



Level 1, 550 Lonsdale Street
Melbourne VIC 3000
AUSTRALIA

P: + 61 3 9225 6695

F: + 61 3 9225 6686

hrlrc@vicbar.com.au

www.hrlrc.org.au

9 October 2007

Ms Mercedes Morales
Committee Secretary
Committee Against Torture

By email: mmorales@ohchr.org

And by fax: 0011 41 22 917 9022

Dear Secretary

**Australia's Third Periodic Report to the Committee Against Torture
NGO Report Addendum**

Further to our letter of 6 July 2007, the National Association of Community Legal Centres (NACLC), the Australian Muslim Civil Rights Advocacy Network (AMCRAN), the Public Interest Advocacy Centre (PIAC) and the Human Rights Law Resource Centre (HRLRC) submit this addendum in response to the List of Issues to be considered during the examination of the Periodic Report of Australia dated 6 June 2007 (List of Issues).

This letter considers:

1. the incompatibility of certain aspects of Australia's counter-terrorism law and practice with articles 2, 11 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention)*; and
2. the incompatibility of various aspects of the imprisonment of persons with mental illnesses in Australia with articles 2, 11 and 16 of the *Convention*.

We also wish to note our endorsement of the Report and Addendum submitted to the Committee by the NSW Council for Civil Liberties.

1. Counter-Terrorism Law and Practice

Further to our letter of 6 July 2007, we make the following additional submissions relevant to:

- the incompatibility of certain aspects of Australia's counter-terrorism law and practice with articles 2, 11 and 16 of the *Convention*; and
- Questions 2, 3 and 5 of the Committee's List of Issues.

(a) Inadequate Safeguards in relation to Incommunicado Detention and Prolonged Solitary Confinement

It is well recognised that there is a strong interrelationship between incommunicado detention and torture¹ and, moreover, that incommunicado detention may, in and of itself, amount to cruel, inhuman or degrading treatment.² It is also well established that prolonged solitary confinement may amount to torture or other cruel, inhuman or degrading treatment.³ Accordingly, the Human Rights Committee has stated that States have an obligation not only to prohibit torture, but also to enact and promote safeguards to realise this prohibition, including provisions against detention incommunicado, and granting persons such as doctors, lawyers and family members access to detainees.⁴

We are concerned that there are insufficient safeguards in Australia's counter-terrorism laws to ensure compliance with the *Convention*. Following the events

¹ See, eg, Nigel Rodley, *The Treatment of Prisoners under International Law* (2nd edition, 1999) 348.

² See, eg, *Mukong v Cameroon*, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994).

³ See, eg, Human Rights Committee, General Comment 20: *Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)* (1992), para 6; *Larossa v Uruguay*, HRC Communication No 88/1981, para 10.3.

⁴ Human Rights Committee, General Comment 20: *Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)* (1992), para 11; Nigel Rodley, *The Treatment of Prisoners under International Law* (2nd edition, 1999) 348.

of 11 September 2001, the Australian Government introduced more than forty new pieces of legislation to address terrorism and related activities.⁵ The enactments have been heavily criticised both domestically⁶ and internationally⁷ for their failure to allow for adequate judicial oversight and redress mechanisms.

As detailed further below, we are particularly concerned about provisions of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth), the *ASIO Legislation Amendment Act 2003* (Cth), and the *Criminal Code* as amended by the *Anti-Terrorism Act (No 2) 2005* (Cth).

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth) and the ASIO Legislation Amendment Act 2003 (Cth)

The powers of the Australian Security Intelligence Organisation (ASIO) were significantly expanded under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) and the *ASIO Legislation Amendment Act 2003* (Cth).

Under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*, a person can be detained without charge under an ASIO warrant for 168 hours, or 7 days.⁸ Further, a separate warrant can be issued at the end of the 168 hours if new material justifies it.⁹ A person may thus be held in detention indefinitely for rolling periods of 7 days, without any charge having been made out against them in accordance with conventional criminal procedure. These powers were opposed by civil liberties groups on the grounds that the legislation would turn the intelligence organisation into a 'secret police' cloaked with impunity.¹⁰

⁵ A comprehensive list of the post 9-11 'legislative suite' can be found at the Government's 'National Security' website:
<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument>.

