

Route 501 Advocacy and Support Ltd

and

Reparation Legal/Withuu Gurlpaa

Lodged with the United Nations Committee Against Torture on 3 October 2022 in advance of the United Nations Torture Committee's Hearing on Australia's 6th Periodic Report under the Convention Against Torture, scheduled for 15-16 November 2022.

Revised 1 November.

Submission of Route 501 Advocacy and Support and Reparation Legal

I. Executive Summary and Recommendations

1. Immigration detention of people at the North-West Immigration Detention Centre on Christmas Island in Australia:
 - a. who have serious medical conditions constitutes cruel and inhuman treatment prohibited by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (henceforward, the Convention against Torture);
 - b. on an indefinite basis constitutes cruel treatment prohibited by Convention against Torture.
2. From time-to-time we will refer to the circumstances of Mr Shayne Forrester, Mr Kopa Toimata, Mr Ritesh Naikar, Mr Sosefo Tu'uta and Mr Pocho Herrera Marcial, five of the thousands of people who have been detained at Christmas Island. Mr Forrester has supplied an affidavit which is included at the end of this Submission, at an annex. We are aware that in the past, the attention of the United Nations has been drawn to the plight of asylum seekers in offshore detention, but this population has now been greatly enlarged by people deported by Australia on "character grounds" under sections 116 and 501 of the *Migration Act 1958* (Cth). The common ground is that both groups experience cruel offshore detention.
3. A statement of Ms Filipa Payne of Route 501 Advocacy and Support is also supplied as part of these Submissions.
4. Decisions of the European Court of Human Rights relating to comparable provisions of the European Convention on Human Rights are deployed where relevant.
5. **We recommend that** Australia closes the North-West Detention Centre on Christmas Island and transfers all detainees to the Australian mainland so that they can get proper medical treatment and emergency medical treatment when this is required.
6. **We recommend** that Australia provides immediate resettlement of all people in indefinite detention in Australian immigration detention centres.
7. This Submission is made in the following format:
 - a. Recommendations. Executive Summary and Recommendations.
 - b. Australia's Obligations under the Convention against Torture (para 8).
 - c. Detention on Christmas Island is Cruel Treatment para 38). Statements provided by:
 - i. Mr Shayne Forrester (para 41)
 - ii. Mr Kopa Toimata (para 60)
 - iii. Mr Ritesh Naikar (para 101)
 - iv. Mr Sosefo Tu'uta (para 156)
 - v. Mr Pocho Herrera Marcial (para 193).
 - d. Statement of Ms Filipa Payne, Route 501 Advocacy and Support (para 203).
 - e. Submissions and Recommendations (para 271).

II. Australia's Obligations under the Convention against Torture

8. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 39/46 of 10 December 1984. It entered into force on 26 June 1987, in accordance with Article 27(1).
9. Australia signed the Optional Protocol to the Convention against Torture (OPCAT) on 19 May 2009 and ratified it on 21 December 2017, thus expressing their intention to be bound to it.^[1]
10. On 9 January 2017 the Committee against Torture produced its *List of issues prior to submission of the sixth periodic report of Australia*. The Sixth Periodic Report submitted by Australia under Article 19 of the CAT was received on 16 January 2019 and distributed on 28 March 2019. In its Report, Australia said:

Australia takes seriously its human rights obligations, including those related to the rights of personal liberty and freedom from arbitrary detention. These rights may be subject to reasonable and proportionate limits as set out in law, in particular where it is necessary to protect national security or the rights and freedoms of others in the community. Accordingly, Australia is entitled to take measures, including detention, to uphold Australia's national security. (Paragraph 88).
11. Article 1 of the CAT defines “torture” as including “any act by which ... suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as ... intimidating or coercing him... at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.
12. The Torture Convention, in addition to prohibiting “torture” (Article 1 and Article 2), also prohibits “cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1” (Article 16)¹. Thus, the definition of “cruel, inhuman or degrading treatment or punishment” is linked to the definition of “torture” and includes acts that “do not amount to torture”.
13. Defining “cruel, inhuman, or degrading treatment or punishment” requires reviewing the elements of “torture,” while recognizing that “[i]n practice, the definitional threshold between [cruel, inhuman or degrading treatment or punishment] and torture is often not clear.”²

^[1] *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, New York, 18 December 2002 as available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en [accessed 25 September 2022]

¹ As mentioned (*supra*), Article 16 of the Torture Convention provides, in relevant part:

“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

² In 2008, the Torture Committee promulgated General Comment No. 2 titled “Implementation of Article 2 by States Parties”. This General Comment addressed cruel, inhuman or degrading treatment or punishment – which it collectively referred to as “ill-treatment”. Paragraph 3 of General Comment No. 2 provides, in relevant part: Paragraph 3 also provides:

14. For purposes of this Shadow Report on Australia’s violation of the Torture Committee, the Torture Committee will examine portions of the definition of torture (article 1 of the Torture Convention) that shed light on the definition of “cruel, inhuman or degrading treatment or punishment” (Article 16 of the Torture Convention) that are relevant to Australia’s violations. The Torture Committee, when assessing whether Australia perpetrated cruel, inhuman or degrading treatment or punishment, should consider whether Australia engaged in the following acts, but at levels that “do not amount to torture”.
 - a. There must be “any act causing severe pain or suffering, whether physical or mental”;
 - b. That act “must be intentionally inflicted on a person for various purposes . . . including or for any reason based on discrimination of any kind”;
 - c. The pain or suffering must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity; and
 - d. And, “torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.
15. The Torture Committee appears to not draw major distinctions between “cruel” or “inhuman” treatment or punishment but has recognized that these are each and both other forms of “ill-treatment” that “do not amount to torture”. On the other hand, “degrading treatment or punishment” might be associated with embarrassing or humiliating a victim.
16. “Other acts of cruel, inhuman or degrading treatment or punishment”, as prohibited by the Torture Convention, is a broad concept.
17. Torture and cruel treatment can be inflicted by agents or subcontractors. At any rate, in *Velasquez Rodriguez v Honduras*, the Inter-American Court of Human Rights observed:

