

Shadow Report

**prepared for the
United Nations Committee Against Torture**

**on the occasion of its review of
Australia's Third Periodic Report under the**

**Convention Against Torture and
other Cruel, Inhuman or Degrading
Treatment or Punishment**

Date submitted: 27 July 2007

About the NSW Council for Civil Liberties

The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

To this end CCL attempts to influence public debate and government policy on a range of human rights issues. We try to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected.

We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

Abbreviations

ABC	Australian Broadcasting Corporation
ACM	Australasian Correctional Management
ACT	Australian Capital Territory
AFP	Australian Federal Police
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Security Intelligence Service
BVE	Bridging Visa E (subclass 051)
CAT	Convention Against Torture & other Cruel, Inhuman or Degrading Treatment or Punishment
CCL	NSW Council for Civil Liberties
CEDAW	Convention on the Elimination of Discrimination Against Women
CPA	Coalition Provisional Authority (in Iraq)
Cth	Commonwealth of Australia
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
FCA	Federal Court of Australia
FOI	Freedom of Information
HREOC	Human Rights and Equal Opportunity Commission
HRMU	High Risk Management Unit (at Goulburn Correctional Centre, NSW)
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
INP	Indonesian National Police
NSW	New South Wales
RSL	Returned & Services League
UNHRC	United Nations Human Rights Committee
US	United States of America

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1. Executive Summary

Let us be clear: torture can never be an instrument to fight terror, for torture is an instrument of terror.

Kofi Annan, former Secretary-General of the United Nations¹

1. Australia ratified the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ('the Convention' or 'Convention Against Torture') on 8 August 1989.² The Convention came into force for Australia on 7 September 1989.
2. Australia submitted its first periodic report under Article 19 of the Convention in 1991.³ Australia's Second Report was submitted to the Committee Against Torture ('the Committee') in 1999.⁴ Australia's Third Report ('the Third Report'), submitted in 2005, is presently before the Committee for consideration,⁵ and is the first report since the commencement of the so-called 'war on terror'.
3. CCL notes the comments of the former UN Secretary-General quoted above. CCL also notes the statement made by the Committee against Torture after 11 September 2001, reiterating that the obligations of State Parties under the Convention are non-derogable.⁶
4. As the global 'war on terror' has progressed, Australia has shown an increasing willingness to acquiesce in the use of torture by other nations. Australia has also demonstrated a willingness to ignore its Convention obligations to investigate, prosecute and punish torture and mistreatment.
5. At least two Australians have been tortured in the name of the 'war on terror' and Australia has done nothing to investigate allegations of Australian complicity or to compensate the victims. On the contrary, the government and media have vilified both victims: one remains under surveillance and is not allowed to travel overseas; the other remains in prison in Australia, serving a sentence after pleading guilty before a US Military Commission at Guantanamo Bay to a charge of 'providing material support for terrorism'.
6. The most disturbing allegations of torture and Australian complicity are made by Australian citizen Mr Mamdouh Habib. Mr Habib was detained in Pakistan, where he was subjected to torture and ill-treatment. When Mr Habib was interviewed by Australian officials in Pakistan he complained about this abuse. Australian law enforcement and security officers decided not to investigate the complaints. Mr Habib was extraordinarily rendered by US officials to Egypt, where he was tortured for six months. Mr Habib alleges that Australian officials were present when he was rendered from Pakistan and, on at least one occasion, when he was being interrogated by Egyptian security officers. On the basis of 'confessions' obtained under torture in Egypt, Mr Habib was then rendered to Guantanamo Bay, where he was abused again. When Mr Habib was

interviewed by Australian officials at Guantanamo Bay, he complained about his torture and mistreatment. Australia referred the allegations to the United States for investigation. These allegations give rise to serious questions about whether Australia has contravened its obligations under the Convention against Torture. No Australian has been investigated or indicted for complicity in the torture of Mr Habib.

7. Another Australian citizen, Mr David Hicks, has also made allegations of torture and mistreatment while in the custody of the US military in Afghanistan and at Guantanamo Bay. Australia referred these allegations to the US military for investigation.
8. CCL *strongly recommends* that the State Party establish a Royal Commission with a full mandate, along the lines of the Canadian Arar Commission, to investigate the serious allegations of torture and mistreatment made by Mr Mamdouh Habib and Mr David Hicks. The State Party should also consider appropriate compensation.
9. CCL recommends that the State Party investigate, prosecute and punish Australians who commit, or are complicit in the commission of, torture.
10. CCL recommends that the State Party cease its practice of referring allegations of torture to the alleged perpetrators for investigation.
11. CCL is concerned that Australian officials were aware of abuse in Iraqi prisons run by the Coalition Provisional Authority (CPA), well before the media published graphic photographs of abuse at Abu Ghraib in April 2004. At least one Australian official was sending back to Australia reports of abuse as early as June 2003. These reports appear to have been ignored. Another Australian military lawyer was responsible for drafting the CPA's official denial of abuse, which was sent to the International Committee of the Red Cross (ICRC) in December 2003.
12. CCL recommends that the State Party establish an independent public inquiry to investigate what its agents knew about abuse in prisons run by occupying forces in Iraq and Afghanistan, and what actions were taken to protect the victims.
13. CCL is concerned that Australia has received many complaints about the use of torture and ill-treatment, but has failed to investigate them in good faith. In particular, CCL is concerned about Australia's knowledge of and acquiescence in the mistreatment of detainees at Guantanamo Bay and prisons run by the Coalition Provisional Authority in Iraq. CCL is also disturbed by Australia's failure to investigate or protest the practice of extraordinary rendition of individuals for torture, especially in the case of Australian citizen Mr Mamdouh Habib.
14. CCL recommends that the State Party acknowledge its responsibility to investigate in good faith all allegations of torture, ill-treatment and refoulement by other States. The failure to do so amounts to acquiescence and is itself a violation of the Convention.

15. CCL recommends that the State Party institute a statutory mechanism for communicating to the Committee against Torture violations of the Convention by other State Parties.
16. CCL recommends that the State Party take steps to acknowledge and discharge its obligation to discourage the practice of torture everywhere.
17. CCL is also concerned that Australia has sought to avoid its obligations under the Convention against Torture by narrowly defining its jurisdiction over territory and by narrowing the definition of torture. It is unclear, for example, whether Australian intelligence agencies have been authorised to use sleep deprivation as an interrogation technique. It is also unclear whether Australia accepts that its agents acting abroad are bound by the Convention.
18. CCL recommends that the State Party provide an account of all authorised interrogation techniques used by its intelligence-gathering agencies and the guidelines for the employment of such techniques.
19. CCL recommends that the State Party take steps to ensure that its agents acting abroad do not, by action or inaction, expose anyone to the risk of torture.
20. Australian law does not absolutely prohibit torture or refoulement. Australian migration, extradition and mutual legal assistance laws provide a discretion for ministers to refoule individuals. It is inappropriate that such a discretion exists because it means that the law cannot protect the unpopular or the weak from torture or refoulement. It is also contrary to the absolute prohibition of torture.
21. CCL recommends that the State Party take steps to amend its Constitution to enshrine the prohibition of torture and the right of non-refoulement.
22. CCL recommends that the State Party's migration, extradition and mutual legal assistance laws be amended to reflect the prohibition of refoulement.
23. CCL recommends that the State Party ensure that all bilateral law enforcement, security, extradition and mutual legal assistance treaties and memoranda of understanding expressly guarantee that no one will be tortured or executed as a result of action taken under these instruments.
24. Australia's system of mandatory immigration detention has led to cruel, inhuman and degrading treatment. Detention has had a serious impact on the mental health of detainees. While there have been changes to migration law recently, the potential for the mandatory, indefinite and arbitrary treatment of men, women and children remains. Such detention is not prohibited by law and the courts cannot order a detainee released from detention because they are being treated in a cruel, inhuman or degrading manner.

25. CCL recommends that the State Party take steps to amend its Constitution to enshrine the guarantee against cruel, inhuman and degrading treatment or punishment.
26. CCL recommends that the State Party heed the weight of expert international and domestic opinion by abandoning the mandatory, indefinite and arbitrary detention of people in its territory without a visa.
27. CCL observes that Australia has not signed or ratified the Optional Protocol to the Convention against Torture. CCL encourages Australia to welcome independent domestic and international scrutiny of its places of detention. Australia has an important role to play as a regional and international leader in human rights.
28. CCL recommends that the State Party reconsider ratification of the Optional Protocol.
29. CCL is also concerned about the treatment of people charged with terrorism-related offences. Contrary to international law, people charged with terrorist offences can only be granted bail if they demonstrate that there are 'exceptional circumstances'. In New South Wales, remandees are kept in maximum security prisons for initial processing. Contrary to the UN Standard Minimum Rules for the Treatment of Prisoners, the Corrective Services Commissioner can keep remandees in maximum security if they are deemed to be a threat to national security. Some remandees are kept under oppressive conditions in the 'supermax' High Risk Management Unit at Goulburn prison.
30. CCL recommends that the State Party invite the Special Rapporteur on Torture to visit the 'supermax' prison-within-a-prison (High Risk Management Unit) at the Goulburn Correctional Centre.

2. Article 1: definition of torture

2.1 the contracting definition of torture

31. Since September 2001, Australia has developed a willingness to redefine what is permissible in terms of torture in the 'fight against terrorism'. The Australian government has chosen, in some circumstances, not to recognise some acts of torture as acts of torture.

32. While visiting the United States in October 2006, the Australian Attorney-General, Mr Philip Ruddock, was interviewed about the post-Hamden military commissions in Guantanamo Bay and the belated US ban on torture. During that interview, Mr Ruddock spoke about his concern that the US ban on torture would limit the ability of intelligence agencies to fight terrorism:⁷

Well, I think the point the United States has made is that it will not use torture. Those instructions have been given to their agencies and that may well limit the capacity of intelligence organisations in the future.

33. In the same media interview, Mr Ruddock also said:⁸

Well, I don't regard sleep deprivation as torture. I've not heard it being put in that way, but it would be seen as coercive.

34. Those remarks were publicly opposed by opposition politicians,⁹ non-government organisations¹⁰ and the Returned & Services League.¹¹ The Commissioner of the Australian Federal Police and the Chief of the Australian Army agreed that sleep deprivation was torture and unacceptable.¹² The Chief Justice of Australia, in a speech to judges in Canberra, reiterated that torture had never been lawful in Australia.¹³

35. However, Mr Ruddock's remarks were supported by the Prime Minister, who said it 'depends upon the severity of it, the regularity of it, the circumstances'.¹⁴ The Justice Minister, Senator Chris Ellison, also backed Mr Ruddock's comments.¹⁵

36. When questioned by a Senate Committee about the use of torture by Australian intelligence agencies, the Justice Minister said:¹⁶

...sleep deprivation *per se* does not of itself constitute torture unless there are other circumstances, such as the method of its use and the extent of it, the time and the manner, relevant to that. As to which particular agencies would use it, I was talking in a generic sense. I am not going to comment on the operational aspects of ASIO, ASIS or, indeed, any other security agencies— Australian or otherwise.