⁶ For example, there was vociferous opposition in the Parliament to the *ASIO Legislation Amendment Bill* (2003) (Cth). The Chairman of the Joint Committee which reviewed the Bill described it as 'the most draconian legislation ever to come before parliament' (*The Australian*, 19 June 2002, 3).

⁷ See, eg, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (2006).

⁸ *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* s 34HC.

⁹ *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* ss 34C(3D), 34D(1A).

¹⁰ See submissions to the Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) xix.

A person detained under an ASIO warrant is prohibited from disclosing information relating to their detention whilst the order is in place at risk of five years imprisonment.¹¹ Further, for two years following detention, a person is prohibited from disclosing 'operational information' relating to the methods or functions of ASIO.¹²

These secrecy provisions prevent the press, academics and human rights advocates from independently monitoring the use of ASIO questioning and detention powers.¹³ As Amnesty International notes, '[t]he level of secrecy and lack of public scrutiny provided for by this Bill has the potential to allow human rights violations to go unnoticed in a climate of impunity.'¹⁴

Anti-Terrorism Act (No 2) 2005 (Cth)

The *Anti-Terrorism Act (No 2) 2005* amended the *Criminal Code* and introduced, among other things, control orders and preventative detention orders. In addition to raising concerns regarding freedom from arbitrary detention, the presumption of innocence and the right to a fair hearing, the regime raises significant concerns due to the inadequacy of safeguards to comprehensively prevent ill-treatment.

A preventative detention warrant up to 48 hours may be made by a senior member of the Australian Federal Police, with no requirement of judicial authorisation.¹⁵ For 'continuing preventative detention orders', a police member is merely required to adduce 'such facts and grounds' which would make the continuation of a detention order 'reasonably necessary' in the circumstances.¹⁶ The detainee is held in circumstances of extreme secrecy and may effectively be held incommunicado, except for limited contact with family. Contact with a lawyer of choice, or any lawyer at all, may be prohibited through a 'prohibited contact order.'¹⁷ Even where contact with a lawyer is permitted, the detainee's ability to effectively communicate is hampered as all communications may be monitored by police.¹⁸ A reporter or advocate who tries to air circumstances of

¹¹ S 34 VAA(1)

¹² S 34VAA(2)

¹³ Amnesty International Australia, *Concerns Regarding the ASIO Legislation Amendment Bill 2003* (2003) at <http://www.amnesty.org.au/airesources/report-03-12-03.html>.

¹⁴ Amnesty International Australia, *Concerns Regarding the ASIO Legislation Amendment Bill 2003* (2003) at <http://www.amnesty.org.au/airesources/report-03-12-03.html>.

¹⁵ Div 105.9.

¹⁶ See s 105.10 (2).

¹⁷ Div 105.16

¹⁸ Div 105.38.

their detention may be liable to five years imprisonment under the 'non-disclosure' offences.¹⁹

Under the preventative detention regime in the *Criminal Code*, an individual can be held for up to 48 hours (and may be extended to 14 days under state legislation) on virtually untested bases and information, with limited contact with the outside world and no ability to appeal or challenge their detention.

(b) Unconvicted Remand Prisoners

Further to the information provided in our letter of 6 July 2007 regarding the situation of 13 terrorist accused held as unconvicted remand prisoners in a maximum security prison in Victoria, we note that the conditions of detention have recently been the subject of highly adverse judicial comment.²⁰

On 6 September 2007, Ezzit Raad, who has been in custody since November 2005, applied for bail in the Supreme Court of Victoria. Mr Raad has been charged with number of terrorism offences contrary to the *Commonwealth Criminal Code*. His trial is due to commence on 4 February 2008 and is expected to run for at least 6 months. By that stage, like his 12 co-accused, he will have been on remand for almost 3 years.

The Supreme Court denied bail to Mr Raad on the ground that the *Criminal Code* establishes a presumption against bail for a person charged with a terrorism offence. The onus is on the accused to demonstrate exceptional circumstances justifying bail. Justice Bongiorno did, however, raise a number of significant concerns about the conditions of Mr Raad's detention, stating at [6] that:

With respect to Raad's conditions of detention Mr Barnes pointed out that those conditions, which are now well known to the court from other applications in these proceedings, are extremely onerous, involving, as they do, confinement in conditions normally reserved for criminals convicted of the most heinous crimes - convicted contract killers and the like. The court has heard and accepted evidence in other cases that the conditions in the Acacia Unit in Barwon Prison are such as to pose a risk to the psychiatric health of even the most psychologically robust individual. Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing.

