

Alternative report
Australia's 6th periodic report

75th session of the Committee Against Torture

by



Remedy.org.au

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Committee Against Torture
Human Rights Council & Treaty Mechanisms Division
UNOG-OHCHR
8-14 Avenue de la Paix,
1211 Genève 10, Switzerland

3 October 2022

Dear Committee,

re: **Individual communications concerning Australia**

We welcome the opportunity to contribute to the Committee's review of Australia's 6th Periodic Report with the following submission from Remedy Australia focussing on relevant individual communications decided by CAT, the CRPD and the Human Rights Committee.

Remedy Australia is a non-governmental organisation dedicated to monitoring Australia's compliance with decisions of UN human rights treaty bodies in response to individual communications. Remedy Australia advocates for the right to an effective remedy, and seeks to support the UN treaty bodies with independent follow-up information on Australian cases.

Our vision is to see every human rights violation by Australia remedied, as determined by the UN treaty bodies. An effective remedy encompasses substantive remedies for the individual, as well as non-repetition measures to prevent the violations recurring.

This submission draws together **15 individual communications** in which Australia has been found in actual and/or potential breach of either CAT, ICCPR article 7 or CRPD article 15, all of which prohibit torture and cruel, inhuman or degrading treatment or punishment. We provide brief summaries of each case and bring together the treaty bodies' recommendations for your reference in reviewing Australia's compliance under CAT – **none of which has been fully implemented**. The recommendations cover migration legislation and immigration detention, criminal and sentencing legislation and the imprisonment of unconvicted persons with disability, especially First Nations persons.

An appendix lists a **further 19 individual communications where the HRC found instances of arbitrary detention**, in both Australia's immigration detention system and prisons, including the practice of indefinite 'preventive detention'.

We urge CAT to press Australia to fully implement the Committees' recommendations on all these individual communications as part of this periodic review.

Yours faithfully,



Dr Olivia Ball
Director, Remedy Australia



Nick Toonen OAM
Director, Remedy Australia

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Summary of UN treaty-body recommendations in relevant Australian individual communications

1. **Provide the authors with an effective remedy**, including reimbursement of any legal costs incurred, rehabilitation and compensation.
2. **Review sentencing and penal legislation** in all Australian jurisdictions to ensure conformity with CAT/ICCPR article 7. (*Blessington & Elliot*, HRC 2014)
3. **Revise Australia's migration legislation** to ensure conformity with ICCPR articles 7 and 9.
4. **End the unwarranted use of prisons for the management of unconvicted persons with disabilities**, focusing on Aboriginal and Torres Strait Islander persons with disabilities, by:
 - **Reviewing, in close consultation with persons with disabilities and their representative organisations, *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA), Part IIA of the *Criminal Code* of the Northern Territory, and all equivalent or related federal, state and territory laws** that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, and repeal provisions that authorise involuntary internment linked to an apparent or diagnosed disability, ensuring compliance with the CRPD and with the CRPD Committee's 2017 [*Guidelines on the Right to Liberty and Security of Persons with Disabilities*](#).
 - **Mandating the provision of adequate and appropriate support and accommodation** measures for persons with disabilities in the criminal justice system.
 - **Ensuring Members of Parliament, Law Reform Commissioners and judicial officers and staff undergo appropriate and regular training** on the CRPD and its Optional Protocol, including on the exercise of legal capacity by persons with intellectual and mental disabilities. (*Doolan, Noble & Leo*, CRPD 2019)
5. **Publish all treaty-body Views and circulate them widely in accessible formats** so that they are available to all sectors of the population.

Case summaries

Blessington & Elliot v Australia (HRC, 2014)

Bronson Blessington and Matthew Elliot were children who committed violent crimes for which they were sentenced to life in prison without parole. The Human Rights Committee found that children should never be sentenced to life in prison without a realistic chance of release. It recommended Australia reform its laws without delay 'to ensure conformity with the requirements of [ICCPR] article 7, read together with articles 10(3) and 24, and allow the authors to benefit from the reviewed legislation.'