[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private prison or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.
18. The Australian Government, by its officials and contractors in immigration detention, has perpetrated cruel, inhuman or degrading treatment or punishment, in breach of Article 16 of the Torture Convention, against people who have been deported on character grounds under the Australian *Migration Act 1958*. These Submissions focus on people who have been deported or removed or who are in the process of being deported or removed.

“3. The obligation to prevent torture in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter ‘ill-treatment’) under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture.

19. Article 2 imposes obligations on Australia to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.
20. The Christmas Island Territory of Australia is located 2,600 kilometres north-west of Perth, Western Australia and 360 kilometres south of Jakarta, Indonesia.
21. Australia bought the island from Singapore in 1957 (see the *Christmas Island (Request and Consent) Act 1957* (Commonwealth)).
22. Christmas Island is excised from Australia’s migration zone under the *Migration Act 1958* (Cth) (see the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth)).
23. The Committee Against Torture, in its General Comment No 2 (24 January 2008) referring to Article 2 of the CAT, said: “the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law” (see also General Comment No 20 of the United Nations Human Rights Committee, paragraph 2).
24. Article 16 states that:
 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
 2. The provisions of this Convention are without prejudice to the provision of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.
25. As the Committee Against Torture observed in its General Comment No 2 (paragraph 7):
 - a. It is a matter of urgency that each State party should closely monitor its officials and those acting on its behalf and should identify and report to the Committee any incidents of torture or ill-treatment ...
26. The Commonwealth of Australia has an obligation not only to ensure that its domestic law criminalises cruel treatment in Australian detention facilities, but that practical measures are available for people who have been victims of cruel treatment to not only complain, but to be adequately compensated (as to which, see General Comment No 2., paragraph 9).
27. Detention on Christmas Island and the failure of the Australian Government to provide funding to support medical and legal services means that detainees are denied their rights to receive independent legal assistance and independent medical assistance, contrary to General Comment No 2., paragraph 14.
28. No exceptional circumstances whatsoever may be invoked to justify cruel, degrading or inhuman treatment of people anywhere in Australia.

29. This is the context within which Australia's immigration detention practices and Australia's use of the Christmas Island Detention Centre needs to be considered.
30. On any view, Christmas Island is a remote place. Flights are infrequent, flight costs are prohibitively expensive, and permissions to visit the North-West Detention Centre can be denied.
31. As many of the detainees are people who were living in poverty before they arrived at Christmas Island, they **never** get family visitors, and will only very rarely receive a visit from advocates.
32. These detainees rely heavily on the internet and mobile telephones, but coverage and service is poor. A teleconference is no substitute for human contact.
33. Ms Filipa Payne, an advocate who runs Route 501 Advocacy and Support, was visiting Christmas Island to speak to detainees at the time these submissions were being prepared, in the last week of September 2022. Her Statement appears below.

“At the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”

34. This submission is concerned with practices in Australian immigration detention facilities, particularly the North-West Detention Centre at Christmas Island. All immigration detention facilities are operated by the Commonwealth of Australia and its agencies (the Department of Immigration and the Australian Border Force) or by contractors. In short, any operations and practices within Australian immigration detention centres, and any resultant outcomes that have not been the subject of domestic complaint, take place with at least the acquiescence of the Australian Government.
35. As the Human Rights Committee observed in *Cabal and Pasini Bertran v Australia* (1020/02), in a communication concerning Australian immigration detention, “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, notably articles 7 and 10”. To the extent that immigration detention is conducted by contractors at Christmas Island, Australia is ultimately responsible for ensuring that they do not violate human rights.
36. The Australian Government spent \$957M AUD on offshore processing in 2021-2022. In 2019, the Asylum Seeker Resource Centre, Save The Children and Get Up! Published a report called “At What Cost?” which found that Australia had spent over \$9BN AUD on offshore detention in the 2016-2020 period. The cost was \$9.6BN from 2013-6. In other words, it costs >\$1M per person to detain a person in offshore detention.
37. The cost of offshore detention is touched on in order to point out that the Australian Government has not only been cruel but spends a lot of money on being cruel. If detention is necessary (which we seriously doubt is necessary in many if not all cases, for reasons we point out later) Australia has ample money to fund detention in the community, which is considerably cheaper and would allow people to access proper (medical and legal) services.

III. Detention on Christmas Island is Cruel Treatment

38. Australia has a positive obligation to protect the health of people it deprives of liberty (*Pretty v United Kingdom* ECHR No 2346/02, 29 April 2002, 29 July 2002). “[T]he essential fact remains that the State party by arresting and detaining individuals takes the responsibility to care for their life.
39. It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected” (*Lantsova v Russian Federation*, CCPR/C/74/D/763/1997, 26 March 2002; 2.4, 7.1, 9.2).
40. In fact, States “have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State, since by depriving individuals of their liberty. States parties assume the responsibility to care for their lives and bodily integrity” (*Rezazade v Kyrgyzstan* CCCPR/C/130/D/2866/2016, p 5 para 7.2).