¹⁹ Div 105.41.

²⁰ *Raad v DPP* [2007] VSC 330 (6 September 2007) at <http://www.austlii.edu.au/au/cases/vic/VSC/2007/330.html>.

His Honour did not, however, consider that these conditions in and of themselves constitute 'exceptional circumstances' justifying bail.

In our view, the presumption against bail, the length of pre-trial detention, and the oppressive conditions of detention raise significant human rights issues under articles 2, 11 and 16 of the *Convention* and also in relation to articles 7, 9, 10 and 14 of the *International Covenant on Civil and Political Rights*, together with various provisions of the *Standard Minimum Rules for the Treatment of Prisoners* and the *Basic Principles for the Treatment of Prisoners*.

2. Imprisonment of Persons with Mental Illnesses

Further to our letter of 6 July 2007, we make the following submissions in relation to:

- the incompatibility of various aspects of the imprisonment of persons with mental illnesses in Australia with articles 2, 11 and 16 of the *Convention*; and
- Questions 22, 23 and 24 of the Committee's List of Issues.

(a) Inadequate Mental Health Care in Prisons

The European Court of Human Rights has consistently held that a failure to provide adequate facilities so as to ensure that prisoners are not subject to degrading conditions, including particularly the failure to provide adequate health care to mentally ill prisoners, may amount to a violation of the prohibition against torture.²¹ According to the European Court, and other bodies such as the Human Rights Committee, it is incumbent on the State to 'organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties'.²²

There is significant evidence that mental health care in Australian prisons is manifestly inadequate and may amount to a level of neglect that constitutes degrading treatment or punishment.

According to evidence given by Forensicare (the Victorian Institute of Forensic Mental Health) to a recent Senate Select Committee on Mental Health:

²¹ See especially, *Keenan v United Kingdom* (2001) 33 EHRR 913. See also *Price v United Kingdom* (2001) 34 EHRR 1285; *McGlinchey v United Kingdom* (2003) 37 EHRR 821; *Holomiov v Moldova* [2006] ECHR 30649/05; *Istratii and others v Moldova* [2007] ECHR 8721/05.

²² *Mamedova v Russia* [2007] ECHR 7064/05, [63]. See also *Mukong v Cameroon*, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994) [9.93], in which the Human Rights Committee rejected an attempt by the state party to justify appalling prison conditions on the basis of economic and budgetary problems. The UK Court of Appeal made a similar finding in *R (Noorkoiv) v Secretary of State for the Home Department* [2002] EWCA Civ 770, [31] (Buxton LJ) where it held that the Government could not be excused from what were otherwise breaches of the right to liberty and freedom from cruel treatment in the prison context 'simply by pointing to a lack of resources that are provided by other arms of government'.

- adequate mental health services are very rare in prisons;
- the seriously mentally ill are often poorly managed in prisons and regularly wait in prison for admission under conditions which are not conducive to well being and recovery and may cause 'enormous destruction to the psychological and human aspects' of the individual concerned; and
- there is a pressing and increasing requirement for additional in-patient beds to meet the needs of the criminal justice system.²³

Forensicare concluded that, 'Currently in Australia the provision of care to mentally ill prisoners is rudimentary at best. Rarely are proper provisions made'.

(b) Solitary Confinement of Persons with Mental Illness

As discussed above, it is well established that prolonged solitary confinement may amount to torture or other cruel, inhuman or degrading treatment.²⁴

The widespread use of solitary confinement (or 'segregation' as it is also known) as a management tool for people incarcerated in Australian prisons is an issue of significant concern, particularly in regard to those incarcerated who are also suffering from a mental illness. Research suggests that solitary confinement can cause and significantly exacerbate symptoms of mental illness, such as paranoia.²⁵

At present, Australian law, in general terms, allows the governor of a correctional centre to direct that an inmate be held in segregated custody in circumstances where they consider that their association with other inmates may constitute a threat to the security of a correctional centre, or good order and discipline within the centre. The security of the facility is given greater priority than the mental health condition of the inmate.

Recent research indicates that, of a total Australian prison population of around 25,000 people, approximately 5000 inmates suffer serious mental illness.²⁶ Rates of major mental illnesses are between three and five times higher in the

²³ Forensicare, *Submission to Senate Select Committee on Mental Health* (May 2005) 4, 5, 19 and 20.