Details: remedy.org.au/cases/29

C v Australia (HRC, 2002)

'C' was detained on arrival in Australia in 1992 and accepted as a refugee in 1995. He acquired serious mental illness in detention, and his threatening behaviour while in a delusional state led to his being sentenced to 3½ years' gaol. With psychiatric care, he made 'dramatic' improvement and was deemed no longer dangerous. However, as a non-citizen with a custodial sentence exceeding 12 months, he was slated for deportation.

The HRC accepted that detention had been the cause of mental illness in this man with no psychiatric history, that his mental illness was the 'direct cause' of his offending and that, with appropriate medical care, he was unlikely to re-offend. As well as being arbitrary and lacking judicial review, his detention became 'cruel, inhuman or degrading treatment' once it was evident that it was causing his deteriorating mental health. To deport Mr C would also breach ICCPR article 7. The HRC recommended compensation. Mr C ultimately obtained a visa to remain in Australia, in accord with the Committee's Final Views, but he has not been compensated.

Details: remedy.org.au/cases/5

Cabal & Pasini v Australia (HRC, 2003)

Two Mexican brothers-in-law living in Australia were subject to arrest warrants in Mexico. They were remanded in custody while contesting extradition. The HRC found that locking the men in a wire cage with floor area only big enough for a chair constituted a breach of prisoners' right to humane and dignified treatment. The men were extradited before the HRC reached its Final Views. Australia has said it would ensure 'a similar situation does not arise again', but does not accept that Cabal and Pasini are entitled to compensation.



'Mexico's most wanted man', Carlos Cabal in 2003 (photo: ABC-TV)

Details: remedy.org.au/cases/6

Chun Rong v Australia (CAT, 2012)

Ke Chun Rong was a Falun Gong leader in his village when the spiritual movement was banned in China in 1999. Thousands of practitioners were gaoled, interned or committed to psychiatric hospitals. When Mr Ke organised a protest, he was detained for 16 days and tortured to extract the names of other Falun Gong practitioners.

Mr Ke escaped to Australia where he applied for asylum. Australia did ‘not dispute that Falun Gong practitioners in China have been subjected to torture’, but did not believe Mr Ke was a Falun Gong practitioner or that he was ‘detained or mistreated’ as he claimed.

The Committee Against Torture found that Australia had ‘failed to duly verify the complainant’s allegations and evidence through ... effective, independent and impartial review’, and that Australia would breach article 3 if it deported Mr Ke to China.

Mr Ke was subsequently allowed to apply for a visa under Australia’s complementary protection provisions, which protect people facing breaches of CAT and the ICCPR that fall outside the Refugee Convention.

Details: remedy.org.au/cases/7

Dewage v Australia (CAT, 2013)

Mr Dewage was a union organiser and active member of an opposition party in Sri Lanka. He suffered threats, harassment and assault from members of governing and rival parties and was also ill-treated by members of the LTTE. After he escaped to Australia, ‘thugs’ broke into his house in Sri Lanka and his mother’s house looking for him, injuring his mother and threatening to kill his family. His wife fled and has not been heard from since.

Australia rejected Mr Dewage’s refugee claim and detained him pending deportation. He petitioned CAT, which issued interim views requesting he not be deported while it considered his communication. The Committee concluded that Mr Dewage faced a ‘foreseeable, real and personal risk of being subjected to torture by Government officials if returned to Sri Lanka’ and that Australia must therefore ‘refrain from forcibly returning [him] to Sri Lanka or to any other country where he runs a real risk of being expelled or returned to Sri Lanka.’

Details: remedy.org.au/cases/28

Doolan v Australia (CRPD, 2019)

A young man arrested for offences committed while suffering psychosis was deemed unfit to stand trial due to his intellectual impairment, but the court ordered that he remain in custody. He was held indefinitely in maximum security prison for over 7 years – far longer than any sentence had he been tried and convicted.

The CRPD Committee found that Mr Doolan’s detention was arbitrary and his treatment – including solitary confinement, involuntary treatment, violence from other prisoners, ‘very limited or no access’ to mental health and disability support services or rehabilitation – and the fact of his indefinite detention in maximum security prison with convicted prisoners for over 7 years was degrading, in violation of CRPD article 15.