Case of Mr Shayne Forrester (Affidavit Attached)

41. Mr Forrester had a serious illness – what was later confirmed as prostate cancer that had metastasized -- and Australian-employed medical authorities who had referred him to a specialist were ignored and he was instead exiled to Christmas Island where there was no specialist treatment available.
42. Comparison with *Okolisan v Moldova* ECHR No 33200/11, 29 March 2016 is pertinent. In that case the European Court concluded that in circumstances where a lack of medical assistance worsened the applicant’s state of health to such an extent that he could no longer control the process of urination, wetting himself as a result, the conditions of detention were inhuman, and a violation of Article 3 was found.
43. As the Affidavit of Mr Forrester demonstrates, he was in physical pain and suffering, causing mental anguish and diminishing his human dignity (see, to like effect, *Mammadov v Azerbaijan*, No 35432/07, 21 February 2019, 21 February 2019).
44. Christmas Island does not have a uro-oncologist and Mr Forrester was never examined by a qualified specialist (to like effect, *Popov v Russia* No 26853/04, 13 July 2006).
45. Mr Forrester was not supplied a specialist when he was in Yongah Hill Detention Centre either.
46. This was cruel, inhuman and degrading treatment.
47. The expectation of medical assistance is that it should be prompt, accurate, regular, systematic and “aimed at adequately treating the detainee’s health problems or preventing their aggravation” (*Ivavhenko v Russia*, No 12622/04, 4 April 2013)
48. This made him anxious and depressed.
49. The authorities did not act with due diligence in taking all measures reasonably expected of them to protect her health (similarly, *Yoh-Ekale Mwanje v Belgium*, No 10485/10, 20 December 2011).
50. Because he was not given proper medical treatment, Mr Forrester was forced to wear clothing wet with urine for some or most of the time. This was cruel and inhumane (to like effect, *Hurtado v Switzerland* No 1754/90, 28 January 1994). It was suffering that no human should reasonably be expected to endure.
51. The lack of appropriate treatment may amount to treatment contrary to Article 3 (*Ilhan v Turkey* [GC], No 22277/93, para 87; *Kennan v United Kingdom*, No 27229/95, 3 April 2001). The lack of effective monitoring and specialist treatment required by Mr

Forrester disclose significant defects in medical care required. This is not compatible with the standards of treatment required, and therefore must be regarded as constituting inhuman and degrading treatment.

52. Factors such as the victim's age and mental health can aggravate the effect of certain treatment so as to bring that treatment within Article 7 of the ICCPR; the assessment "depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim" (*Vuolanne v Finland* (265/87); *Castan and Joseph*, 2013, 211).
53. Shayne Forrester had severe depression (contrast *Jensen v Australia* (762/97)).
54. His treatment was degrading – his humiliation and debasement was excessive, and caused hardship well beyond the mere fact of deprivation of liberty (*Vuolanne v Finland*). Australia has violated its own Immigration Detention Standards.
55. As the Committee observed in General Comment 20 (paragraph 11):
 - a. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.
56. A corresponding duty is found in Article 11 of the Convention against Torture.
57. It has been argued that article 10 is primarily aimed at redressing the poor state of a prison whereas Article 7 is concerned to protect violent attacks on personal integrity (*Castan and Joseph*, 2013, 279, citing Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, 1993, 188). However it is possible for general conditions of detention to be so severe as to reach the threshold of a violation of Article 7 (*Portorreal v Dominican Republic* (188/84)).
58. In *Mukong v Cameroon*, the HRC said that the Standard Minimum Rules for the Treatment of Prisoners 1957 are incorporated into the Article 10 ICCPR guarantee. *It is submitted that the Mandela Rules must now be incorporated into the Article 10 guarantee.*
59. Depriving a person of their medication for days on end is a violation of Article 10 (to similar effect, *Hill and Hill v Spain* (526/93), paragraph 13).

Case of Mr Kopa Toimata

60. Mr Kopa Toimata was born in Timaru, New Zealand and arrived in Australia as a child of 10 or 11.
61. When he was five years old, Mr Toimata had an accident. His clothes were set on fire and he suffered burns to 80% of his body. He endured many skin grafts throughout childhood. Mr Toimata requires regular surgical cutting and physiotherapy treatment in order to remain physically mobile and relatively free of pain.
62. Mr Toimata was in prison when he found out that his Australian visa had been cancelled on character grounds. It was Christmas Eve 2014 and he had been looking forward to going home to his family upon his release.
63. He had served his sentence, was rehabilitated and apologetic for his actions but was effectively being punished without having committed any new crime.
64. Mr Toimata was placed in maximum security and segregation after the visa news.
65. Mr Toimata was told he had 28 days to appeal. Mr Toimata did not really understand the letter. He read it to his mother (Patricia) over the phone and she set about finding a