²⁴ See, eg, Human Rights Committee, General Comment 20: *Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)* (1992), para 6; *Larossa v Uruguay*, HRC Communication No 88/1981, para 10.3.

²⁵ NSW Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson* (17 July 2006), 16 at [http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/\\$file/Simps onInquest.doc](http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/Simps onInquest.doc).

²⁶ J P R Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (Australian Institute of Criminology, March 2007).

prison population than in the general Australian community.²⁷ There is both a causal and consequential link between imprisonment and mental illness. People with mental illness are more likely to be incarcerated, particularly having regard to the lack of support provided by the poorly resourced community mental health sector, and people in prison are more likely to develop mental health problems, with prisons not being conducive to good mental health.

According to Forensicare, the high incidence of mental illness in prison in combination with the lack of adequate mental health care means that it is very common for mentally ill prisoners displaying acute and disturbing psychiatric symptoms to be placed in a 'management and observation cell' (also known as a 'Muirhead cell'). This placement is often not a mental health decision, but one made by correctional administrators where there are no other accommodation available to guarantee the safety of a prisoner displaying disturbing psychiatric symptoms. Forensicare noted that solitary confinement and strict observation and control in these cells may prevent suicide, but may also cause 'enormous destruction to the psychological and human aspects' of the individual concerned.²⁸

Australia does not collect or publish data on conditions in Australian prisons and, accordingly, it is difficult to definitively comment on the prevalence of the use of solitary confinement as a management tool, particularly for prisoners with mental illness. Anecdotal evidence suggests, however, that the use of solitary confinement is widespread, with inmates being locked up for 22 or 23 hours a day in their cells, provided with incorrect, or inappropriate medications, and with limited access to mental health professionals. If prisons are in lock down, inmates stay in their cells at all times. Greg Barns, barrister and legal adviser to a state based Prison Action Reform group, has observed that: 'Solitary confinement is routinely used for prisoners who have mental illness. Hundreds of prisoners around Australia are in solitary confinement.'²⁹

In June 2006, the Deputy State Coroner of New South Wales investigated the suicide death in custody of an inmate, Scott Simpson. At the time of his death, Mr Simpson was awaiting admission into a prison hospital facility for treatment for his mental illness, but this admission had been repeatedly delayed. At the time of his death, he had no traces of anti-psychotic medication in his system, despite the fact that a number of psychiatrists had diagnosed him as suffering

²⁷ J P R Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (Australian Institute of Criminology, March 2007).

²⁸ Forensicare, *Submission to Senate Select Committee on Mental Health* (May 2005) 21; Official Committee Hansard, Senate Select Committee on Mental Health, 6 July 2005, 48-9. See also the comments of the Victorian Court of Appeal in respect of the use of solitary confinement, normally viewed as a form of punishment, to protect a mentally disturbed prisoner in *R v SH* [2006] VSCA 83 at [22]; Senate Select Committee on Mental Health, *A National Approach to Mental Health: From Crisis to Community*, First report (March 2006) [13.110] – [13.111].

²⁹ Elizabeth Wynhausen, 'Jailed in Body and Mind', *The Australian* (Sydney), 28 August 2006.

from a serious case of paranoid schizophrenia, and the fact that he was urgently awaiting admission into hospital for treatment. He had been found not guilty on the grounds of mental illness but was still being kept in a segregation cell in the main high security prison, and was in a cell with hanging points. For the final 26 months of his life (except for two short periods), he was kept in solitary confinement. The Deputy State Coroner was critical of the circumstances of his incarceration. She recommended, in line with international human rights law, that inmates suffering from mental illness should be held in solitary confinement only as a last resort, and for a limited period.³⁰ This recommendation, however, has only been poorly and patchily implemented across Australia.

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

We note that Philip Lynch and Ben Schokman of the Human Rights Law Resource Centre will be attending the Committee's session with Australian NGOs on 5 November to make further oral submissions on our behalf. In the meantime, we would be happy to elaborate on any of these issues, or indeed any further issues, if required.

Yours sincerely



Teena Balgi
National Association for Community Legal Centres



Philip Lynch
Human Rights Law Resource Centre

³⁰ NSW Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson* (17 July 2006) at [http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/\\$file/SimpsonInquest.doc](http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/SimpsonInquest.doc).