... We do not believe that where there is intelligence-gathering that sleep deprivation *per se* equates with torture.

37. To justify his view, the Justice Minister relied on comments of the Special Rapporteur on Torture, Sir Nigel Rodley, who, in his 1997 report, stated

that sleep deprivation on its own might not constitute torture, but might if applied over a space of several hours.¹⁷

38. The passage referred to in the Special Rapporteur's report deals with secret interrogation methods employed by Israel and goes on to condemn these practices because the investigation of 'politically-motivated terrorist activities...cannot justify torture or cruel, inhuman and degrading treatment'.¹⁸
39. The Australian government's view does not take into account the fact that this kind of treatment, even if it does not constitute torture, is certainly cruel and inhuman and contrary to Article 16 of the Convention.
40. Nor does the Australian government's view take into account Sir Nigel Rodley's suggestion that the difference between torture and ill-treatment is not be defined by reference to any '*relative* intensity of pain or suffering', but rather by the *purpose* of the ill-treatment.¹⁹ This suggests that the former Special Rapporteur has clarified his view, particularly in the light of the definition of torture in the Rome Statute.²⁰
41. What emerges from a lengthy questioning in the Senate Committee is that Australian security forces are authorised to use sleep deprivation as an interrogation technique. What remains unclear are the internal procedures and guidelines governing the use of this form of torture.
42. CCL notes the Committee against Torture's view that State Parties should ensure that interrogation methods and instructions should not derogate from the principle of the absolute prohibition of torture.²¹
43. CCL recommends that the State Party provide an account of all authorised interrogation techniques used by intelligence-gathering agencies and the guidelines for the employment of such techniques.
44. In particular, Australia should acknowledge whether any of the following 'coercive' techniques (which are listed in the Special Rapporteur's 1997 Report) are authorised:
 - sitting in a very low chair or standing arced against a wall (possibly in alternation with each other);
 - hands and/or legs tightly manacled;
 - subjection to loud noise;
 - sleep deprivation;
 - hooding;
 - being kept in cold air;
 - violent shaking.

3. Article 2: preventing torture

3.1 implementation of the Convention

45. The Convention has been partially adopted into federal law by the *Crimes (Torture) Act 1988* (Cth). This Act has extra-territorial effect.²² It is a federal criminal offence for an Australian public official to commit torture.²³ It is a federal criminal offence for an Australian public official to attempt, to procure or to be complicit in torture.²⁴ It is also a federal criminal offence for an Australian public official to incite others or conspire with others to commit torture.²⁵ It is no defence to plead exceptional circumstances or superior orders.²⁶
46. However, Australia has no constitutional Bill of Rights and there is no constitutional prohibition on torture and other cruel, inhuman or degrading treatment.
47. This means that Parliament can authorise violations of the Convention, leaving victims with no legal remedy. An example of this is the system of indefinite mandatory immigration detention (see Article 11 below). Parliament can also authorise refoulement, contrary to the Convention (see Article 3 below).
48. CCL recommends that the State Party take steps to amend its Constitution to enshrine the prohibition of torture and the right of non-refoulement.
49. CCL recommends that the State Party take steps to amend its Constitution to enshrine the guarantee against cruel, inhuman and degrading treatment or punishment.
50. CCL notes that Australia's Third Report lists the enactment of the *Human Rights Act 2004* (ACT) as a positive development. CCL notes that the state of Victoria has passed similar legislation.²⁷ The States of Tasmania and Western Australia are also examining the introduction of such legislation.²⁸
51. However, CCL also notes that there is considerable and powerful opposition to allowing the courts to adjudicate on human rights. For example, prominent members of the federal government, including the Prime Minister and Attorney-General oppose the creation of a federal Bill of Rights.²⁹ The NSW Attorney-General has made it clear that he does not support a Charter of Rights for New South Wales.³⁰

3.2 narrow definition of jurisdiction

The international prohibition of torture requires states not merely to refrain from authorising or conniving at torture but also to suppress and discourage the practice of torture and not to condone it.

His Honour Murray Gleeson, Chief Justice Of Australia³¹

52. CCL is concerned that Australia is seeking to avoid its international obligations under the Convention against Torture by taking a very narrow view of its jurisdiction. This concern is reflected in the Australian government's failure to thoroughly investigate the torture allegations of Mambouh Habib and David Hicks (discussed below under Article 12), and its failure to accept any responsibility for the advice of the Australian military lawyer who endorsed the interrogation techniques at Abu Ghraib as consistent with the Geneva Conventions (see below under Article 12). In these cases, Australia claims it has no jurisdiction.
53. The Australian government has taken a very narrow view of jurisdiction under international law. With the exception of Australia's obligations under the *Rome Statute of the International Criminal Court*, Australia's Third Report refers only to jurisdiction within Australia's borders.³²
54. CCL is concerned that Australia does not accept that the actions of its agents abroad fall necessarily within its jurisdiction. This has been illustrated by the transnational operations of the Australian Federal Police (AFP) with respect to Australia's obligations under the ICCPR and its Second Optional Protocol.
55. AFP officers operate in countries which retain the death penalty, particularly in Asia. Australia has ratified the Second Optional Protocol to the ICCPR³³ and therefore has an international obligation to ensure that it does not expose anyone to the death penalty.³⁴ Nevertheless, AFP officers can and do cooperate with foreign police in investigations that will lead to people being executed.³⁵ Once a suspect is charged abroad with a capital offence, important human rights safeguards, such as the requirement to obtain a guarantee that no will be executed, are engaged in Australia.³⁶ However, prior to a suspect being charged, the AFP is free to cooperate without these safeguards. This distinction between pre-charge and post-charge situations is artificial and it fails to protect the rights of individuals.
56. For example, the AFP helped Indonesian police identify, arrest and investigate nine Australians who have been convicted for drug trafficking in Bali, six of whom have been sentenced to death.³⁷ The Australian government is unapologetic about this.
57. Having examined documents obtained under Freedom of Information, and which are heavily censored, it appears to CCL that the government has concluded that its obligations under the ICCPR and Second Optional Protocol do not extend beyond Australia's borders.³⁸ CCL has attempted

to obtain a copy of the legal advice the Australian government has received about its international obligations with respect to capital punishment. The federal Attorney-General has refused to release this advice, on the grounds that the subject matter is 'sensitive'. The Attorney-General has even refused to provide CCL with a list of the caselaw to which the advice refers.

58. While Australia clearly should cooperate with its regional neighbours in matters of transnational crime, Australia should do so in a manner consistent with its international obligations. For example, information should be shared with foreign agencies under the express condition that no one will be executed or tortured as a result of the cooperation.
59. The same considerations apply to Australia's international obligations under the Convention against Torture. The actions of Australian agents overseas, subject to the exception of *force majeure*,³⁹ accrue jurisdiction to Australia. This obligation was acknowledged recently in a Canadian Commission of Inquiry:⁴⁰

...the prohibition against torture in the Convention against Torture is absolute. Canada should not inflict torture, nor should it be complicit in the infliction of torture by others.
60. At the very least, Australia should protest to foreign countries that practice torture and should only cooperate with such countries under strict and accountable conditions.
61. CCL recommends that the State Party take steps to ensure that its agents acting abroad do not, by action or inaction, expose anyone to the risk of torture.
62. CCL recommends that the State Party take steps to acknowledge and discharge its obligation to discourage the practice of torture everywhere.

4. Article 3: non-refoulement

4.1 Australian law does not always prohibit refoulement

63. The Convention against Torture requires that refoulement is prohibited absolutely.
64. CCL notes the very carefully phrased observation, in Australia's Third Report, that "current policy and practice is not inconsistent with Australia's obligations under the Convention".⁴¹ Such a phrase is necessary because Australian law does prohibit refoulement absolutely.
65. CCL recommends that the State Party's migration, extradition and mutual legal assistance laws be amended to reflect the prohibition of refoulement.
66. Australian extradition and mutual legal assistance legislation do *not* guarantee freedom from torture or non-refoulement. The legislation provides guarantees with respect to capital punishment,⁴² but not torture.
67. Migration law allows someone to be sent to a country where they might be tortured. In the case of *NATB*, the Full Court of the Federal Court of Australia concluded that no one has the 'fundamental right or freedom to absolute protection in Australia from death, torture or persecution in the country to which they are to be removed'.⁴³ The Court confirmed that when an immigration officer is ordered to remove an 'unlawful non-citizen' from Australia 'as soon as reasonably practicable', then the officer *must not* consider whether the removal and return of an unlawful non-citizen to a particular country would violate Article 3 of the Convention or Article 33 of the Refugees Convention.⁴⁴ An immigration officer can only consider matters of non-refoulement if the unlawful non-citizen applies for a Protection Visa.
68. CCL is also concerned by the increasing practice in Australia of ratifying bilateral law enforcement and security cooperation treaties that do not contain express guarantees that no person will be tortured or executed as a result of cooperation under these treaties.
69. For example, Australia is soon to ratify a Security Cooperation Treaty with Indonesia.⁴⁵ CCL expressed its concern to a parliamentary committee that there are no express human rights safeguards in the treaty,⁴⁶ but the committee concluded that, because the Treaty does not attempt to exclude Australia's international human rights obligations, the obligations remain and there is no need to expressly include them.⁴⁷
70. CCL argues that this is inconsistent with the approach taken in extradition and mutual legal assistance legislation, which provide such safeguards. It makes little sense to protect rights under some laws, but not others. This also sets a bad precedent for the negotiation of similar cooperation treaties. Australia is currently negotiating a similar treaty with Japan.

71. CCL recommends that the State Party ensure that all bilateral law enforcement, security, extradition and mutual legal assistance treaties and memoranda of understanding expressly guarantee that no one will be tortured or executed as a result of action taken under these instruments.

4.2 ministerial discretion

72. There has been an increasing trend in Australia to accrue to Ministers the power to make decisions about extradition, mutual legal assistance and deportation matters.⁴⁸ Often there is no independent review mechanism for these decisions.