Details: remedy.org.au/cases/42

Elmi v Australia (CAT, 1999)

A Somali man from a persecuted ethnic minority claimed asylum because he feared torture by the Hawiye clan, but his claim was rejected by Australia. Somalia was then a ‘failed state’. The Committee Against Torture found that, in the absence of a conventional government, the dominant Hawiye clan was exercising quasi-governmental control and the threat of torture by this clan could, under these circumstances, fall under CAT. Therefore, Australia would violate CAT if it deported Mr Elmi ‘to Somalia or to any other country where he runs a risk of being expelled or returned to Somalia.’

Australia allowed Mr Elmi to submit a fresh refugee application which also failed. After more than 3 years in detention, Elmi ‘chose’ to leave Australia, ‘heading in the general direction of Somalia.’ His destination and fate are unknown. Remedy Australia questions the voluntariness of Mr Elmi’s departure from Australia when his choices appeared to be to end his prolonged detention by agreeing to leave, or else endure indefinite detention until forced deportation.

Details: remedy.org.au/cases/14



Perth airport, 1998: Australia’s second attempt to deport Sadiq Elmi, in defiance of CAT’s interim request. The deportation was disrupted by civil society action and abandoned. (photo: Ross Swanborough)

FJ et al v Australia (HRC, 2016)

Five authors – refugees from Iran, Sri Lanka and Afghanistan – were detained on arrival by boat in Australian territorial waters. They were assessed by Australian authorities as refugees, but also deemed a security threat. The basis of their security assessment was kept secret, meaning the authors were unable to challenge the merits of the assessment nor the justification of their detention.

The HRC accepted that the arbitrary and indefinite nature of the authors’ detention, as well as the conditions of their detention, inflicted “serious, irreversible psychological harm” in breach of ICCPR article 7.

Details: remedy.org.au/cases/36

FKAG et al v Australia (HRC, 2013)

Thirty-six Tamils, including 3 children, plus a Rohingya man from Burma, applied for asylum in Australia and were detained. They were later accepted by Australia as refugees, but were not released from detention because Australia determined that they represented an undisclosed security risk. The HRC issued repeated requests concerning the authors' mental health, which led to no discernible improvement in their conditions.

The HRC found the authors had suffered inhuman and degrading treatment and arbitrary detention. It recommended the authors be released, and given rehabilitation and compensation. Further, Australia 'should review its migration legislation' to respect the prohibitions on inhuman and degrading treatment and arbitrary detention.

Details: remedy.org.au/cases/13

Horvath v Australia (HRC, 2014)

A 21-year-old woman was assaulted by police during an unlawful raid on her home. Her nose was broken and she was hospitalised for 5 days. Despite her case reaching the High Court of Australia, Ms Horvath has still not received court-ordered compensation. Further, none of the police involved was disciplined or prosecuted for what the court found to be trespass, assault, unlawful arrest and false imprisonment. Ms Horvath seeks compensation and effective discipline of the police officers involved. The Human Rights Committee found that Ms Horvath's right to an effective remedy was violated in relation to the cruel, inhuman or degrading treatment and arbitrary arrest and detention to which she was subjected, and recommended legislative reform and compensation.



Corinna Horvath, on the night she was assaulted by police (photo: her mother)

Details: remedy.org.au/cases/27

Kwok v Australia (HRC, 2009)

Ms Kwok fled China when her husband was arrested for corruption offences. He was later sentenced to death. She was wanted for alleged involvement in the 'same set of circumstances'. China sought her forced repatriation without launching formal extradition proceedings, and Australia was willing to comply. Ms Kwok claimed she would not receive a fair trial in China and could also be sentenced to death. The HRC requested a stay of deportation; Australia complied.

The HRC found that Australia should not deport Ms Kwok, as the risk to her life 'would only be definitively established when it is too late'. It found potential violations of the right to life and the prohibition on torture. It also found that Ms Kwok's 6½ years in immigration detention was arbitrary detention. Australia should not send Ms Kwok to China 'without adequate assurances' from the People's Republic, and should compensate her for 'the length of detention to which [she] was subjected'. Ms Kwok was not refoiled, but neither was she compensated.