- lawyer. Patricia couldn't afford to hire a lawyer and couldn't find anyone to act pro bono. Kopa and Patricia did the appeal document themselves.
66. On his release date from prison in 2013 (Mr Toimata served 12 months total). He was then moved to Brisbane Immigration Detention. Mr Toimata's hands were handcuffed.
 67. All up, Mr Toimata spent two years in immigration detention – twice as long as his prison sentence. Approximately 14 months of that period was spent on Christmas Island and 10 months at Yongah Hill in Western Australia.
 68. This was emotionally crushing for Mr Toimata as his large extended family all live in Brisbane, QLD, which is thousands of kilometres away.
 69. As Ms Filipa Payne notes in her affidavit at Annexure F, decisions to detain people thousands of kilometres away from their families are not unusual, but they are cruel.
 70. Seven months into his detention, Mr Toimata was woken at 4:00am, handcuffed and put on a flight to Christmas Island.
 71. Mr Toimata saw drones for the first time on Christmas Island. They are used for surveillance but he found them intimidating.
 72. Importantly, the weather on Christmas Island is hot, tropical and uncomfortable. 80% of Mr Toimata's skin is grafted. The burns incident happened when he was a child so his grafts have to grow with him. Mr Toimata requires regular surgical cutting and physiotherapy treatment in order to remain physically mobile and relatively free of pain.
 73. These necessary medical services were not provided to Mr Toimata when he was in immigration detention at Yongah Hill or on Christmas Island.
 74. The weather on Christmas Island caused his skin to become irritated, itchy and sore. He was constantly scratching or needing to scratch.
 75. Mr Toimata was passed around to every nurse in the detention centres. The most help he was given was over-the-counter anti-fungal creams. The least help was sorbolene or Vaseline. None of these treatments eased his symptoms. He begged to see a specialist dermatologist.
 76. Ultimately the tropical conditions made Mr Toimata's skin constantly flare up. It was uncomfortable to wear a shirt in such heat and humidity and clothing agitated my skin.
 77. Guards enforced a "shorts on" rule even though this caused Mr Toimata pain.
 78. Mr Toimata was in agony one day and needed some air on his skin. He took his shirt off and tried to find a quiet part of the yard.
 79. A guard came up to him and said that the sight of his burns offended and sickened him and the guard made Mr Toimata put his shirt back on. This was humiliating and degrading.
 80. It was hard for Mr Toimata to keep his skin clean as the shower blocks on Christmas Island had no ventilation and were always covered in mould with a horrible smell. I may even have gotten skin infections from the bathrooms and showers in Detention.
 81. Medical help was substandard in immigration detention. Mr Toimata was mentally struggling and depressed. He was told by a nurse that he had symptoms of depression

- and insomnia and they prescribed Seroquel and Avanza. Mr Toimata took these as directed. He slept better but his depression remained.
82. The guards would enter the rooms of people in detention at night for no reason at least twice a fortnight. All hours of the night they would come in and switch lights on and either search the room or just leave again.
 83. Mr Toimata was part of a group of 8 detainees who had an altercation with asylum seekers. They were later sent to the segregation wing of Christmas Island where they were kept in our cells for 23 hours a day. They were given a jug of water.
 84. They were kept in segregation for one month.
 85. On Christmas Island Mr Toimata saw another Iranian asylum attempt to commit suicide in front of him by slashing their own wrists and trying to cut their own throat.
 86. There was blood everywhere and Mr Toimata still has nightmares about it.
 87. In March 2015 Mr Toimata witnessed riots at the Christmas Island Detention Centre. The combination of poor food, lack of contact to the outside world, harsh rule enforcement caused detainees to start fires and break windows.
 88. Mr Toimata did not physically partake in the rioting but was later accused of being a ringleader.
 89. When the guards quelled the riots, Mr Toimata saw dozens of detainees beaten by guards, even if they were not resisting.
 90. After the riots Mr Toimata was handcuffed and feet-shackled and flown back to Western Australia where he spent six months at Albany Prison whilst the matter was being investigated.
 91. Mr Toimata was then handcuffed and feet shackled and flown back out to Christmas Island.
 92. The thought of returning to Christmas Island broke Mr Toimata. For the last two years his mother had been urging me to hold on and keep fighting the deportation.
 93. By this stage Mr Toimata's mental health had degraded to the point where he was constantly talking to myself out loud.
 94. Returning Mr Toimata to Christmas Island was the incident that caused him in March 2016 to sign a declaration accepting deportation to New Zealand.
 95. Mr Toimata was handcuffed for the flight from Christmas Island to Perth and again for a commercial Flight to Sydney and onwards to Wellington, NZ.
 96. Two guards accompanied Mr Toimata on the flights.
 97. Mr Toimata live with pain and discomfort from my burns injuries and the loss of 2 years of my life in detention has been hard.
 98. Mr Toimata still experiences crushing depression from his experiences in immigration detention.
 99. Depriving Mr Toimata of proper medical treatment for his burns was cruel treatment contrary to the Convention against Torture.
 100. The other aspects of his treatment noted above were also cruel and degrading.