4.2.1 extradition

73. Australian extradition law does not expressly prohibit refoulement to a country where a person might be tortured.
74. There have been calls for the amendment of extradition law to prohibit refoulement for torture. However, CCL is concerned that, even if the Extradition Act is amended to require guarantees from foreign nations that an extradited person will not be tortured, the Attorney-General will still have a non-reviewable discretion to extradite that individual *without* such a guarantee.
75. CCL bases this concern on the state of extradition law with respect to the death penalty. The Federal Court of Australia has confirmed that the federal Attorney-General may lawfully authorise the extradition of an individual to a country that could very well execute that individual.⁴⁹
76. Under the *Extradition Act 1988* (Cth) the federal Attorney-General has the final say on who will be extradited from Australia. The Attorney-General can only authorise the extradition of an individual for a capital offence if the extradition country undertakes that:⁵⁰

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- (i) the person will not be tried for the offence; [or]
 - (ii) if the person is tried for the offence, the death penalty will not be imposed on the person; [or]
 - (iii) if the death penalty is imposed on the person, it will not be carried out.
-

77. This discretion was examined in the case of *McCrea*.⁵¹ Mr McCrea was facing extradition to Singapore for the capital offence of murder. He unsuccessfully challenged the undertaking, given by the Singaporean government to the Australian government, not to execute him if he was found guilty.
78. Judicial review of the minister's decision to extradite in a death penalty case is limited to ensuring that an undertaking has been made.⁵² The courts may not inquire into whether the undertaking is *bone fide*, enforceable or whether it be honoured.⁵³

79. Even more significantly, North J stressed that the Attorney-General has an overriding discretion to extradite in a death penalty case.⁵⁴ Even if the Attorney-General concludes that someone might be executed, he or she can nevertheless lawfully choose to surrender a fugitive for extradition.⁵⁵
80. If the law of extradition is changed to require guarantees that no one will be tortured, then it will be subject to the same overriding ministerial discretion.

4.2.2 mutual legal assistance in criminal matters

81. Australian mutual legal assistance law does not expressly prohibit refoulement to a country where a person might be tortured.
82. There have been calls for the amendment of mutual legal assistance laws to prohibit refoulement for torture. However, CCL is also concerned that, even if mutual legal assistance laws are amended to require guarantees from foreign nations that assistance will not lead to anyone being tortured, the Attorney-General will still have the discretion to provide assistance *without* such a guarantee.
83. CCL bases this concern on the state of mutual assistance law with respect to the death penalty. The *Mutual Assistance in Criminal Matters Act 1987* (Cth) ('the Mutual Assistance Act') was amended in 1996 to provide two ministerial discretions with respect to the death penalty. These two discretions were engaged in the aftermath of the October 2002 terrorist bombings in Bali (see next section).
84. The first ministerial discretion provides that a request for assistance 'must not' be provided if an individual sentenced to death or charged with an offence punishable by death *unless* there are special circumstances.⁵⁶ 'Special circumstances' are not defined in the Mutual Assistance Act, but were traditionally believed only to cover two situations: where a guarantee that the individual will not be executed is provided; and where the information requested is exculpatory.⁵⁷
85. Recently, a third special circumstance has been revealed: where the information requested goes to the impact of a crime on the victims.⁵⁸ The purpose of this new circumstance was to permit Australian relatives of victims of the October 2002 Bali Bombing to present victim impact statements at the sentencing proceedings of the convicted bombers.⁵⁹ The significance of the addition of a new circumstance should not be underestimated. It demonstrates that the government is willing to expand the definition of 'special circumstances' and, potentially, expose more and more people to the death penalty.
86. If the law of mutual assistance is changed to require guarantees that no one will be tortured, then it will be subject to the same overriding ministerial discretion.
87. The second ministerial discretion in the Mutual Assistance Act provides that, before a person is charged with a capital offence, a request for

assistance 'may' be refused if the Minister believes that the death penalty might apply. This discretion relates to the investigatory stage and does not operate to prohibit cooperation automatically – it only provides for refusal of cooperation at the discretion of the Minister.

4.2.3 ministerial approval to cooperate in terrorism-related death penalty cases

88. The appalling terrorist bombings in Bali in October 2002 changed Australia in many ways. One of the more profound changes has gone largely unremarked. The first Bali bombing marks the point in time that Australian ministers endorsed Australian assistance in death penalty cases for the first time since ratifying the Second Optional Protocol to the ICCPR and the Convention against Torture. Prior to October 2002, it was unthinkable that politicians would have so enthusiastically endorsed police-to-police assistance in capital cases. This is yet another example of how the response to the so-called 'war on terror' is eroding human rights in Australia.
89. After the October 2002 Bali bombings, an Australian-Indonesian investigative task force was established, jointly headed by the Indonesian National Police (INP) and the Australian Federal Police (AFP).⁶⁰ The joint taskforce was codenamed Operation Alliance.⁶¹ Only a day or two later, President Megawati decreed new anti-terror laws, introducing the death penalty.⁶² Not long thereafter, Prime Minister John Howard was quoted in the Australian press saying that Australia would not protest the execution of the (as yet unidentified) Bali Bombers.⁶³ The continued operation of the joint taskforce could have been halted or renegotiated by a decision of the Attorney-General.⁶⁴ It never was.
90. Once the Bali Bombers were captured and charged, continued Australian assistance required ministerial approval.⁶⁵ Documents obtained by CCL under freedom of information show that, in February 2003, the then federal Attorney-General Darryl Williams and Justice Minister Chris Ellison approved continued police-to-police cooperation with the Indonesian police – despite the fact that they both knew that people might be executed. The Justice Minister wrote to AFP Commissioner Mick Keelty advising that further cooperation is not inconsistent with Australia's international obligations in relation to the death penalty.⁶⁶
91. As noted above,⁶⁷ ministerial approval also issued to permit the provision of victim impact statements in the proceedings that led to the death penalty being imposed on the Bali Bombers.
92. Australia has an international obligation to ensure that no one is exposed to the death penalty.⁶⁸ The ministerial approval of cooperation in terrorism-related death penalty cases has demonstrated Australia's willingness, in the name of the 'war on terror', to ignore its international human rights obligations.

93. CCL is gravely concerned that this willingness extends to Australia's international obligations under the Convention against Torture, particularly with respect to the terrorism-related cases of Mamdouh Habib, David Hicks and Abu Ghraib.

4.2.4 immigration and deportation

94. Successive Australian governments have elected to eliminate the generic power of officials to grant visas on compassionate and humanitarian grounds, instead channelling this power to a single person – the Minister for Immigration.⁶⁹ Under section 417 of the Migration Act, the Immigration Minister has the discretionary power 'to substitute a more favourable decision' than that obtained by the asylum seeker on appeal.
95. The decisions of the Minister are discretionary, non-compellable and non-reviewable and 'obtaining a favourable result almost inevitably depends less on the merits of the case than on the identity of the intercessor and the personal access he or she has with the incumbent Minister'.⁷⁰
96. Advocacy by various members of the community such as local and State MPs, human rights groups and religious groups play a large part in attracting the Minister's attention to certain cases. Many asylum seekers, particularly those with few English language skills, find it difficult to garner such community support for their case.⁷¹ As such, the attention given by the Minister to cases is unequal and highly driven by public opinion and political outcomes. Combined with the non-compellable and non-reviewable nature of the Minister's decisions, Australia is at risk of breaching its obligations under the Convention not to refoule individuals who may be in fear of torture or other such treatment.⁷²
97. A statement on the exercise of the Minister's section 417 discretion must be tabled in Parliament.⁷³ A Senate inquiry into the use of the Immigration Minister's discretion noted that, at the same time that there has been a steady increase in the exercise of the Minister's discretion, there has been a steady decline in the amount of information provided in these statements to Parliament.⁷⁴ The Senate Committee found that until late 1997 reasons were given for the Minister's decision in these statements, however this is no longer done. The Committee recommended that more information should be provided in the statements to Parliament.⁷⁵ This would 'improve the transparency and accountability of the minister's decision making process'.⁷⁶

5. Article 11: custody and treatment of detainees

5.1 immigration detention

98. CCL recommends that the State Party heed the weight of expert international and domestic opinion by abandoning the mandatory, indefinite and arbitrary detention of people in its territory without a visa.

5.1.1 immigration detention: cruel, inhuman and degrading

99. Any person who enters Australia without a valid visa is, according to law, an 'unlawful non-citizen'.⁷⁷ All unlawful non-citizens *must* be detained in immigration detention centres, until they are granted a visa or forcibly deported.⁷⁸ Unlawful non-citizens can be detained indefinitely.
100. Australia's mandatory immigration detention system is cruel, inhuman and degrading; and it is most obviously so for children.
101. Disturbingly, in 2004, the High Court of Australia ruled that courts cannot release detainees simply because of the appalling conditions in the detention centres. Australia does not have a Bill of Rights, and therefore all the courts can do is review a decision as to whether someone is or is not an unlawful non-citizen, and if they are not then the court can order their release. Ultimately, Parliament can authorise the detention of unlawful non-citizens under cruel, inhuman and degrading conditions. As one High Court Justice put it:⁷⁹
- Conditions of detention cannot invalidate the grant and exercise of the power to detain in immigration detention.
102. A national inquiry into children in immigration detention, conducted by the Australian Human Rights and Equal Opportunity Commission ('HREOC') in 2004, found that the federal government's 'failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents amounted to cruel, inhuman and degrading treatment of those children in detention'.⁸⁰
103. In July 2002, after visiting Australia's immigration detention centres, the Special Envoy of the UN High Commissioner for Human Rights, his Honour Justice P. N. Bhagwati, handed down a damning report.⁸¹ The former Chief Justice of India wrote that 'from a human rights perspective it might be useful to ask whether the current approach to illegal immigration is the correct one'.⁸²
104. Justice Bhagwati wrote that conditions at the Woomera immigration detention centre 'could, in many ways, be considered inhuman and degrading'.⁸³ (The Woomera centre was finally closed in 2003.) Justice Bhagwati's report continues:⁸⁴

[He] was considerably distressed by what he saw and heard in Woomera IRPC. He met men, women and children who had been in

detention for several months, some of them even for one or two years. They were prisoners without having committed any offence. Their only fault was that they had left their native home and sought to find refuge or a better life on the Australian soil. In virtual prison-like conditions in the detention centre, they lived initially in the hope that soon their incarceration will come to an end but with the passage of time, the hope gave way to despair. When Justice Bhagwati met the detainees, some of them broke down. He could see despair on their faces. He felt that he was in front of a great human tragedy. He saw young boys and girls, who instead of breathing the fresh air of freedom, were confined behind spiked iron bars with gates barred and locked preventing them from going out and playing and running in the open fields. He saw gloom on their faces instead of the joy of youth. These children were growing up in an environment, which affected their physical and mental growth and many of them were traumatized and led to harm themselves in utter despair.

105. In October 2002 the UN Working Group on Arbitrary Detention reported on its visit to the immigration detention centres.⁸⁵ The group's report observed that 'a system combining mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practised by any other country in the world'.⁸⁶
106. In *C v Australia* the UN Human Rights Committee found Australia to be in violation of ICCPR article 7 ('cruel, inhuman or degrading treatment or punishment') because it had continued to detain Mr C in immigration detention even after becoming aware that his mental deterioration was the direct result of his detention.⁸⁷
107. On six occasions the UN Human Rights Committee has found that Australia's immigration detention regime is arbitrary and a violation of the right to liberty.⁸⁸ The UNHRC notes that 'arbitrary' means more than just 'unlawful', as the Australian courts are forced to interpret it:⁸⁹

...the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice.

