14].

²⁴ Ibid [15].

In addition to the Palmer Report, in 2006 the Commonwealth and Immigration Ombudsman released three reports in relation to the immigration detention of 20 people between 2000 and 2005.²⁵ As stated by the Ombudsman, Prof John McMillan:²⁶

The reports highlight serious administrative deficiencies that existed in [the Department] during the period under investigation. The main areas of concern were poor understanding of law and policy relating to immigration and citizenship, inadequate staff training, deficient record keeping, wrongful exercise of the power to detain, failure of internal monitoring and review, and delay in resolving the immigration status of those in detention.

Possible Further Questions:

7. Please provide details of the changes made to training for immigration officials in the last year in light of the Palmer Report and recent Ombudsman's Reports regarding the culture, administration and understanding of the legislation they are responsible for enforcing.
8. Please provide copies of the Immigration Detention Standards developed by DIMIA in consultation with the Commonwealth Ombudsman's Office and HREOC.

5. Communications to UN Treaty Bodies

In its Report, Australia acknowledges that it has been the subject of a number of complaints to the United Nations Human Rights Committee alleging a violation of article 7 of the ICCPR within the reporting period. In paragraph 46, it says that these complaints will be addressed in Australia's upcoming Fifth Periodic Report under the ICCPR.

However, Australia has recently released its Draft Fifth Periodic Report, which contains no information of the complaints made to the Human Rights Committee in relation to article 7 of the ICCPR. The decisions by the Human Rights Committee in both *Cabal and Pasini v Australia* and *Brough v Australia* both raises serious issues in relation to the CAT.

Possible Further Questions:

9. Please provide details of what has been done to implement the recommendations made by the UN Human Rights Committee's decisions in *Cabal and Pasini v Australia* and *Brough v Australia*.

²⁵ *Mr G* (Report No 06–2006), *Mental Health and Incapacity* (Report No 07–2006) and *Children in Detention* (Report No 08–2006).

²⁶ Media release, 6 December 2006 – Ombudsman releases three reports on immigration detention.

6. Counter-Terrorism Law and Practice

(a) Unconvicted Remand Prisoners

Article 2

List of Issues 3, 5

At its 48th Session in May 2007, the UN Working Group on Arbitrary Detention considered the situation of 13 detainees held as unconvicted remand prisoners in a maximum security prison.²⁷ The detainees have been charged with various terrorist offences under the anti-terror provisions of the *Criminal Code Act 1995* (Cth). Nine of the detainees have been held since November 2005 and the remaining three since March 2006. It is anticipated that they will be held on remand for at least 3 years by the conclusion of their trial.

The Working Group expressed significant concerns in relation to:

- the 'particularly severe' conditions of detention, especially taking into account that the detainees have not yet been declared guilty;
- the 'extraordinarily restrictive conditions' of detention prescribed for any person charged with a terrorist offence; and
- the lack of sufficient discretion for judges to decide on bail applications in such matters.

(b) Admission of Confessional Evidence Obtained under Duress

Articles 2, 5

List of Issues 3, 5, 16

In 2003, an Australian citizen, Joseph Thomas, was arrested at Karachi airport, Pakistan on suspicion of various terrorist offences. Mr Thomas was detained in Pakistan for a period of five months, during which he was allegedly subjected to ill-treatment including being hooded, handcuffed behind the back and shackled during interrogation, being told his wife would be raped and threats to inflict pain in ways such as the crushing of his testicles and electrocution.²⁸

Mr Thomas was interviewed in Pakistan by officers of the Australian Federal Police and the Australian Security Intelligence Organisation, without the presence of a lawyer. Confessional evidence obtained during that interview was used for charges to be brought against him on his return to Australia.

²⁷ 48th Session of the Working Group on Arbitrary Detention, *Opinion No. 7/2007 (Australia)*, 9 May 2007.

²⁸ See *R v Thomas* [2006] VSCA 165.

Possible Further Questions:

10. How does Australia consider that holding unconvicted remand prisoners charged with 'terrorist' offences in maximum security prisons for periods up to 3 years constitutes a proportionate level of action for people who have not been convicted of committing a crime?
11. What legislation prohibits the admission of evidence obtained by way of cruel, inhuman or degrading treatment or punishment, wherever obtained?

7. Treatment of Australian citizens abroad

Article 5

List of Issues 16

David Hicks and Mamdouh Habib are two Australian citizens who were formally held by the United States Government in Guantanamo Bay on suspicion of terrorism related offences. During their periods of detention (which in the case of Hicks was over five years), it is alleged that Hicks and Habib were subjected to various incidents of mistreatment, including extended periods of solitary confinement, regular beatings, routine sleep deprivation, being forced to take unknown medicine and other treatment by the 'Internal Reaction Force'.

The 'Bali 9' is a group of nine Australians arrested in Bali, Indonesia on suspicion of drug trafficking. The arrests were made on the basis of material supplied to Indonesian authorities by Australian Federal Police. Since their arrest, six of the nine Australians have been convicted and sentenced to the death penalty in Indonesia. The actions of the Australian Federal Police raised serious issues in relation to the prohibition on torture and other cruel, inhuman or degrading treatment or punishment.

Possible Further Questions:

12. Does Australia acknowledge that it has an obligation to prevent Australian citizens being subjected to torture or cruel, inhuman or degrading treatment or punishment overseas?

We hope that the information provided may assist the Committee in its consideration of Australia's Report and any further questions that may be asked of the Australian Government at the next session of the Committee in November 2007.

We would be happy to elaborate on any of these issues, or indeed any further issues, if required.

Yours sincerely



Philip Lynch

Director and Principal Solicitor