



Australia's Fifth Report under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)

The New South Wales Council for Civil Liberties (CCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies.

CCL thanks the Attorney General and the Human Rights Policy Branch for the invitation to provide input to Australia's Report.

CCL notes that in some matters Australia is in a position to reply to the CAT Committee's List of Issues Prior to Reporting (the List), that it has taken the action that committee recommends. In particular, the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act has been passed, the National Security Legislation Monitor has been appointed, the Migration Amendment (Complementary Protection) Act is in place, and the suspension of the processing of visas by asylum seekers from Afghanistan has been lifted.

The best form of response to many other matters in the List would be for the Government similarly to take action as proposed by the CAT Committee in time for its report. While endorsing the other concerns of the CAT Committee, CCL recommends in particular that the following matters be addressed.

1. The treatment of mentally ill people and those with cognitive impairments in prisons.

The following problems need to be addressed, urgently:

- inadequate mental health facilities for people with mental illnesses in prison;
- inappropriate and damaging use of seclusion/involuntary confinement, especially in supermax prisons such as the HRMU;
- overdosing with drugs prescribed for psychiatric purposes;
- keeping persons in prison who have not been convicted of a crime because they were held to be mentally ill, or who have been found unfit to stand trial; and
- over-representation of people with mental illnesses and disabilities in prison.

The extent of the problem is apparent from a research study conducted by Tony Butler, Gavin Andrews, Stephen Allnut, Chika Sakashita, Nadine E. Smith and John Basson. They found that

The 12-month prevalence of any psychiatric illness in the last year was 80% in prisoners and 31% in the community. Substantially more psychiatric morbidity was detected among prisoners than in the community group after accounting for demographic differences, particularly symptoms of psychosis (OR=11.8, 95% CI 7.5–18.7), substance use disorders (OR=11.4, 95% CI 9.7–13.6) and personality disorders (OR=8.6, 95% CI

7.2–10.3). Mental functioning and disability score [sic] were worse for prisoners than the community except for physical health.¹

It is understandable that the focus in a prison is on controlling misbehaviour, and then preventing suicide. But solitary confinement in small cells with all conceivable means to suicide removed is not conducive to recovery. Indeed, it hard to see how imprisonment in a normal prison can contribute to a mentally ill person's health.

There is always a problem with providing mental health care within the context of a prison. The culture of prisons inevitably is a culture of observation and control. The culture of therapy for mental disorder is a culture—or should be—of communication and enablement of people to begin to stretch their capacities and begin to move. You see it very clearly when you come across suicide risk. The response of a prison to suicide risk is to restrict the possibilities of suicide. At the grossest end, you put people in a plastic bubble, take all their clothes away and watch them. That does prevent suicide but it also, in my view, produces enormous destruction to the psychological and human aspects of that individual, and it is not the way to go. So whenever you are trying to provide mental health care to severely distressed and disabled people within a prison, you are running up against a clash of cultures, the result of which can lead to abuse.²

All prisoners, correctional patients and forensic patients should have access to quality health care including proper psychiatric and psychological services.

Persons who have not been convicted of a crime should not be held or treated in a correctional setting.

The new Forensic Hospital in Malabar is a laudable attempt to provide better arrangements; and a reference to this will no doubt be included in the Government's report. Yet the male section of this facility is reported to be full already, with a waiting list.³

2. The effects of long periods in immigration detention on persons who arrived in Australia after undergoing traumatic experiences, and the treatment of mentally ill persons in detention centres.

The mental health effects of prolonged and indefinite detention have been repeatedly documented. A major cause of prolonged detention is the length of time it has taken ASIO to determine that asylum

Mental disorders in Australian prisoners: a comparison with a community sample
Australian and New Zealand Journal of Psychiatry, , Vol. 40, 2006, No. 3 , Pages 272-276

² Evidence to Senate Select Committee on Mental Health, Parliament of Australia, Canberra, 6 July 2005, 49 (Paul Mullen)

³ Life sentence in the grey zone, Sydney Morning Herald, June 18 2011
June 18, 2011



seekers are not security risks. The consequences of these delays are serious mental illness, self-harm, suicide attempts and death.

The case of Mr. Parvis Yousefi, Mrs. Mehrnoosh Yousefi and Manoochehr Yousefi v Commonwealth of Australia (Department of Immigration and Citizenship) is one of many illustrations of the devastating effects of prolonged detention. It is also a paradigm example of wrongful treatment.

All three Yousefis suffer ongoing mental disorders as a result of their detention, and Manoochehr Yousefi, who was a happy, normal boy of ten when taken into detention, now suffers from permanent serious psychological problems.