108. As the Human Rights Committee points out in a recent case:⁹⁰

...in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification. It observes that the authors were detained in immigration detention for three years and two months. Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated that their detention was justified for such an extended period. It has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by resorting to, for example, the imposition of

reporting obligations, sureties or other conditions which would take into account the family's particular circumstances.

109. The Human Rights Committee has also criticised the lack of judicial review of, and compensation for, human rights abuses in Australia.
110. Australia's immigration detention regime and treatment of asylum seekers has also been criticised by the UN Committee on the Elimination of Racial Discrimination,⁹¹ the Committee on the Rights of the Child⁹² and the Committee on the Elimination of Discrimination against Women.⁹³

5.1.2 general conditions in immigration detention centres

111. Detention centre conditions have come under much scrutiny and criticism. In 2002, the UN Working Group on Arbitrary Detention reported that:⁹⁴

...the conditions of detention are in many respects similar to prison conditions; detention centres are surrounded by impenetrable and closely guarded razor wire; detainees are under permanent supervision; if escorted outside the centres they are, as a rule, handcuffed; escape from a centre constitutes a criminal offence under the law and the escapee is prosecuted.

112. The Working Group on Detention also reported a number of practices which it believed to create stressful conditions for detainees. These include:
- constant video surveillance robbing detainees of all privacy;
 - the practice of handcuffing detainees when making visits outside the centres;
 - frequent roll calls and reference to detainees by their identity numbers rather than names;
 - language problems creating barriers of communication;
 - collective isolation – where groups of detainees are isolated from other groups to prevent experienced detainees from sharing information with new arrivals.
113. The Working Group also reported that DIMIA statistics supported claims of self-harm in the detention centres.⁹⁵

In the eight months between 1 March 2001 and 30 October 2001 there were 264 incidents of self-harm reported (238 males and 26 females). The rates of self-harm were extremely high for people in the 26-35 age range: 116 people (105 men and 11 women). Of those aged 20-25 years, 103 had self-harmed (98 males and 5 females). Twenty-nine children and young people up to the age of 20 were recorded as having self-harmed.

114. There have been a number of reported disturbances within the Woomera, Curtin and Port Hedland detention centres that have posed significant threats to the physical health of detainees. There have been riots and fires in which tear gas and water cannons were used as control measures.⁹⁶ There have also been demonstrations, protests, suicide

attempts, self-mutilations (including sewing lips together and swallowing shampoo and detergents), hunger strikes where detainees have been forcibly fed and acts of violence, such as tearing down fences.⁹⁷

115. In 2002, HREOC found that, in December 2000 at the Port Hedland detention centre, five asylum-seekers had been arbitrarily detained for six and a half days.⁹⁸ During those six and half days, the detainees were allowed outdoors for a total of 20 to 25 minutes, and only two of the five detainees were given a change of clothes after five days.

5.1.3 mental health crisis in immigration detention centres

116. The mental health of people in immigration detention has long been of concern. In 2001, a joint parliamentary committee recommended that 'a review be carried out by the Department of Immigration and Multicultural Affairs...into the adequacy of psychological services provided to detainees'.⁹⁹
117. In 2002, the UNHRC expressed concern about the deterioration of the mental health of 'Mr C',¹⁰⁰ an Iranian asylum seeker, in immigration detention. The Committee found that Australia treated Mr C in a cruel, inhuman or degrading manner, because it had continued to detain Mr C in immigration detention even after becoming aware that his mental deterioration was the direct result of his detention.
118. In 2004, the UNHRC expressed concern about the deterioration of the mental health of Mr Madafferi in immigration detention.¹⁰¹ Mr Madafferi was detained because he was an unlawful non-citizen who had overstayed his visa. Australia's decision to return Mr Madafferi to immigration detention, in the full knowledge that his first admission to such detention had led to mental illness, was a violation of article 10 of the ICCPR (the humane treatment of people in detention).¹⁰²
119. The mental health issues of people in immigration detention only really gained national attention in 2005 when the Cornelia Rau and Vivien Alvarez-Solon scandals broke. Mrs Alvarez immigrated to Australia from the Philippines and became an Australian citizen in 1986.¹⁰³ In 2001, she was injured when she fell into a deep drain in the NSW country town of Lismore. At the local hospital she was committed to the psychiatric ward. Immigration officials, who were unable to establish her identity, concluded that she was an unlawful non-citizen and she was deported to the Philippines. Over the next few years, several DIMIA officials become aware that Ms Solon was an Australian citizen and that she had been deported: they did nothing. In fact nothing was done until, in sheer desperation in April 2005, Ms Solon's ex-husband emailed the Minister to alert her to Ms Solon's unlawful deportation. An independent inquiry into Ms Solon's unlawful deportation concluded that she had been unlawfully detained in immigration detention because the officers who detained her had failed to make sufficient enquiries to enable them to form a reasonable suspicion that Ms Solon was an unlawful non-citizen.¹⁰⁴

120. Ms Cornelia Rau, an Australian citizen, disappeared from the psychiatric wing of a Sydney hospital in March 2004. About two weeks later she was stopped by police in Far North Queensland. She identified herself variously as Anna Brotmeyer and Anna Schmidt, a German tourist who had overstayed her visa. She was detained as an unlawful non-citizen. She was transferred to a Queensland prison, where she spent six months in detention with convicted criminals, and then transferred to the Baxter immigration detention centre. In February 2005, Ms Rau's true identity was established when her family contacted police after reading an article in the *Sydney Morning Herald* entitled 'Aid sought for ill, nameless detainee'.¹⁰⁵ She was finally released from detention into the care of a psychiatric hospital in South Australia. The inquiry into Ms Rau's treatment noted that detainees require a higher level of mental health care than the general community, and yet a consulting psychiatrist was flown to Baxter on an infrequent basis.¹⁰⁶
121. In May 2005 a Federal Court judge found that the Commonwealth government owed a non-delegable duty of care to detainees to provide adequate health care.¹⁰⁷ The judge concluded that detainees did not 'have to settle for a lesser standard of mental health care because they were in immigration detention'.¹⁰⁸ His Honour called upon the government to review the outsourcing of mental health services.¹⁰⁹ His Honour found that the provision of mental health services in the Baxter detention centre was 'clearly inadequate'.¹¹⁰
122. Following the Alvarez-Solon and Rau inquiries, DIMIA created a Detention Health Advisory Group consisting of medical experts.¹¹¹ Mental health screening is now available to all detainees from the day they enter detention. Following another report into the private management of detention centres,¹¹² DIMIA has taken away the responsibility of the provision of mental health care from the private contractors who run the detention centres. By October 2006, DIMIA expects that other arrangements will be in place. It is unclear whether there will be adequate torture and trauma counselling.
123. In January 2007, HREOC again called for the repeal of Australia's mandatory detention laws.¹¹³ In relation to the mental health crisis in immigration detention, it noted that the situation had improved over the past few years, but that the underlying issues remain:¹¹⁴

The fundamental reasons for mental health problems in immigration detention are the same as they have always been:

- the fact of detention itself
- the long periods of detention
- uncertainty regarding the length of detention
- uncertainty regarding the future
- past torture and trauma.

5.1.4 children in detention

124. Australia's mandatory immigration detention policy has an enormous impact on children. As at December 2003, the average length of detention for a child was one year, eight months and 11 days.¹¹⁵ Between 1999 and June 2003, 2184 children arrived in Australia unlawfully to seek asylum and were detained in immigration detention.¹¹⁶ Most of these children were from Iraq, Afghanistan and Iran.¹¹⁷ More than 92% of these children were found to be refugees.
125. In 1998, HREOC released a 250-page report called *Those who've come across the seas* about Australia's mandatory immigration detention regime.¹¹⁸ HREOC was especially concerned that children were being detained as a matter of course, rather than only in exceptional circumstances.¹¹⁹ HREOC found that 'the detention regime in the Migration Act violates the ICCPR and CROC and is therefore a breach of human rights'.¹²⁰ HREOC essentially recommended that the Australian government adopt the view of arbitrary detention given by the UN Human Rights Committee in *A v Australia*.¹²¹ HREOC proposed a detailed alternative to mandatory immigration detention.¹²²
126. Immigration Minister, Mr Philip Ruddock, labelled HREOC's 1998 findings as 'totally unacceptable'.¹²³ He stressed that Australia does not 'as a matter of policy, ...detain asylum seekers who have entered Australia unlawfully, ...although I stress we will continue detaining people arriving here without valid documents'.
127. In 2004, HREOC released a 900-page report called *Last Resort* about children in immigration detention in Australia. It found that Australia's mandatory immigration detention system was 'fundamentally inconsistent with the *Convention of the Rights of the Child*'.¹²⁴ The report found that the combination of Australia's immigration policy and the limited judicial review of detention amounted to the 'automatic, indeterminate, arbitrary and effectively unreviewable detention of children'.¹²⁵
128. HREOC's report also found that 'children in immigration detention for long periods of time are at high risk of serious mental harm' and that the government's failure to address this issue 'amounted to cruel, inhuman and degrading treatment of those children in detention'.¹²⁶ The report detailed disturbing reports from psychologists and psychiatrists, who had all concluded that the mental health of children in detention is a serious and prevalent problem.¹²⁷ The report also detailed accounts of actual and attempted self-harm by children, including children as young as nine (9) cutting themselves with razor blades, drinking bottles of shampoo, going on hunger strike, sewing their lips up and hanging themselves from playground equipment and fences.¹²⁸
129. HREOC called for all children to be released from detention.¹²⁹
130. In a joint media release, the Attorney-General Phillip Ruddock and Immigration Minister Senator Amanda Vanstone rejected the major

findings of the report.¹³⁰ They described HREOC's report as 'unbalanced and backward looking'. They expressed disappointment that HREOC would recommend that children be released from immigration detention and that family unity should be preserved, because it 'would in practice encourage the inclusion of children in people smuggling operations'. They also repeated the government mantra that:

Australia has the right under international law to determine who it admits to its territory and under what conditions.

131. The abuses of children in immigration detention continued. In one case in 2005, two children aged six and eleven were seized from school and held in detention for four months, where they were exposed to the despair of adults who are at risk of being deported and where they witnessed an attempted suicide.¹³¹ Children in detention have also witnessed the slow decline into clinical depression of adult detainees who have been held for long periods in detention, and the refusal of authorities to take appropriate action to provide proper diagnosis and medical care for those adults.

132. It was not until July 2005, after government MPs threatened to introduce legislation releasing children from detention, that the Prime Minister agreed to change the law to ensure that the detention of children is a 'measure of last resort'.¹³² The Minister ordered that all families in detention be released into Residential Housing Centres (RHC).¹³³ Children now have the opportunity to attend community schools.¹³⁴ While this is an improvement, families living in RHCs are still living in detention, as HREOC recently noted:¹³⁵

it is important to remember that the housing centres are still detention facilities. People are not free to come and go as they please.

The mental health problems associated with restricted movement and uncertainty as to the future also apply to the detainees in these facilities, although they all acknowledge the improvement as compared to the main facilities.