Case of Mr Ritesh Naikar

101. Mr Ritesh Naikar was born on the 7th of November in 1980, in Nadi, Fiji.

102. He lived in Fiji until he migrated to Australia in 2012 aged 32 with his then wife Vijay Reddy.
103. Vijay had Australian citizenship and Mr Naikar was granted a partnership visa.
104. Mr Naikar has a degree in mechanical engineering from the Fiji Institute of Technology.
105. Over 20 years Mr Naikar worked in a variety of mechanical engineering and general mechanic jobs.
106. Mr Naikar lived in Melbourne, Victoria for ten years.
107. In August 2016 Vijay Reddy withdrew her partnership visa for me when they separated.
108. In 2017 Mr Naikar served three months in an Australian prison for breach of a domestic intervention order.
109. Mr Naikar's visa was cancelled under section 116 of the Migration Act on 16 March 2017.
110. On 17 March 2017, Mr Naikar was in prison in Melbourne when he found out that his visa had been cancelled.
111. Mr Naikar only had 7 days to appeal. He was unable to find a lawyer to assist. He lodged the appeal without legal advice.
112. The intervention order was predicated on alleged violent threats made by myself over to the phone to my ex-partner over the phone (which I deny doing and have never been proven and now no longer alleged by Vijay).
113. Mr Naikar is currently in the custody of Australian Immigration Detention in Perth, Western Australia
114. Mr Naikar has been in immigration detention since 15 June 2017 (over 4 years).
115. Mr Naikar is presently medically unfit to be deported.
116. On 17 December 2017 he was placed in the Green One Compound at the North-West Immigration Detention Centre at Christmas Island, on the second story.
117. Mr Naikar was going downstairs to breakfast when he slipped on a step and landed on his back, heavily.
118. Cleaners had mopped the step.
119. Mr Naikar was seriously injured.
120. Mr Naikar attempted to stand but he was in immense pain.
121. The cleaners apologised to Mr Naikar for failing to put a sign in place saying that the floor was slippery.
122. From 8.30am to 1.00pm no officers came to him and no medical assistance was provided.
123. At 1.00pm a SERCO Officer came and Mr Naikar asked him to go find a doctor.
124. From 1.00pm to 6.00pm no one came to see Mr Naikar.
125. Mr Naikar was crying because of the pain.
126. At 7.39pm another SERCO Officer came. Mr Naikar told her he had been crying.

127. Mr Naikar was assisted into a wheelchair.
128. Officers gave him Panadol but there was still no doctor.
129. Mr Naikar could not sleep.
130. At 11.00am, a doctor saw Mr Naikar and gave him Panadol.
131. Mr Naikar complained that he was in immense pain.
132. Mr Naikar was left like this for ten days.
133. Then they sent Mr Naikar to the Christmas Island Public Hospital and he was admitted from 27th of December 2017 to 4th of January.
134. Mr Naikar was then sent to the mainland for an MRI.
135. A SERCO Officer handcuffed him and put him beside the window, with two officers beside him.
136. When the plane was taking off, he cried for the entire 3-and-a-half hour flight
137. They then put Mr Naikar in a wheelchair and lifted him down.
138. On the 5th of January they scanned Mr Naikar, and they found three bulging discs.
139. Mr Naikar was in this condition until July 2018, and his back pain was so bad they put him in emergency care and on the 6th of July they conducted his first emergency surgery.
140. In Perth Immigration Detention Centre, medication can be administered at 8.00pm but then you have to wait until the next morning for more.
141. This was contrary to Mr Naikar's pain doctor's recommendation that Mr Naikar should have medication administered at midnight.
142. Mr Naikar has since had four surgeries.
143. In September 2020 Mr Naikar was in such pain that he lost control of his urination.
144. On 30 September 2020 Mr Naikar was sent to hospital by ambulance.
145. On 2 October 2020 Mr Naikar was again given surgery.
146. Mr Naikar was then diagnosed with depression.
147. Mr Naikar was discharged into the custody of Perth Immigration Detention Centre.
148. There have been a number of subsequent surgeries.
149. On all these occasions his medication needs were not met in the detention centre.
150. Mr Naikar complained that they put him in a hotel under guard.
151. In 2022, he contracted COVID-19 and was in considerable pain due to coughing.
152. Mr Naikar is presently recovering from his latest surgery in residential house in Banksia Grove Perth under 24-hour guard by SERCO Officers.
153. Mr Naikar does not understand why they have him under 24 hour guard.
154. Notwithstanding what has happened to him, Mr Naikar anticipates that when he is deemed sufficiently recovered, he will be deported to Fiji.
155. Australia deprived Mr Naikar of the immediate and emergency medical assistance he required when he was injured on Christmas Island. This was cruel treatment, and contrary to the CAT.

Case of Mr Sosefo Tu'uta Katoa

156. Mr Sosefo Tu'uta was born in New Zealand.
157. Mr Tu'uta has been detained at Yongah Hill Immigration Detention Centre, and previously the North-West Immigration Detention Centre at Christmas Island, and was typically isolated from other detainees.
158. Mr Tu'uta arrived in Australia as a child.
159. Mr Tu'uta's Australian visa was cancelled on character grounds pursuant to section 501 of the *Migration Act*.
160. Mr Tu'uta was a member of a legislatively declared unlawful organisation (the Comancheros motorcycle club).
161. Mr Tu'uta's visa was cancelled while he was in remand, and he was moved to immigration detention.
162. Mr Tu'uta was originally taken to a detention centre only a few hours from his home but was then removed and taken to another detention centre thousands of kilometres from his home, and before he could meet his immigration lawyer.
163. No explanation has ever been given for why this was deemed necessary.
164. Mr Tu'uta spent a year at this detention centre before being taken to Christmas Island, which was even further away from his home.
165. Mr Tu'uta was handcuffed for the whole trip to Christmas Island.
166. Mr Tu'uta's immigration appeals were heard and rejected while he was on Christmas Island.
167. The criminal charges against Mr Tu'uta were dropped.
168. Mr Tu'uta has renounced his membership of the Comancheros.
169. At Christmas Island, Mr Tu'uta did not have a video call with his child for eight months.
170. Many of the people in Christmas Island have nothing to do, have no courses to do, and have significant mental health problems.
171. There were riots on Christmas Island while Mr Tu'uta was there.
172. Mr Tu'uta was not involved in any of these riots.
173. Rooms had been raided while detainees were at the gym.
174. Guards would walk into bathrooms and dormitories without knocking.
175. Guards would come into bedrooms while detainees were sleeping.
176. Mr Tu'uta reports that there was a lot of racial tension in that facility.
177. Mr Tu'uta and other detainees were locked in a "cage" and not allowed outside.
178. Mr Tu'uta was placed in solitary confinement for two months when he was at Christmas Island.
179. Mr Tu'uta was suicidal at Christmas Island. He has suffered from depression and poor mental health as a result of his incarceration.
180. Raids were common at Christmas Island and would happen often and without any reason.
181. During riots, tear gas and rubber bullets were used.

