Supplementary Submission of Professor Patrick Keyzer

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.

Respectfully submitted to the United Nations Committee against Torture on the occasion of the Committee's consideration of the Sixth Periodic Report, submitted by Australia on 28 March 2019 under article 19 of the Convention against Torture, for the hearings of the United Nations Committee against Torture, at the United Nations European Headquarters in Geneva, Switzerland.

Shadow Report date: 3 October 2022.

Hearing Dates of the UN Committee against Torture: 15 and 16 November 2022.

Treatment of Malcolm Morton

I. Australia's Obligations under the Convention against Torture

1. 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).

2. 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]

3. 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).

4. 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".

5. 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".

6. 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]

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[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:

7. 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".
8. The Northern Territory is a territory of Australia and the national government of Australia, the Commonwealth of Australia, has plenary power to pass legislation that applies in the Northern Territory: section 122 of the Australian Constitution.
9. 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).
10. 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.
11. As the Committee Against Torture observed in its General Comment No 2 (paragraph 7):

"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.

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 …

12. 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).

13. No exceptional circumstances whatsoever may be invoked to justify cruel, degrading or inhuman treatment of people anywhere in Australia.
14. 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.
15. 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).

Statement of Patrick McGee (Guardian for Malcolm Morton)

The Use of Medication on Malcolm Morton by the Department of Health - Forensic Disability Unit, and the Risk that this could be a form of chemical restraint

1. In 2018 and 2019 under the supervision of Malcolm Morton's General Practitioner Dr Colin Marchant and psychiatrist Dr Maria Tomasic and in partnership, albeit reluctantly, with the Forensic Disability Unit known then as the Secure Care Facility (SCF) and attending to the policy goals of the National Framework for Eliminating Restrictive Practices in the Disability Services Sector, the guardians, Patrick McGee and Aunty Margaret Campbell asked the Forensic Disability Unit to address and decrease the considerable amount of medication that Malcolm Morton was prescribed as there were fears that this was being used as a form of chemical restraint.
2. By the time that the reduction of medication began in 2018 Malcolm had been very heavily medicated since 2007. Much of this medication was prescribed whilst Malcolm was detained in Alice Springs Correctional Centre which is a maximum-security prison. It is noted in passing that the Australian Human Rights Commission reported on the case of Malcolm Morton, and concluded that his imprisonment was arbitrary detention contrary to the International Covenant on Civil and Political Rights. The Australian Human Rights Commission found that the conditions of Malcolm's detention "amounted to cruel, inhuman or degrading treatment".
3. Over a period of two years the process of decreasing the medication prescribed to Malcolm Morton took place and much of the medical restraint was reduced. The reduction of the restraint was accompanied by a number of changes for Malcolm, many of which the SCF found challenging, including:
    (1) Malcolm's alertness and ability to participate in daily activities and his assertiveness

(2) The quality of Malcolm's interaction with family and with the staff of the Secure Care Facility
(3) The intensity and the frequency of a range of behaviors associated with his impairment

4. Malcolm's assertiveness and the intensity and frequency of a range of behaviours associated with his impairment, which included head-banging behaviour, which is distressing for all concerned, led the SCF staff to begin to oppose the reduction of medication. This difference of opinion on continuing the phased reduction of medication due to the perceived negative impacts led to agreements to implement a range of strategies including to:
    (1) Reduce the dosages that were to be lowered at each step of the planned reduction;
    (2) Change the medication that was to be the focus of the planned reduction;
    (3) Increase the amount of time over which the reduction was to occur.
5. However, the view of the Secure Care Facility was that Malcolm's behaviours of concern, particularly aggressive behaviour placed their staff at risk. The SCF also appeared to hold that view that Malcolm was psychologically and physically suffering distress as the medication was reduced.
6. The guardians took a more long-term view about the physical and psychological suffering and distress that Malcolm exhibited at times during the reduction of chemical restraint. The view of the guardians was that:
    (1) Malcolm seemed more himself
    (2) His drug affected presentation became sharp in contrast
    (3) Malcolm seemed on the whole happier in himself and had more energy
    (4) That the reduction of the medical restraint allowed for more connection to family and more community access
    (5) That the medical advice by Dr Marchant was that over time the physical and psychological distress associated with the reduction would decrease
    (6) That on the whole there were more positives than negatives for Malcolm in reducing the chemical restraint that he was prescribed
    (7) That a structured behavioural response, in the form of a behaviour support plan and consistently implemented, was the appropriate and least restrictive option to respond to behaviours of concern
7. For a period of time, a compromise was agreed to by the guardians and the staff of the SCF in terms of slowing down the reduction and at times pausing the reduction to allow Malcolm and the staff to adapt to his new state of being – a state of being that reflected a reduction in chemical restraint.
8. However this compromise broke down with the unilateral decision by the SCF to reinstate chemical restraint in the face of a range of behaviours that were characterised as a risk of harm to others which compromised the safety of staff and others in February 2019.
9. Following this decision taken without consultation with the guardians and *without the guardian's consent*, Malcolm returned to the state of being characterised by chemical restraint which included:
    (1) Drowsiness
    (2) Withdrawal

(3) Insecurity
(4) Lack of confidence
(5) Confusion
(6) Loss of independence
(7) Loss of dignity
(8) Loss of capacity
(9) Loss of connection to family community culture and country