133. It should also be observed that the Minister makes the decision to release someone into RHC. The Minister must make the decision personally and the Minister cannot be compelled to make a decision.¹³⁶ The Minister's decision is not judicially reviewable.¹³⁷

134. Despite the changes in July 2005, children can still be held in detention. In 2007, HREOC published a disturbing report that unaccompanied minors are still being kept in immigration detention.¹³⁸ According to HREOC, thirteen (13) unaccompanied Indonesian boys found on illegal fishing boats were held in immigration detention for between 8 and 15 days.

135. The UN Committee on the Rights of the Child, after acknowledging the July 2005 changes, expressed serious concern about the Australian immigration detention system:¹³⁹

...the Committee remains concerned that children who are unlawfully in

Australian territory are still automatically placed in administrative detention - of whatever form - until their situation is assessed. In particular, the Committee is seriously concerned that:

- (a) Administrative detention is not always used as a measure of last resort and does not last for the shortest appropriate period of time;
- (b) Conditions of immigration detention have been very poor, with harmful consequences on children's mental and physical health and overall development;
- (c) There is no regular system of independent monitoring of detention conditions.

136. The UN Human Rights Committee has been highly critical of Australia's immigration detention. In the case of *Bakhtiyari*, the Committee examined the treatment of children.¹⁴⁰
137. In October 1999, Mr Bakhtiyari arrived in Australia from Afghanistan on a boat as an asylum seeker. He was detained in an immigration detention centre. In May 2000 Mr Bakhtiyari was granted refugee status and released into the community.
138. In January 2001 Mrs Bakhtiyari arrived in Australia by boat with their children. They were detained in an immigration detention centre. Mrs Bakhtiyari was refused refugee status. Mr Bakhtiyari only found out that his family was in Australia in July 2001.
139. In December 2002, Mr Bakhtiyari's refugee visa was cancelled on the grounds that he had allegedly lied in his application for refugee status. In January 2003, the family was reunited – in an immigration detention centre. The psychological health of the children deteriorated and they self-mutilated. UN requests to release the Bakhtiyari family from detention, while there were outstanding court cases, were rejected.
140. In June 2003 the Family Court of Australia ordered that the Bakhtiyari children be released from detention.¹⁴¹
141. The Human Rights Committee found that the detention of Mrs Bakhtiyari and the children for over 2 years was a violation of ICCPR articles 9(1) and 9(4) (freedom from arbitrary detention and right to judicial review of detention). The violation, with respect to the children, came to an end when the Family Court ordered their release.
142. The Human Rights Committee found that Australia, by keeping the children in detention for so long when it was well-documented that they were suffering in detention, failed to protect the rights of the Bakhtiyari children in violation of ICCPR article 24(1) (protection of children).
143. The Human Rights Committee concluded by stating that:¹⁴²
- ...the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration,

forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State... The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children...in circumstances where that detention was arbitrary and in violation of article 9...of the Covenant.

144. The Australian government rejected the Human Rights Committee's determinations in *Bakhtiyari*. In April 2004, the High Court overturned the decision of the Family Court to release the Bakhtiyari children. On 30 December 2004, Australia deported the Bakhtiyari family to Pakistan.

5.1.5 length of detention

5.1.5.1 generally

145. A period of immigration detention is usually terminated by the issuing of a valid visa to, or the removal from Australia of, an unlawful non-citizen. For stateless people, immigration detention can be indefinite.
146. The UN Working Group on Arbitrary Detention found 'particularly worrying the lengthy detention of unlawful non-citizens, especially those whose application (for asylum or for permission to remain in Australia) has been refused by a final decision and who are awaiting removal or deportation'.¹⁴³ The Australian government contemptuously replied to this concern by restating its position that unlawful non-citizens are 'free to leave detention and return home at any time'.¹⁴⁴
147. The processing of asylum claims takes time and, as a matter of course, asylum seekers who arrived by boat have been forced to remain in detention until *after* their claims are heard. However, the Bridging Visa E (subclass 051) permits the release of asylum seekers into the community.¹⁴⁵ BVE holders have only very limited access to government services. Very few of these subclass visas are issued: there were only 167 issued between 2001 and 2005.
148. According to the government, most people are in detention for no more than three months.¹⁴⁶ However, for a significant number of people it can extend into years – especially for stateless asylum seekers in indefinite detention. Justice Bhagwati observed that 'detention for unduly long periods of time is sometimes due to complications in the refugee status determination procedure itself, and sometimes due to lengthy and cumbersome appeal procedures and unnecessary delays in disposal of the proceedings'.¹⁴⁷
149. Under section 196(3) of the *Migration Act 1958* (Cth), Australian courts cannot order the release of a detainee other than for the purposes of removal or deportation, or where a visa has been granted. There is no limit on how long DIMIA may take in assessing a visa application. In 2003–2004 the Refugee Review Tribunal (RRT) took as long as 22 weeks

to process the applications lodged by detainees. In this same time frame only 65% of detainee applications were processed within the RRT's own recommended time frame of 70 calendar days.¹⁴⁸ By 2004-2005 the average time to process an application had grown to 39 weeks.¹⁴⁹

5.1.5.2 statelessness and indefinite detention

150. A period of immigration detention is usually terminated by the issuing of a valid visa to, or the removal from Australia of, an unlawful non-citizen. However, detention can be indefinite. This adds yet another significant stressor impacting on the mental health of immigration detainees who are stateless.¹⁵⁰

151. Mr Ahmed Al-Kateb, a stateless man held indefinitely in immigration detention, describes the effects of indefinite detention this way:¹⁵¹

We can't work and we can't study. And we can't have any benefits [from] the government or Centrelink or Medicare. Nothing. We [are] just walking in a big detention. And we are all the time worried that they will send us back to detention again. All the time scared and worried. When you do not know about your future it's very crazy. I feel I am dying. They cannot deport us [because] we haven't a country to go back [to]. They don't want to give us a visa. That means that we have to stay in detention forever. It's like a death punishment.

In September 2004, after almost four years in immigration detention, Mr Al-Kateb was finally released on a Removal Pending Bridging Visa.¹⁵²

152. In 2004, the High Court confirmed that it was constitutional for Parliament to authorise the indefinite detention of a stateless person.¹⁵³ In dissent in that case, the Chief Justice of Australia pointed out that the majority's conclusion authorises the administrative detention of an alien for the rest of their life.¹⁵⁴

153. A stateless person has no recourse to the courts to challenge his or her arbitrary and indefinite detention. As Amnesty International Australia observes:¹⁵⁵

...review of indefinite detention of stateless asylum-seekers is...entirely a matter for the Minister for Immigration, on the basis of a non-enforceable, non-compellable, non-reviewable discretion.

154. The case of Mr Peter Qasim illustrates this point.¹⁵⁶ Mr Qasim was held in immigration detention from 1998 until 2005. He was Australia's longest serving immigration detainee and is considered a stateless person as no country is willing to accept him as a national. Mr Qasim's original application for refugee status was rejected on the grounds that he did not have a well founded fear of persecution in his native Kashmir. Mr Qasim applied unsuccessfully to the Federal Court of Australia to have his detention reviewed on the basis that there was no reasonable chance of his removal. After some time in detention, he unsuccessfully applied to the Indian Government for a passport. No country has been willing to

accept him. On 17 July 2005, after much petitioning by prominent Australians, Mr Qasim was granted a temporary visa by the Minister of Immigration until his situation is resolved.¹⁵⁷

5.1.6 privatisation of immigration detention centres

155. In 1997 the Australian government announced the contracting out of the running of immigration detention centres to Australasian Correctional Management ('ACM'), a subsidiary of Wackenhut Corrections Corporation.¹⁵⁸ ACM already ran private prisons in Australia.
156. ACM's management of detention centres was heavily criticised. As a commercial enterprise, they were concerned with maximising profit, not conforming to the strictures of the humane treatment of individuals under international human rights law. When the UN Working Group on Arbitrary Detention asked for a copy of the contract between ACM and the Australian government, it was denied access on the grounds that it was a 'business secret'.¹⁵⁹
157. The Inspector of Custodial Services in Western Australian, Mr Richard Harding, accused the government of privatising the immigration detention centres in an effort to evade its international human rights obligations:¹⁶⁰
- I think that the government in a sense, was trying to purchase some kind of moral immunity for the fact that it was setting in train regimes that really could not, and would not, conform with international obligations. Of course, there is no way that any government can contract out of its international obligations and its duty of care. But the government wanted this to be out of sight and out of mind.
158. The Auditor General estimated that, over the six years in which ACM ran the detention centres, the Australian government paid more than half a billion dollars to ACM.¹⁶¹ The *Migration Act* allows the government to recover the costs of detention from a non-citizen.¹⁶² These provisions were inserted by the Labor government in 1992.¹⁶³ The UN Working Group on Arbitrary Detention expressed its concern about this levy on detainees:¹⁶⁴
- Payment of a daily fee (A\$ 60-114) for detention for those detainees leaving the country, either voluntarily or by expulsion. This measure seems aimed at dissuading arrivals, as the money is not payable unless the alien returns – even legally – to Australia. However, this is not always made clear in the bill given to the detainee; the document, of which the delegation saw many examples, only mentions that such "arrangements" are possible. The shock felt at the sudden receipt of this bill is all the more striking as the persons concerned are generally destitute. The delegation was informed of two bills for A\$214,346 and A\$37,685.50, respectively.
159. It should be noted that an unsuccessful applicant who is charged for their stay in detention and then deported cannot return to Australia until they have repaid the debt to the Commonwealth.¹⁶⁵ A constitutional challenge

to the law levying this accommodation fee on detainees was unsuccessful in the Federal Court.¹⁶⁶

160. In August 2003, under increasing public pressure, the government awarded the contract to run the centres to Group 4 Falck Global Solutions Pty Ltd.¹⁶⁷ Group 4 later changed its name to Global Solutions Limited (GSL). The contract between the government and Group 4 is now publicly available.¹⁶⁸ The immigration detention centres are still privately run.
161. The privatisation of immigration detention centres does not mean that the Australian government is not responsible for violations therein of Australia's international obligations under the Convention against Torture. The UN Human Rights Committee has observed this principle, with respect to the *International Covenant on Civil and Political Rights*:¹⁶⁹

[The] contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve the State party of its obligations under the Covenant...