182. Mr Tu'uta made complaints to the Australian Human Rights Commission and the Australian Border Force but these were never satisfactorily resolved.
183. Mr Tu'uta was locked in a compound at an onshore detention centre for four months without being able to go outside.
184. Mr Tu'uta admits that he was a member of an unlawful organisation, but he has renounced his membership of that organisation.

Case of Mr Pocho Herrera Marcial

193. Mr Pocho Herrera Marcial is a Cuban national who married an Australian and moved to Australia.
194. Mr Marcial was convicted of a crime and served a sentence of 2.5 years.
195. His visa was revoked on character grounds.
196. He has been in detention for over seven years, and there is no indication when this might end.
197. Mr Marcial has provided evidence that he has a well-founded fear of persecution in Cuba, but this evidence has not been accepted
198. He has made complaints to a number of Australian agencies, but to no avail.
199. Australia does not have legislation that enables a person whose human rights have been violated to seek a judicial remedy when violations have taken place.
200. Mr Marcial was advised by the Australian Government that his detention could end if he agreed to be resettled in Kyrgyzstan.
201. Mr Marcial speaks Spanish and English. Unsurprisingly, the proposal that he accept removal to was rejected.
202. The indefinite nature of his detention is cruel treatment contrary to the Convention against Torture.

Statement of Ms Filipa Payne

203. My name is Filipa Payne, I am 50 years old, a single mother, and I have been advocating on behalf of people detained in Australian immigration detention centres for seven years.
204. I am the Director of the Route 501 Advocacy and Support Pty Ltd, a company registered in New Zealand that provides support and advocacy.
205. On September the 25th 2022 I flew to Christmas Island where I have been undertaking visits with detainees. This is my third visit.
206. These visits cost about \$10,000 each.
207. I work in a voluntary capacity and do not receive any income for the advocacy and support that I provide.
208. I pray every day that I can help people to keep hope, and to give them support so that they can keep their mental health stable, and so that they know that someone does care about them, and that someone will continue to be their advocate while they are in detention.
209. On my current visit to Christmas Island, there was no internet coverage. This was problematic as the Detention Centre required five days' notice of my proposed visit.

210. This is just one of the typical problems that can occur when visiting Christmas Island.
211. I feel very disconnected to the wider world, and I feel very isolated.
212. I find it very hard to keep communications going with the legal team that is supporting me.
213. I find it very hard to keep in touch with my children while I am away.
214. The heat is at an extreme level. I have found myself physically and mentally fatigued by the heat.
215. At times I am very fearful and anxious for my own personal safety.
216. I have an emergency beacon from the police station but it is scary for me to be here by myself.
217. People seem to know me without having been introduced to me, to know what I am doing without having been introduced to me. I have found this intimidating.
218. I have had the misfortune of being spoken to disrespectfully, and in a degrading manner, and I experienced a hostile physical presence, from one particular guard at the reception of the Detention Centre.
219. He tried to incite a disagreement with me, which I would not allow him to do. He belittled me and belittled my work.
220. He told me he would be denying me access to visitation because I had not submitted the applications giving five days' notice.
221. I asked him for compassion and consideration due to the lack of internet on the Island. He told me that was my problem and that I should sue my accommodation provider.
222. On the online application for access there is provision for making an application outside of time.
223. I duly explained the reasons for my delay, pointing out that it had already cost me \$6,500 to come to Christmas Island.
224. Since being on Christmas Island one of my bank accounts has been hacked. As I am on Christmas Island, it is impossible to contact my New Zealand back to sort this out. This illustrates the sort of difficulty that advocates face on Christmas Island.
225. Border Force and SERCO guards treat me with contempt. Fans are no longer provided in the visitation area. I am required to take COVID-19 tests, and despite negative results, am required to wear a mask. The sweltering heat and requirement that I wear a mask when I plainly do not have COVID-19 has made me feel faint and nauseous when making visits.
226. Today during visitation, the fans were not in the room and the toilets were blocked. All I could smell was sewage.
227. I have found that SERCO are not complying with the visit rules. The men are not getting notified of my visits. Normally they would receive a slip and advance notification. Instead, they are being yanked out of their classes and gym. They are sweaty, smelly and upset.
228. I am not allowed to take pen, paper or anything with me into detention so that I can take notes. I have had to take file notes when I return to my accommodation.
229. I have seen men who have had strokes and are paralysed.
230. I have seen men who have serious medical conditions.
231. These men have told me that all they are given is Panadol, and that their medical needs are not being met.