In her report on the above case, *Report into arbitrary detention, the standard of treatment in detention and rights of the child in detention*, November 3, 2011, the President of the Australian Human Rights Commission includes the following:

270. Despite these recent positive developments, the Commission is seriously troubled that over a two year period between late 2008 and late 2010, significant numbers of children were held in immigration detention facilities instead of being placed into Community Detention arrangements.

271. As of 4 February 2011, there were 6659 people in immigration detention in Australia including 1027 children.ⁱ Of those children, 37 were in Community Detention and the remainder were in various immigration detention facilities.

272. The complaint [by the Yousefis highlights the devastating effects prolonged detention in institutional settings can have on children and on families. **There is an urgent need to make further policy and legislative changes to ensure that mistreatment of the type that occurred to this family is never repeated in Australia.** [Emphasis added.]

273. Given the ongoing detention of people in immigration detention, and particularly children, despite the above developments, I make the following recommendations:

1. Legislation should be enacted to set out minimum standards for conditions and treatment of people in all of Australia's immigration detention facilities, including those located in excised offshore places. The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.ⁱⁱ
2. An independent body should be charged with the function of monitoring the provision of health and mental health services in immigration detention. The Australian Government should ensure that adequate resources are allocated to that body to fulfill this function.



3. The Department should implement the Residence Determination Guidelines, under which people with significant physical or mental health concerns, people who may have experienced torture or trauma and people whose cases will take a considerable period to substantively resolve are to be referred to the Minister as soon as practicable for consideration of a Community Detention placement.ⁱⁱⁱ
4. The Department should implement the Residence Determination Guidelines, which require that all children and their accompanying family members or guardians be referred to the Minister for consideration of a Community Detention placement as soon as they are detained.^{iv}
5. The Migration Act and other relevant Commonwealth laws should be amended as a matter of urgency to incorporate the following minimum requirements:
 - a presumption against the detention of children for immigration purposes;
 - a proscription on children being detained in Immigration Detention Centres;
 - that a court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention;
 - that there should be prompt and periodic review by a court of the continuing detention of any child for immigration purposes;
 - if a child must be taken into immigration detention, as soon as possible after being detained they should be placed in Community Detention under a Residence Determination with any accompanying family members or guardians;
 - prescribed minimum standards of treatment for children in immigration detention consistent with the ICCPR, CRC and other relevant international human rights standards such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; and
 - all courts and independent tribunals should be guided by the principle that the detention of children must be a measure of last resort and for the shortest appropriate period of time.



CCL has repeatedly argued against the use of immigration detention of asylum seekers, and this case provides a further reason why. The CAT Committee also looks for an end to this abuse (paragraph 39).

However, if the Government is unwilling or unable to eliminate it, it should at least implement the President of the Human Rights Commission's recommendations, and report to the CAT Committee accordingly.

The Government should report on progress on all these matters—but it should, with the States, also take action to improve on the matters listed below.

Move to ratify the Optional Protocol to the CAT.

Remove the requirement that the Attorney General consent in writing before extra-territorial torture charges can be laid against Australians.

Include the CAT in the Australian Human Rights Commission Act so that the CAT rights are included under the statutory functions of the AHRC.

Expand the powers, function and funding of the AHRC.

Make tighter the definition of terrorism in the Criminal Code Act, so that acts against property are not terrorist actions unless they have foreseeable consequences of significant harm to persons.

Review the powers of ASIO to detain persons under a questioning warrant without access to a lawyer.

Set by legislation a maximum limit on the length of time any person may be held in immigration detention. This should be no longer than three months.

Guarantee by law that all detainees, whether in criminal justice system or in immigration detention, have access to independent doctors and lawyers.

Address the problems of overcrowding in prisons, both by discouraging legislation that is part of politically expedient law and order campaigns (and the repeal of existing excessive laws) and supporting alternatives to imprisonment.

Ensure that conditions in all prisons are consistent with the CAT.



Work with State Governments to have laws that criminalise sleeping in public places repealed.

Follow the investigation by the Inspector General of Intelligence and Security (IGIS) into the rendering and torture of Mahmoud Habib with a full public inquiry.

Institute a full public inquiry into the imprisonment and torture of David Hicks at Guantanamo Bay.

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- i Community and Detention Services Division, DIAC, *Immigration Detention Statistics Summary* (4 February 2011). At <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 5 March 2011).
 - ii See the comments of the Human Rights Committee 95th Session (16 March to 3 April 2009) concluding observations re Australia.CCPR/C/AUS/CO/5 at p 5.
 - iii *Minister for Immigration and Citizenship, Minister's Residence Determination Power Under S. 197AB and S. 197AD of the Migration Act 1958: Guidelines* (2009), paras 4.1.4, 4.1.5.
 - iv *Minister for Immigration and Citizenship, Minister's Residence Determination Power Under S. 197AB and S. 197AD of the Migration Act 1958: Guidelines* (2009), para 6.1.2.