5.2 over-representation of indigenous Australians in prisons

162. CCL notes the Committee against Torture's concern about the over-representation of indigenous Australians in prison.¹⁷⁰
163. Despite making up only 2.4% of Australia's total population,¹⁷¹ indigenous Australians made up 21% of the country's prison population on 30 June 2004.¹⁷² The rate in the March quarter of 2005 was 2,004 per 100,000 of the adult indigenous population, an increase of 9% since the March quarter 2004.¹⁷³ In June 2004, the national rate of imprisonment of indigenous Australians was 11 times higher than the rate for non-indigenous people.¹⁷⁴
164. The rate of the incarceration of indigenous women has accelerated at an alarming rate. Aboriginal and Torres Strait Islander women are currently the fastest-growing group of inmates in NSW prisons.¹⁷⁵
165. There is widespread concern that indigenous youth are disproportionately represented in juvenile detention.¹⁷⁶ In 2003, indigenous children between 10 and 14 were 30 times more likely to be incarcerated than non-indigenous children of the same age.¹⁷⁷
166. In 2003-2004 in NSW, 24% of juveniles under the supervision or control of the Department of Juvenile Justice were indigenous (Aboriginal and Torres Strait Islanders make up only 2% of the NSW population).¹⁷⁸ In South Australia the rate of detention in 2002-2003 of indigenous children aged between 10 and 17 reached 538.1 per 100,000. In Western Australia the rate has grown alarmingly and was 671.8 in 2003-04: more than twice the national rate. The national figures are shown in the following table:¹⁷⁹

Average rate of detention of Indigenous and non-Indigenous people aged 10–17 yrs in juvenile detention, per 100 000 people

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Indigenous									
1999-2000	343.5	181.9	250.8	624.1	266.2	na	284.1	97.6	315.1
2000-01	324.9	142.4	222.2	565.4	265.9	na	524.7	121.4	294.5
2001-02	351.4	135.8	221.1	555.6	388.2	na	624.4	119.9	307.9
2002-03	353.8	173.6	212.0	604.7	538.1	na	458.6	182.6	326.6
2003-04	339.3	231.0	202.6	671.8	333.2	158.7	503.2	108.6	310.1
Non-Indigenous									
1999-2000	23.6	10.9	13.4	18.7	21.9	na	24.6	31.8	17.8
2000-01	19.9	10.7	8.7	15.1	29.3	na	36.4	26.6	16.0
2001-02	17.9	10.7	8.8	17.3	23.0	na	35.7	23.7	15.0
2002-03	17.5	10.3	10.3	12.2	23.8	na	36.9	30.9	14.9
2003-04	17.5	9.1	8.9	13.8	20.3	39.6	39.4	12.2	13.9

167. The daily average population of indigenous children aged 10-17 in juvenile detention centres is also increasing:¹⁸⁰

Daily average population of Indigenous people aged 10–17 yrs in juvenile detention

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
1999-2000	91	8	60	77	13	na	2	10	261
2000-01	86	7	53	71	13	na	4	12	246
2001-02	92	7	53	71	19	na	5	12	259
2002-03	98	10	54	80	28	na	4	19	295
2003-04	98	14	54	92	18	6	4	12	298

5.3 conditions in NSW prisons

168. The UN Human Rights Committee has examined a case involving the treatment of a juvenile in the *adult* prison at Parklea in Sydney, New South Wales.¹⁸¹

169. In February 1999 Mr Brough, a 17 year old Aboriginal male, was sentenced to 8 months prison for burglary and assault. In March 1999, after he participated in a riot and held a guard hostage at the Kariong Juvenile Justice Centre in a protest against conditions, Mr Brough was transferred to the adult prison at Parklea. In Parklea, Mr Brough began to self-harm and was placed in a solitary confinement cell for 72 hours, where the artificial lights were on all the time and where he was stripped to his underwear and his blanket was taken away from him. Mr Brough suffers from a mild intellectual disability.

170. In 2006 the UN Human Rights Committee published its determination in Mr Brough's case. The Committee found that:¹⁸²

In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his

clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal.

171. The UNHRC determined that Australia had breached articles 10(1) (humane treatment), 10(3) (segregation of juveniles and adults) and article 24(1) (protection of children) of the *International Covenant on Civil and Political Rights*.¹⁸³
172. CCL recommends that the State Party invite the Special Rapporteur on Torture to visit the Parklea Correctional Centre.

5.4 domestic counter-terrorism measures

5.4.1 ASIO detention

173. In 2003 the Australian Security Intelligence Organisation (ASIO) was given the power to detain a person for questioning for up to 7 days.¹⁸⁴ Written permission must be obtained from the federal Attorney General, and a warrant then obtained from a list of former judges. Further warrants can be issued if new information arises. A detainee need not be a terrorist suspect, they need only be in possession of information that will 'substantially assist the collection of intelligence' related to a terrorism offence.
174. It is a criminal offence, punishable by up to five (5) years imprisonment, for a detainee not to answer questions put to them by ASIO.¹⁸⁵ However, the answers are not admissible against a detainee in criminal proceedings.¹⁸⁶
175. UN Special Rapporteur Martin Scheinin observed that, while the information obtained under these ASIO warrants cannot be used to prosecute a detainee, such information could be used by police to further their own investigations.¹⁸⁷ The Special Rapporteur recommended that 'police officers should not be present at ASIO hearings' and a 'clear demarcation should exist and be maintained between intelligence gathering and criminal investigations'.¹⁸⁸
176. Detainees must be treated 'with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment'.¹⁸⁹ A detainee can complain to the Inspector General of Security Services, who can report to the Parliament. Juveniles under the age of 16 may not be the subject of a detention warrant. All contact between a detainee and lawyer is monitored by security officials.¹⁹⁰ It is a criminal offence for anyone (including the detainee and lawyers) to disclose 'operational information' not only during the period of the warrant, but for a period of two years after the expiry of the warrant.¹⁹¹
177. All of these provisions are subject to a sunset-clause and these powers cease on 22 July 2016.¹⁹²

178. The detainee, even when only suspected of having information, has fewer rights than a person actually charged with a serious offence. There is no guarantee of access to the lawyer of your choice or even, in some cases, no right to contact a spouse or family member.

179. CCL's Vice President, Mr David Bernie, has observed that:¹⁹³

...the laws relating to ASIO detention and questioning are based not on being a suspected terrorist, but on being suspected of having information about a terrorist act whether in the past or future. These laws therefore have great potential to be used against those whose professions, such as journalists and lawyers, usually involve the collection of information.

...The laws give automatic secrecy to actions of ASIO and the police, irrespective of whether the secrecy is needed or not, stopping the parties and their lawyers from objecting in the public to government spin which may be freely placed in the media...

5.4.2 preventative detention

180. In 2005, preventative detention laws were introduced.¹⁹⁴ Preventative detention orders allow for a person to be detained without charge for up to 14 days, and potentially indefinitely if subsequent orders are sought. In order to obtain a preventative detention order, police must reasonably suspect that a person is preparing to commit a terrorist act. A person may not be interviewed by ASIO or police while in detention. These powers will cease in 2015.

181. UN Special Rapporteur Scheinen expressed concern that preventative detention orders can be based on secret information that neither the detainee or their lawyer can see.¹⁹⁵ The Special Rapporteur expressed concern that such information could potentially be 'contrary to the right to a fair trial'.

182. Detainees must be treated humanely, however they may only contact one relative and a work colleague to tell them that they are 'safe but unable to be contacted for the time being'.¹⁹⁶ In some Australian States it is a criminal offence to tell relatives or work colleagues that you are being detained; in other States a detainee is allowed to tell their relative that they are being detained. It is an offence for the person contacted to tell anyone else.

183. All conversations between a lawyer and detainee will be monitored by police. The content of the conversations may not be used in evidence against a detainee.¹⁹⁷

5.4.3 treatment of terrorist suspects

5.4.3.1 adults

184. People charged with federal terrorist offences can only receive bail in exceptional circumstances.¹⁹⁸ UN Special Rapporteur Scheinen found this

situation to be contrary to article 9(3) of the ICCPR (right to a presumption in favour of bail).¹⁹⁹

185. In New South Wales, all people charged with terrorist offences and refused bail are kept, initially at least, in maximum security prisons. Terrorist suspects who are, in the opinion of the NSW Corrective Services Commissioner, 'a special threat to national security', are given a security classification of "AA" (for men) or "Category 5" (for women).²⁰⁰ This decision of the Commissioner is not reviewable in a court of law. UN Special Rapporteur Scheinen commented that there should be 'appropriate avenues available for the remanded person to seek an independent review of the classification'.²⁰¹
186. All inmates charged with, or convicted of, committing terrorist offences are automatically classified AA/5 when they are received by the Department of Corrective Services.²⁰² They then undergo a classification procedure, which can take up to two weeks and during which time each remandee is housed in a separate cell in an isolation wing of a high security prison.²⁰³ In one instance, two AA inmates were housed in segregation at the High Risk Management Unit ('HRMU') in Goulburn for 'significantly longer than 2 weeks', until the classification process was complete.²⁰⁴
187. CCL notes that from October 2006, terrorist suspects are no longer kept in segregation while undergoing this initial assessment.²⁰⁵
188. Visitors to the AA/5 remandees are photographed and are subjected to criminal background checks and to biometric testing.²⁰⁶
189. AA/5 remandees are excluded from the jurisdiction of the Official Visitor by the Crimes (Administration of Sentences) Regulation 2001 (NSW).²⁰⁷ This means that they cannot make complaints about their treatment to the Official Visitor, as is the right of all other remand and prison inmates.
190. CCL is concerned that the policy behind the AA/5 classification is oppressive and violates Australia's international human rights obligations. The *UN Standard Minimum Rules for the Treatment of Prisoners*²⁰⁸ permit remand inmates to be treated differently from other remand inmates only on the grounds that it is 'necessary in the interests of the administration of justice and of the security and good order of the institution'.²⁰⁹ National security, however, is *not* a legitimate ground on which to discriminate against remand inmates. In fact, it is hard to see how someone could be a threat to national security while in prison.
191. A NSW parliamentary committee recommended that the Minister for Justice review the application of the AA/5 classification to remandees.²¹⁰ The Minister refused because, in his view:²¹¹

The classification is based on risk. No evidence has been produced to suggest that a risk to national security can only arise from a convicted inmate and not from a remand inmate; or that the risk from a convicted inmate is greater than a risk from a remand inmate.

192. CCL notes that terrorist suspects, like all unconvicted accused, should be presumed innocent²¹² and be treated differently from convicted inmates.²¹³ Furthermore, bail-refused terrorist suspects should be housed, like other accused people, in a general remand facility, unless they represent a rational threat to the security and good order of the institution.
193. CCL is also concerned about media reports that NSW Police, AFP and ASIO officers raided terrorist suspect Omar Baladjam's cell at the HRMU on 8 March 2006 and seized *inter alia* notes intended to brief his lawyer the following day about his alleged mistreatment in prison.²¹⁴ This is a serious breach of client-solicitor privilege and adds weight to allegations that conditions in the HRMU are oppressive.²¹⁵
194. CCL recommends that the State Party invite the Special Rapporteur on Torture to visit the 'supermax' prison-within-a-prison (High Risk Management Unit) at the Goulburn Correctional Centre.