232. The cost of living is extreme and high on Christmas Island. A lettuce costs \$12 and the only one available was half rotten. I have had to live on baked beans, two-minute noodles and bread.
233. The internet access is very limited, it is only available at particular spots and at high expense. I have struggled to communicate with anyone who is not on Christmas Island.
234. The time difference makes things very difficult.
235. On my first visit to Christmas Island in 2017 I was made to take off my bra at the Reception Area to go through a metal detector. This was on the very last day of my visits when I had walked through previously without this requirement having been imposed. There were a group of SERCO Officers at the reception area – more than usual – and I believe this was done to humiliate me.
236. I took off my bra as ordered and walked through, crossing my arms to hide my breasts.
237. I found this so humiliating, but I did not confront the guards about this indignity as it meant more to me to see the people inside than stand there and fight for my dignity.
238. During my current visit I have spent so far approximately about \$500 on singlets and shorts, as many of the men don't have their own clothing, and are required to wear clothes provided by SERCO, which are ill fitting and uncomfortable.
239. The men complain to me that they feel as if they are in prison because they have to wear the SERCO clothes.
240. I also buy hygiene materials for them, which have not been provided by Australia.
241. I hope these gifts bring some joy and comfort to the men.
242. It is costing me more than \$500 to pay for phone services so that I can stay in touch with the outside world, and my clients.
243. The Detention Centre is across the island. The road is being repaired and so I have had to drive through jungle. This road is scary and has made me feel fearful that the care will be break down. Car hire has been more than \$1000 for the two weeks I have been here.
244. I wanted to be here for just one week but as there are no flights available I have had to stay for two weeks, incurring additional expense.
245. There is no pricing on the supermarket shelves. I have been told that I am being “charged as a tourist” and much more than the locals. I was charged over \$20 for a meal that would cost \$5 on the mainland.
246. The normal process to enter a detention centre is that you have to walk through a medical detector or swiped with a wand, and you also need to be swabbed for drug paraphernalia. At no point have I been tested for drug paraphernalia.
247. I have not pointed out this lapse to the detention centre as I do not want them to make my visits more difficult in future.
248. There are no ATMs in Christmas Island and you cannot withdraw cash. The exchange rates are significant.
249. Since being here I have started smoking again and drinking again at night in order to cope.
250. My normal health outlet would be to walk, to clear my thoughts, connect with my emotions and to avoid triggers. On Christmas Island I am too fearful to walk the streets as I am concerned I will be targeted. I have isolated myself and stayed inside my room to feel safe.

251. Whilst I know the men in the detention centre are grateful for my presence and very forthcoming in sharing their stories I have received nasty messages from a partner of one of the people I visited. However I understand that she cannot visit her partner, as she has not seen him over two years, and this triggered her behaviour and jealousy. This again illustrates the human dimension of locking people up thousands of kilometres from their loved ones.
252. Every morning when I wake up I am being contacted by more or more person. There is no way that I can meet the physical and emotional needs for these people. These people are desperate and suicidal. I try every day to be a voice for those in detention with the capabilities and resources that I have.
253. The majority of the people that I have seen are brown skinned. I believe that racism is one of the reasons they are in detention. The guards ostracise them, and I have witnessed this treatment.
254. There have been many nights since I have arrived on Christmas Island that I have spent isolated in my room crying, upset and scared. 1., because of what I have witnessed inside the detention centre, 2. because of the isolation I have felt; 3. because I feel that people have right to be rehabilitated.
255. I have spoken to a number of men who did not have drug problems before they entered into immigration detention, but who have turned to drugs to manage their mental health and feelings of desperation and are now not being given the services they need to minimise harms.
256. I believe that everyone has the right to dignity. I pray every day that I will survive this trip.
257. I feel ashamed that Australia treats people in this way and regards my humanitarian intentions as some sort of risk, which it is plainly not.
258. I feel constantly watched and observed.
259. I feel vulnerable when I sleep.
260. The applications for visitation were approved, but I am not provided with sufficient advance notice of day-to-day arrangements, allowing me to plan.
261. I have been denied access to some people with no explanation provided.
262. Whilst I am not in the detention centre and have the freedom to move I feel as if my life is regimented.
263. The reality is that if I wanted to leave Christmas Island I could not due to insufficient flights.
264. During the first visit in 2017 I attended a church ceremony where a local Indigenous person gave me a \$3000 cheque for library materials for the detainees. That cheque was confiscated by a SERCO Officer who said that I could not use these funds for that purpose as I did not have an Australian bank account. This officer, who I know by name, has also made unwelcome sexual advances. I refused.
265. I felt that if I did not continue to speak to him at that time that my visits would be cancelled. I felt fearful during this trip due to those unwelcome advances. All I wanted to do was run away and hide.
266. I have overheard people on Christmas Island being critical of me.
267. I will not let this stop me from my advocacy.
268. What is the purpose of the United Nations when human rights are routinely violated by Australia and the detainees cannot get any redress?
269. One of the most significant changes I have noticed in the last seven years is the growing number of people in indefinite detention.
270. I am having trouble sleeping. I am having nightmares. Trauma from my childhood has resurfaced. I have not had these thoughts for many years.