10. In late 2019 the Department of Health at the Review of Malcolm's Custodial Supervision Order put forward the position that the existence of both the guardianship order and the custodial supervision order were unworkable and that decision making authority, particularly for health care decisions which included decisions related to the management of his behaviour (including medication) should be restricted to the agents with authority for the Custodial Supervision Order.
11. The Northern Territory Supreme Court agreed with the position of the Department of Health and determined that the CSO was the dominant order and thus decision-making authority, particularly for health, would solely be made by the CEO of the Department of Health.
12. The outcome of this decision was that the CEO of Health, with legislative authority to detain a person for treatment was also the sole decision maker for all aspects of his detention for the purposes of treatment. The guardian's authority still existed, but effectively the guardians had no power to make decisions.
13. This leaves Malcolm vulnerable to continued chemical restraint without any independent or transparent checks and balances that a common feature of systems where restrictive practices are used on people with cognitive impairments who are detained for the purposes of treatment.
14. The judgment also isolated Malcolm culturally, as up until this point the guardianship order was a joint order with Malcolm's Aunty Margaret Campbell leading decision making in the area of family, community, culture and country
15. Combined with a high turnover of staff in the SCF and a management model located in Darwin, a two hour flight away from Alice Springs, the use of chemical restraint, became the dominant behavioural response to Malcolm Morton.
16. Despite this philosophical and practical difference of opinion regarding the use of medical restraint between the guardians and the SCF, and during this same period of time, Malcolm was made eligible for the National Disability Insurance Scheme (NDIS) and was funded through an NDIS plan for community access.
17. Providing for community access, primarily to ensure Malcolm could visit family and community on country, was an important initial strategy in building a platform for transition from custody to community. Over the period from early 2019 – May 2022 the guardians focused on building a solid community access plan that was culturally relevant and created a pathway for Malcolm to transition from a custodial supervision order to a non-custodial supervision order.
18. Importantly, the NDIS Registered Provider - My Voice - became a significant advocate of Malcolm's pathway out of detention by employing Arrente men who used cultural protocols to frame the provision of targeted disability support.
19. Employing Arrente men who used cultural protocols to provide disability support saw a remarkable drop in behaviours of concerns.

20. In June 2022 the transition plan from custody to community was derailed by the Forensic Disability Unit contacting the Alice Springs Mental Health Unit to suggest that Malcolm was suffering from Obsessive Compulsive Disorder recommending that he be immediately started on Fluoxetine. This suggestion was provided to the Mental Health Unit without consulting the guardians / family or My Voice.
21. The introduction of Fluoxetine saw Malcolm:
    (1) Physically injured by falling over at the Forensic Disability Unit
    (2) Fall asleep at odd hours of the day and be up all night
    (3) Withdraw from key cultural and family relationships
    (4) Hospitalised four times in a three week period
    (5) Experience serious epileptic seizures whilst hospitalised on one of the occasions
    (6) Exhibit serious behaviours of concern that involved violence
    (7) Defecate in his bed
    (8) Require admission to the High Dependency Unit of the Mental Health Unit
    (9) See the proposal from FDU for Malcolm to be transferred to the Alfred Hospital in Melbourne
22. In late June 2022 I had lunch with Malcolm where I directly observed him to:
    (1) Fall asleep on his feet
    (2) Fall asleep whilst eating
    (3) Not orientated in place or time
    (4) A loss of fine motor skills
    (5) A loss of receptive and expressive language
23. This period of severe effects from fluoxetine lasted until late July 2022 where Dr Colin Marchant from the Congress declared the fluoxetine trial a failure and halted further use of that medication.
24. Since then, there have been a number of case conferences and a resumption of culturally relevant support which has seen improvements in Malcolm's capacity to participate in activities of daily living and a decrease in all behaviours of concern. Since the Fluoxetine has been ceased there have been no further hospitalization or admission to the Mental Health Unit. Finally, after the derailment of the timeframe for transition plan in June, the transition plan from custody to community is back on track.
25. It is now time to see the return of decision making to the guardians as Malcolm transitions from custody to community. As the transition plan nears the moment when Malcolm will be living in the community supported by My Voice it will no longer be legally or ethically appropriate or workable for the CEO of the Department of Health to be Malcolm's decision maker. At the June NDIS Meeting this matter was raised and the Department of Health representatives had no answer on whether decision making would be returned to the guardians (Aunty Margaret Campbell and Patrick McGee). All other agencies except the Northern Territory Department of Health recognize the authority of the guardians. Upon the transition from custody to community Malcolm will no longer be detained for the purposes of treatment under the Custodial Supervision Order – and will instead receive culturally relevant disability support from My Voice. There will be no need for the CEO of Health to retain decision making control of Malcolm's life.

Submissions and Recommendations

26. Indigenous people with cognitive impairment in the Northern Territory who have been found unfit to please are either incarcerated in prison or placed in a forensic disability unit where guardians have minimal involvement.
27. A person who has not been found guilty of a crime should not be incarcerated (*Fardon v. Australia*, CCPR/C/98/D/1629/2007, UN Human Rights Committee (HRC), 10 May 2010).
28. The use of chemical restraint can be a form of cruel treatment, and it is vital that guardians of a vulnerable people be consulted when decisions about medications are made lest medication become a form of chemical restraint.
29. The Committee against Torture is asked to remind Australia of its obligations under the Convention against Torture, and to take active steps to prevent the use of chemical restraint in Northern Territory prisons and forensic facilities.
30. 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).
31. 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).
32. 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).
33. 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.
34. 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).
35. **We recommend that** Australia ceases the imprisonment or forensic detention of Indigenous people, and instead arrange for NDIS packages for them so that they can return to community and kin, in a secure and safe way.
36. **We recommend** that Australia investigates the use of medical restraint in these facilities, and provides scope for an independent medical examiner to review cases and ensure that use of medication does not become a form of chemical restraint.
37. The combined effect of the conditions of detention of Indigenous men with cognitive impairment in the Northern Territory, and the indeterminate length of that detention under heavy medication, amounts to cruel treatment.

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On behalf of Malcolm Morton, with the assistance of Mr Patrick McGee, Guardian.

Professor Patrick Keyzer.