Details: remedy.org.au/cases/16

Leo v Australia (CRPD, 2019)

A young man was arrested for an assault committed while he was apparently suffering psychosis. He was deemed unfit to stand trial due to his intellectual impairment, but the court ordered that he remain in custody. He was held indefinitely in maximum security prison for over 9 years – far longer than any sentence that might have been imposed had he been tried and convicted – and he was, at times, held in solitary confinement, subjected to involuntary treatment and given ‘very limited or no access’ to mental health and disability support services or rehabilitation programs.

The CRPD Committee found that Mr Leo’s detention was arbitrary (CRPD art. 14(1) (b)) and his treatment was inhuman and degrading (art. 15).

Details: remedy.org.au/cases/41

MMM et al v Australia (HRC, 2013)

The 9 authors of this communication – 6 Tamils, including one child, who fled the conflict in Sri Lanka in 2009 or shortly thereafter, plus 2 Burmese and a Kuwaiti man – arrived in Australia and were detained. All were accepted by Australia as refugees. However, they were not released from detention because Australia determined they were an undisclosed security risk.

The HRC found the authors suffered inhuman and degrading treatment and arbitrary detention, recommending they all be released, rehabilitated and compensated. Further, Australia should review its migration legislation to ensure its conformity ICCPR articles 7 and 9. All 9 authors have reportedly been released; none is known to have been compensated nor provided with rehabilitation services.

Details: remedy.org.au/cases/18

Madafferi & Madafferi v Australia
(HRC, 2004)

Mr Madafferi, an Italian in Australia, overstayed his tourist visa. He came to the attention of Australian authorities when he was sentenced by an Italian court *in absentia*. In the meantime, he had married an Australian and fathered Australian children, but his application for a spouse visa was refused on character grounds and he was detained, pending deportation. Mr Madafferi developed a ‘stress disorder’ in detention and was admitted to a psychiatric hospital for 6 months. The HRC requested a stay of deportation, which was initially refused. The Committee found that conditions in immigration detention were inhuman. In 2005, his deportation order was overturned ‘on humanitarian grounds’. The HRC has deemed Australia’s response satisfactory.

Francesco Madafferi in Melbourne
(photo: Paul Rovere in *The Age*, 26 March 2009)



Details: remedy.org.au/cases/17

Noble v Australia (CRPD, 2016)

A court decided an intellectually impaired teen facing criminal charges was unfit to plead; he was imprisoned indefinitely without trial. A psychologist determined that, with appropriate assistance, he was capable of standing trial, but the charges were dropped owing to insufficient evidence. After 10 years in prison, the man was released on restrictive conditions of unlimited duration and with no avenue of appeal to have them lifted.



Marlon Noble, imprisoned for 10 years without trial.
(photo: Justin McManus, *The Age*)

The CRPD Committee found Mr Noble's disability was the 'core cause' of his deprivation of liberty, which it deemed arbitrary and a form of inhuman and degrading treatment. In response, Australia admitted failures, but denied violating Mr Noble's rights and declined to comply with any of the Committee's recommendations.

Details: remedy.org.au/cases/40

Additional cases of arbitrary detention

- A v Australia* (HRC, 1997) see: remedy.org.au/cases/1
- Baban v Australia* (HRC, 2003) remedy.org.au/cases/3
- Bakhtiyari v Australia* (HRC, 2003) remedy.org.au/cases/2
- D & E v Australia* (HRC, 2006) remedy.org.au/cases/9
- Fardon v Australia* (HRC, 2010) remedy.org.au/cases/11 ‘preventive’ detention
- Griffiths v Australia* (HRC, 2014) remedy.org.au/cases/31
- Hicks v Australia* (HRC, 2015) remedy.org.au/cases/34
- MGC v Australia* (HRC, 2015) remedy.org.au/cases/32
- Nasir v Australia* (HRC (2016) remedy.org.au/cases/43
- Shafiq v Australia* (HRC, 2006) remedy.org.au/cases/21
- Shams et al v Australia* (HRC, 2007) remedy.org.au/cases/22 8 separate authors
- Tillman v Australia* (HRC, 2010) remedy.org.au/cases/23 ‘preventive’ detention



Mr Payam Saadat, one of the 8 complainants in *Shams et al v Australia* (photo: Olivia Ball)