5.4.3.2 juveniles

195. The NSW government has decided that juveniles held under preventative detention orders will be held in the Kariong Juvenile Correctional Centre for serious juvenile offenders.²¹⁶ To date, there has not been a case of a juvenile being held under a preventative detention order.
196. As at June 2005, Kariong held 11 youths on remand and 28 sentenced offenders.²¹⁷ There is no segregation of juveniles on remand and sentenced juveniles in Kariong.²¹⁸
197. There are nine juvenile justice centres in NSW. Eight are run by the Department of Juvenile Justice.²¹⁹ In November 2004, management of the ninth centre, Kariong Juvenile Justice Centre for serious male offenders over 16 years of age, was transferred from the Department of Juvenile Justice to the Department of Corrective Services, which is responsible for adult prisons.²²⁰ In December 2004, it was renamed the Kariong Juvenile Correctional Centre.
198. In July 2005, the NSW Parliament's Select Committee on Juvenile Offenders recommended that the state government consider returning management of Kariong to the Department of Juvenile Justice in the longer term.²²¹ The NSW government rejected this recommendation.²²²

6. Article 12: obligation to investigate torture

6.1 acquiescence and failure to investigate

199. Australian citizen, Mr Mamdouh Habib, makes serious allegations that Australian officials were aware he was being tortured and mistreated. He also alleges that Australian officials were present during some of this abuse.
200. CCL is deeply concerned that Australia has refused to investigate these allegations of Australian complicity and acquiescence. CCL is also concerned that Australia has never demonstrated a willingness to prosecute and punish Australians who are complicit, or who acquiesce, in torture or ill-treatment.
201. CCL recommends that the State Party investigate, prosecute and punish Australians who commit, or are complicit in the commission of, torture.
202. CCL notes the Committee against Torture's view that where there is an immediate risk that someone will be tortured or ill-treated and where the agents of a State Party are present and fail to act to prevent a violation of the Convention, then these violations are committed with the acquiescence of the State Party and constitute a violation of the Convention by that State Party.²²³
203. It appears that Australia was aware of, and acquiesced in, the mistreatment of detainees at Guantanamo Bay, prisons run by the Coalition Provisional Authority in Iraq, and the practice of extraordinary rendition of individuals for torture. CCL notes the Committee against Torture's view that rendition to states that torture constitutes refoulement.²²⁴
204. CCL is deeply concerned that Australia's willingness to ignore, and Australia's failure to protest, violations of the Convention by other States amounts to acquiescence in this torture and ill-treatment.
205. CCL recommends that the State Party acknowledge its responsibility to investigate in good faith all allegations of torture, ill-treatment and refoulement by other States. The failure to do so amounts to acquiescence and is itself a violation of the Convention.
206. CCL is also deeply concerned about Australia's practice of referring complaints about torture and ill-treatment to the alleged perpetrators for investigation. For example, allegations of the torture and mistreatment of Mr Mamdouh Habib and Mr David Hicks were referred to the US military for investigation.
207. CCL recommends that the State Party cease its practice of referring allegations of torture to the alleged perpetrators for investigation.
208. CCL notes that Australia has made a declaration under Article 21 of the Convention against Torture, recognising the competence of the

Committee against Torture to receive and consider communications submitted by another State Party. CCL also notes that Australia's allies in the 'war on terror', in particular the United States and the United Kingdom, have made similar declarations.²²⁵

209. CCL recommends that the State Party institute a statutory mechanism for communicating to the Committee against Torture violations of the Convention by other State Parties.

6.2 torture of Australian citizens abroad

210. CCL *strongly recommends* that the State Party establish a Royal Commission with a full mandate, along the lines of the Canadian Arar Commission, to investigate the serious allegations of torture and mistreatment made by Mamdouh Habib and David Hicks. The State Party should also consider appropriate compensation.
211. Mr Mamdouh Habib, a dual Australian-Egyptian citizen, has made serious allegations that he was tortured in Pakistan, Egypt and Guantanamo Bay. None of these allegations have been investigated in good faith by the Australian government.
212. Mr David Hicks, an Australian citizen captured in Afghanistan, has also made serious allegations that he was tortured and mistreated by US officials in Afghanistan and at Guantanamo Bay. The Australian government referred these allegations to the US military for investigation.

6.2.1 Mamdouh Habib

213. Mr Mamdouh Habib was captured and detained in Pakistan in October 2001, where he was interviewed *inter alia* by officers of the Australian Federal Police and ASIO.²²⁶ During his interviews with the AFP in Pakistan, Mr Habib made allegations that he had been kidnapped and tortured, but Australian officials did not take those allegations seriously and they were not investigated.²²⁷
214. Mr Habib also alleges that an Australian official was present when he was interrogated by American officials in Pakistan.²²⁸
215. At no time did the Australian government ask the Pakistani or US governments to return Mr Habib to Australia.²²⁹
216. Mr Habib soon after 'disappeared' from Pakistan. According to the Interior Minister of Pakistan, Mr Makhdoom Syed Faisal Saleh Hayat, Mr Habib was sent to Egypt at the request of the United States.²³⁰ Mr Habib alleges that an Australian official was present at the Pakistani airport where he, bound and gagged, was placed on a plane for extraordinary rendition to Egypt.²³¹
217. Mr Habib was held in Egypt for six months, where he was tortured. He was *inter alia* repeatedly beaten, attacked by dogs and subjected to

electric shocks.²³² According to Mr Habib's US lawyer, Professor Joe Margulies of the MacArthur Justice Centre at the University of Chicago.²³³

The torture was unspeakable. Mr Habib described routine beatings. He was taken into a room, handcuffed, and the room was gradually filled with water until the water was just beneath his chin. Can you imagine the terror of knowing you can't escape?

218. Mr Habib alleges that an Australian official was present during at least one of his interrogation sessions in Egypt.²³⁴ Mr Habib alleges that his Egyptian torturers had access to information, including telephone records, that could only have been obtained from Australian sources.²³⁵ It is unclear who handed this information to Egyptian security forces. The Australian media has reported that ASIO shared with the CIA information about Mr Habib, and possibly information obtained coercively in Australia from the execution of a search warrant of Mr Habib's Sydney home.²³⁶
219. Australian officials deny they knew for a fact that Mr Habib was ever in Egypt. According to the Australian government: despite repeated requests by Australian consular officials, the Egyptian government never admitted Mr Habib was in Egypt.²³⁷
220. The CIA agent responsible for establishing the extraordinary rendition programme, Mr Michael Scheuer, told an Australian TV journalist that, because of the close relationship between Australia and the US, it was unlikely that Australian officials were not informed by the CIA of Mr Habib's rendition to Egypt.²³⁸
221. In November 2001, ASIO 'suspected' Mr Habib was in Egypt.²³⁹ ASIO has never revealed how it came by this knowledge. ASIO requested the permission of Egyptian intelligence services to interview Mr Habib in Egypt.²⁴⁰
222. Within days of Mr Habib's rendition, the Department of Foreign Affairs and Trade sent a cable stating as fact that Mr Habib had 'been transferred to Egypt'.²⁴¹ Australian officials also wrote to Mr Habib's wife informing her that 'we believe that your husband is now detained in Egypt' and 'we are not aware of the details of his movement to Egypt from Pakistan'.²⁴²
223. From Egypt, Mr Habib was transferred to the US military base at Bagram in Afghanistan and then on to Guantanamo Bay.²⁴³ ASIO admits to becoming aware that Mr Habib had been transferred into US custody at Guantanamo Bay at some point prior to 17 April 2002.²⁴⁴
224. Mr David Hicks, another Australian detainee at Guantanamo Bay, alleges that he was shown a photograph of Mr Habib who was so badly beaten that Mr Hicks said:²⁴⁵

I thought it was a photo of a corpse. I was told I'd be sent to Egypt and suffer the same fate if I didn't co-operate with my US interrogators.

225. In May 2002 at Guantanamo Bay, during an interview with AFP officers, Mr Habib raised allegations that he had been tortured by people who 'spoke the Egyptian language'.²⁴⁶ The AFP, believing it was the responsibility of the Department of Foreign Affairs and Trade (DFAT) to investigate, informed DFAT of Mr Habib's allegations of torture.²⁴⁷
226. US military officials holding Mr Habib at Guantanamo Bay claimed that he 'knew about the September 11 attacks in advance, had trained in martial arts with two of the core terrorists [groups] and planned to later hijack a plane himself'.²⁴⁸ Despite these serious allegations, Mr Habib was released from Guantanamo Bay shortly after his allegations of torture and rendition were made public in a US court.²⁴⁹
227. In January 2005, after three years in Guantanamo Bay, Mr Habib returned to Australia.²⁵⁰ It is important to note that Mr Habib was released from Guantanamo Bay by the Americans without charge, and Mr Habib has never been charged with any terrorism offences in Australia.
228. None of these allegations of torture made by Mr Habib have been thoroughly or effectively investigated by the Australian government or an independent commission. Unlike Canada, where a Commission of Inquiry was established to investigate the extraordinary rendition and torture of a citizen,²⁵¹ there has been no independent judicial inquiry into Mr Habib's claims. Such a commission could seek answers to some of the many unanswered questions, such as: who told ASIO that Mr Habib was in Egypt; and, why do Australian officials still have Mr Habib under surveillance?
229. The federal Attorney-General considers it futile to ask the Americans about whether Mr Habib was rendered and tortured, because "I don't think I'd get an answer".²⁵² Nevertheless, the Australian government chose to refer Mr Habib's allegations of torture by Egyptians to the United States for investigation.²⁵³ In the context of allegations by Mr David Hicks of torture, the Australian Foreign Minister, Mr Alexander Downer, stated his view that 'people from al-Qaeda always claim to be tortured – always'.²⁵⁴
230. Given what is now known about the American practice of extraordinary rendition²⁵⁵ and given the findings of the Canadian Arar Commission,²⁵⁶ Mr Habib's allegations that Australian officials knew he was in Egypt and being tortured are credible and need to be thoroughly investigated.
231. Australia has a mechanism for investigating such serious breaches of human rights: the Royal Commission.²⁵⁷ A Royal Commission is headed by a judicial officer with the power to subpoena witnesses and documents. This is the only appropriate mechanism for examining the serious allegations of Mr Habib. Such a Royal Commission must be given a full mandate to investigate the actions of all Australian officials (including politicians) with respect to Mr Habib.