Submissions and Recommendations

271. The fact that Christmas Island has been operating for decades does not mean that the Council should not reach a conclusion now that detention there is cruel and/or inhuman.
272. Human rights tribunals are perfectly entitled to expect increasingly high standards over time, and, correlatively, to ensure greater firmness in assessing breaches of the fundamental values of democratic societies (see *Selmouni v France* No 25803/94, 28 July 1999, para 101).
273. The Australian Government has failed to keep arrangements for the torture-free custody and treatment of persons subjected to detention under systematic review. It has failed to ensure that torture does not take place in detention (Article 11).
274. The Australian Government has failed to honour its obligations in Article 16 to take steps to ensure torture-free custody and treatment of persons subjected to detention under systematic review (Article 16).
275. The role of this Committee under the Optional Protocol to the Convention against Torture (OPCAT) to receive individual communications is contemplated by Article 22 of the Convention.
276. People who have been convicted and sentenced and who have served their time in prison and are to be deported on character grounds do not pose a threat to national security. A court has already considered the principles of punishment and protection of the community when the person has been sentenced. If a court, which is the best placed institution to make a judgment on this topic, forms the view that a sentence should have a particular length, it is not for the Federal Executive Government to subvert or usurp that judicial power by grafting a further, indeterminate and therefore arbitrary period of punishment onto the end of their prison sentence.
277. In 2014, the Australian Government removed access to the Immigration Advice and Application Assistance Scheme, and “501s” are expected to rely on their own resources for legal representation.
278. The conditions of immigration detention have previously been considered by the UN Special Rapporteur on Torture. In 2013, the UN Special Rapporteur was reported by Radio New Zealand International to have observed:
1. “The physical and treatment conditions in the detention centres is [sic] not up to international standards”.
279. When detention is mandated and does not take into account individual circumstances, it can be considered arbitrary (Navi Pillay, Statement by the United Nations High Commissioner for Human Rights, 25 May 2011).
280. **We recommend that** Australia closes Christmas Island and transfers all detainees to the Australian mainland so that they can get proper medical treatment and emergency medical treatment when this is required.
281. **We recommend that** Australia provides immediate resettlement of all people in indefinite detention in Australian immigration detention centres.
282. The combined effect of the conditions of detention, its arbitrary and indeterminate length, and the uncertainty that detainees feel, amounts to cruel treatment.

283. In its Fourth and Fifth Periodic Reports, due in 2012 but lodged on 31 July 2013, the Commonwealth of Australia said (paragraph 258):

Where concern exists that a person presents an unacceptable risk to the community, they will remain in detention until their removal can be effected or that concern is allayed and they are eligible for grant of a visa.

284. The word “until” is a preposition, and it is clear that Australia wanted to convey the impression in these Reports that a detainee could challenge the justification for their detention, an “unacceptable risk to the community”. However, practically speaking, people on Christmas Island have no access to legal representation and cannot seek judicial review of their detention, notwithstanding Australia’s opinion that they can.

285. In its Fourth and Fifth Periodic Reports, due in 2012 but lodged on 31 July 2013, the Commonwealth of Australia said (paragraphs 263-4):

1. 263. All people in immigration detention have access to appropriate health care commensurate with the level of care available to the broader Australian community and consistent with the duty of care owed to people in immigration detention. All people entering immigration detention receive a Health Induction Assessment within 72 hours of arrival to identify conditions that will require attention and in order to formulate a personalised health care plan.

2. 264. For people in facility-based detention, most primary health care services are available onsite with referral to external health providers in the community as clinically required. For people in community detention and some immigration residential housing, health care services are provided by community-based health providers.

286. This representation is false. Detainees on Christmas Island do not have access to specialist medical care or psychiatric care.

287. Their detention is quintessentially arbitrary, causes their lives to be filled with fear, and denies them the respect, dignity and moral equality they are owed as fellow human beings (Martin Krygier, “The Rule of Law: Pasts, Presents, and Two Possible Futures”, (2016) 12 *Annual Review of Law and Social Science* 199, 203).

288. The practical reality is that Christmas Island is inaccessible. Visits by a psychiatrist are non-existent. People on suicide watch are watched by people with no training.

289. The risk assessments that are deployed in a putative attempt to justify the detention of people who have already served their criminal sentences are undertaken by people who are not qualified to make those risk assessments (Ian Coyle and Patrick Keyzer, “The Removal of Convicted Non-Citizens from Australia: Is There Only a Minimal and Remote Chance of Getting It Right?” (2016) 41(2) *Alternative Law Journal* 86-88). Risk assessment is an undertaking that should only be conducted by experienced forensic psychiatrists or forensic psychologists, deploying instruments that have demonstrated intra-rater reliability, in controlled circumstances, and for limited purposes.

290. As the European Court of Human Rights observed in *Khalifia & Ors v Italy* 16483/12, 15 December 2016, para 60:

[T]he State must ensure a person is detained in conditions which are compatible with respect for his human dignity (and) that the manner and execution of the

(detention) measure do not subject him to distress or hardship of an intensity exceeding the unavoidable levels of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see Kudla v Poland [GC], no 30210/96, pars 92-94 and Rahimi v Greece, no 8687/08, para 60, 5 April 2011).

291. As the European Court of Human Rights observed in *Paposhvili v Belgium*, No 41738/10, 13 December 2016, para 175:

The ... suffering which flows from naturally occurring illnesses may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which authorities can be held responsible.

292. Australia's use of Christmas Island as a detention facility reflects a "pattern of gross, flagrant" and "mass violation" of human rights, contrary to Article 3(3) of the Convention against Torture.

Lodged with the United Nations Committee Against Torture on 3 October 2022 in advance of the United Nations Torture Committee's Hearing on Australia's 6th Periodic Report under the Convention Against Torture, scheduled for 15-16 November 2022.

Reparation Legal.

We thank Filipa Payne, Shayne Forrester, Ritsh Naikar, Kopa Toimata, Sosefo Tu'uta Katoa and Pocho Herrera Marcial for their stories. With the exception of Shayne Forrester, these stories are presented as statements due to the difficulty of causing documents to be sworn in detention centres. That said, these statements are their stories and have been faithfully recorded in their words. We rely on the accuracy of the accounts provided by the witnesses.