6.2.2 David Hicks

232. Mr David Hicks was captured by Northern Alliance forces in Afghanistan in November 2001.²⁵⁸ He was later transferred to Guantanamo Bay. In 2007, after almost six years at Guantanamo, Mr Hicks pleaded guilty before a US military commission to being a terrorist sympathiser.
233. As part of his plea bargain, Mr Hicks agreed not to speak to the media for 12 months and that he would not sue the US government. Mr Hicks also recanted allegations of torture and abuse by signing a document stating that he had always been treated humanely while in US custody. This contrasts starkly with allegations that surfaced before the plea bargain.
234. In a sworn affidavit filed in the United Kingdom in early May 2007, Mr Hicks revealed details of his treatment at Guantanamo Bay.²⁵⁹ He alleges that he was beaten and subjected to sleep deprivation. He was only allowed 15 minutes exercise every week. He was kept in isolation for almost eight continuous months.
235. Like Mr Habib, there has been no official Australian investigation into these allegations of torture. The Australian government referred allegations of torture and mistreatment of Mr Hicks at Guantanamo Bay to the US military for investigation. In July 2005, a US report found no evidence that Mr Hicks had been mistreated at Guantanamo Bay.²⁶⁰ Australian Prime Minister Howard responded by saying:²⁶¹
- We have allegations of abuse, those allegations are investigated. We have a response from the Americans. I have nothing to add to that except to remind you of the nature of the allegations that have been made about Mr Hicks. Let us not lose sight that these are very serious allegations.
236. Mr Hicks was returned to Australia in May 2007.²⁶² He is currently serving his nine-month sentence, imposed by the US Military Commission, in a maximum security prison in Adelaide, South Australia.

6.3 Australian support for Guantanamo Bay

237. CCL notes that the Committee against Torture has called on the United States of America to close the detention centre at Guantanamo Bay.²⁶³
238. Australia has been a strong supporter of the US military prison at Guantanamo Bay in Cuba. Despite the serious allegations of torture and mistreatment there, at no time did the Australian government ask for the release of Mr Habib or Mr Hicks. At no time did Australia undertake an independent investigation into these allegations. At no time has Australia called for the detention centre to be closed and the detainees released.
239. Australia has also ignored the report of the UN Special Rapporteurs, which documented allegations of torture and mistreatment and which called for the immediate closure of Guantanamo Bay.²⁶⁴

6.4 Australian indifference to abuse at Abu Ghraib

240. CCL recommends that the State Party establish an independent public inquiry to investigate what its agents knew about abuse in prisons run by occupying forces in Iraq and Afghanistan, and what actions were taken to protect the victims.
241. In July 2003, Amnesty International raised concerns about allegations of torture at Abu Ghraib prison and in other installations under the control of the Coalition Provisional Authority in Iraq.²⁶⁵ The Australian government was aware of these allegations, but did not investigate them.²⁶⁶
242. An Australian military lawyer, Colonel Mike Kelly, who was posted to the Coalition Provisional Authority in Baghdad, reported Amnesty's concerns to Ambassador Paul Bremer and the Australian government.²⁶⁷ After resigning from the Australian Army in May 2007 to run as an opposition candidate in the upcoming federal election, Colonel Kelly revealed that he had started visiting Abu Ghraib and other detention facilities in Iraq in June 2003 (before the Amnesty report) and had sent detailed situational reports back to Canberra about abuse in Coalition-run prisons and camps.²⁶⁸ Colonel Kelly's reports were ignored and their full extent was not revealed by defence officials to the Australian Senate when it investigated what Australia knew about abuse at Abu Ghraib.²⁶⁹
243. In October 2003 the International Committee of the Red Cross (ICRC) raised its concerns about abuses in Iraqi prisons with the United States and the United Kingdom. The ICRC's report stated that some detainees in Abu Ghraib were subjected 'to both physical and psychological coercion (which in some cases was tantamount to torture)'.²⁷⁰ There were allegations of sleep deprivation, keeping detainees naked and handcuffing detainees to the bars of their cells for 3-4 hours. The ICRC did not send Australia a copy of this report, but the report was available to some Australian officials.
244. On 4 December 2003, Australian military lawyer Major George O'Kane attended the Abu Ghraib prison to interview 'various people who were involved in the interrogation processes' for the purpose of addressing 'issues of mistreatment allegations and the accuracy of contents of draft reply by US Army military police and military investigators'.²⁷¹
245. The extent of Major O'Kane's inquiry into the abuses alleged in the October 2003 ICRC report was that 'he raised the contents of the report "paragraph by paragraph" with the appropriate military officials and that the allegations were denied'.²⁷²
246. It is not clear whether the draft letter prepared by Major O'Kane was edited or changed by superior officers before it was sent to the ICRC by the United States, as detaining power. However, the Australian Defence Minister has confirmed that Major O'Kane's opinion at the time was that 'internees were not being held or interrogated contrary to the Geneva Convention'.²⁷³

247. In August 2004, US Major General George Fay reported that the ICRC's October 2003 allegations 'were not believed, nor were they adequately investigated'.²⁷⁴ Major General Fay noted that Major O'Kane was sent to Abu Ghraib to help 'craft a response to the ICRC memo'.²⁷⁵ He went on to find that:²⁷⁶

The only response to the ICRC was a letter signed by [Brigadier General] Karpinski, dated 24 December 2003. According to [Lieutenant Colonel] Phillabaum and [Colonel] Warren (as quoted above) an Australian Judge Advocate officer, [Major] O'Kane, was the principal drafter of the letter. Attempts to interview MAJ O'Kane were unsuccessful. The Australian Government agreed to have MAJ O'Kane respond to written questions, but as of the time of this report, no response has been received. The section of the BG Karpinski letter pertaining to Abu Ghraib primarily addresses the denial of access to certain detainees by the ICRC. It tends to gloss over, close to the point of denying the inhumane treatment, humiliation, and abuse identified by the ICRC. The letter merely says: Improvement can be made for the provision of clothing, water, and personal hygiene items.

248. The Australian government did not make inquiries of the United States, its Coalition partner in Iraq, about Colonel Kelly's allegations of abuse. The Australian government did not ask the United States about the ICRC's October 2003 report. Nor did the Australian government make inquiries of the United States when further allegations surfaced in January 2004 or when graphic photographs of abuse arose in April 2004.²⁷⁷ The Australian government has not undertaken any public inquiry into its conduct of these matters.

249. The Australian government continues to deny any state responsibility for the abuse that occurred in Coalition-run facilities in Iraq. Australia relies on the fact that it is not named as one of the Occupying Powers in UN Security Resolution 1483.²⁷⁸ It relies on the fact that Abu Ghraib, and other facilities, were under American jurisdiction.²⁷⁹ In May 2007, Australia's Defence Minister, Dr Brendan Nelson, said that it is unhelpful to keep raising these allegations of Australian knowledge of the abuse at Abu Ghraib because it is 'ancient history'.²⁸⁰

250. Australia has failed to meet its international obligations, under article 12 of the Convention against Torture, to investigate these allegations of torture and ill-treatment.

7. Article 14: compensation and rehabilitation for victims

7.1 compensation for victims of torture

251. As already noted, Mr Mamdouh Habib and Mr David Hicks have not been compensated by the Australian government (see Article 12 above).
252. Mr Habib has never been compensated for his rendition and torture. Prime Minister John Howard made it clear in January 2005 that Mr Habib would not receive an apology or compensation from the Australian government.²⁸¹
253. In contrast, CCL notes that, after a full judicial inquiry, the Canadian government compensated Mr Maher Arar with \$10 million.²⁸²

7.2 rehabilitation of victims of torture

254. Counselling for victims of trauma and torture is available to all refugees, whether they are on temporary or permanent protection visas.²⁸³ The story is very different for men, women and children held in immigration detention centres or released into the community on 'bridging visas' pending the determination of their visa applications.

7.2.1 children

255. In 2004, HREOC reported that torture and trauma counselling was not provided to children in immigration detention. This was because ACM, the private company contracted to run immigration detention centres,²⁸⁴ refused to escort detainees to offices of the specialist agency STARTTS (Service for the Treatment and Rehabilitation of Torture and Trauma Survivors), which are outside the facilities.²⁸⁵
256. HREOC also found that 'the failure to make routine assessments regarding the mental health of children on arrival in order to ensure that the appropriate services were provided (for instance torture and trauma assessments)' was inconsistent with the *UN Rules for the Protection of Juveniles Deprived of their Liberty*.²⁸⁶ Furthermore, HREOC found that Australia failed to ensure that children in detention 'were treated with "humanity and respect for [their] inherent dignity", taking into account the needs of their age, in accordance with article 37(c) of the [Convention on the Rights of the Child]'.²⁸⁷

7.2.2 victims on bridging visas

257. Asylum seekers who arrived as unlawful non-citizens, usually by boat, can be released from immigration detention, pending a decision on their application for protection, on a Bridging Visa E subclass 051 (BVE).

According to DIMIA, 167 BVE (subclass 051) were granted between 2001 and December 2005.²⁸⁸

258. Another class of BVE (subclass 050) is granted to unlawful non-citizens who entered Australia lawfully but whose entry visa has expired. This BVE is granted to permit unlawful non-citizens to remain in the community, rather than being detained. As at February 2006, there were approximately 7000 people on these Bridging Visas.²⁸⁹
259. All asylum seekers on BVEs are ineligible for federally-funded torture and trauma counselling, and so must rely on state-based services if they are available.²⁹⁰ BVE holders also have no automatic right to work, no access to Medicare and no access to federally-funded mental health services. The federal government has recently undertaken a review of Australia's bridging visa system, but as of June 2007 the report is not yet publicly available.

8. Optional Protocol

260. The Optional Protocol to the Convention against Torture²⁹¹ ('the Optional Protocol') establishes a system of regular visits, to be undertaken by independent international and national bodies, to places of detention in order to prevent torture and other cruel, inhuman and degrading punishment.
261. Australia has not ratified the Optional Protocol because it wants to reserve to itself the right to refuse access to Australian facilities:²⁹²
- [The Australian government] is therefore not willing to bind itself to a protocol that constitutes a standing invitation and that would not provide an opportunity for the government to make a decision on a case-by-case basis.
262. CCL notes that the Joint Standing Committee on Treaties recommended that Australia not ratify the Optional Protocol.²⁹³ CCL also notes the strong dissenting report, which recommended ratification. The seven dissenting members observed that 17 of the 20 public submissions to the Committee supported ratification and that Australia should continue to work with the United Nations.
263. The Australian Senate condemned the Australian government's decision not to ratify the Optional Protocol,²⁹⁴ on the grounds that the government is indifferent to human rights in Australia.²⁹⁵
- ...and that this indifference includes, but is not limited to:
- (i) the refusal to allow independent inspections of immigration detention centres in Australia and the Pacific,
 - (ii) the acquiescence by the Australian Government to the indefinite detention of David Hicks and Mamdouh Habib at Guantanamo Bay by the United States of America, and
 - (iii) the human rights abuses being committed in Afghanistan and Iraq.
264. Australia should welcome independent domestic and international scrutiny of its places of detention. Australia has an important role to play as a regional and international leader in human rights.
265. CCL recommends that the State Party reconsider ratification of the Optional Protocol.

9. Notes

- ¹ Kofi Annan, 'Message on Human Rights Day' (10 December 2005) <http://www.ohchr.org/english/events/day2005/docs/hrday_sg.doc>.
- ² *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* [1989] ATS 21.
- ³ UN Doc. CAT/C/9/Add.8 (submitted: 27 Aug 1991; considered: 15 November 1991).
- ⁴ UN Doc. CAT/C/25/Add.11 (submitted: 19 October 1999; considered: 19 November 2000).
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