

Shadow Report

**prepared for the
United Nations Human Rights Committee**

**on the occasion of its review of
Australia's Fifth Periodic Report under the**

**International Covenant
on
Civil and Political Rights**

and

**Second Optional Protocol
to the ICCPR**

Date submitted: 28 November 2008

About the NSW Council for Civil Liberties

The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

To this end CCL attempts to influence public debate and government policy on a range of human rights issues. We try to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected.

We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

Abbreviations

ZOP	Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty
ABC	Australian Broadcasting Corporation
ACM	Australasian Correctional Management
ACT	Australian Capital Territory
AFP	Australian Federal Police
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Security Intelligence Service
BVE	Bridging Visa E (subclass 051)
CAT	Convention Against Torture & other Cruel, Inhuman or Degrading Treatment or Punishment
CCL	NSW Council for Civil Liberties
CEDAW	Convention on the Elimination of Discrimination Against Women
CPA	Coalition Provisional Authority (in Iraq)
CROC	UN Committee on the Rights of the Child
Cth	Commonwealth of Australia
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
FCA	Federal Court of Australia
FOI	Freedom of Information
HREOC	Human Rights and Equal Opportunity Commission
HRMU	High Risk Management Unit (at Goulburn Correctional Centre, NSW)
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
INP	Indonesian National Police
LRC	Legislative Review Committee (of the New South Wales Parliament)
NSW	New South Wales
RDA	<i>Racial Discrimination Act 1995</i> (Cth)
RHC	Residential Housing Centres
RRT	Refugee Review Tribunal
RSL	Returned & Services League
UNHRC	United Nations Human Rights Committee
UN	United Nations
US	United States of America

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1. Background

1. Australia ratified the *International Covenant on Civil and Political Rights* ('ICCPR') on 13 August 1980. The Convention came into force for Australia on 13 November 1980.¹ Article 41 came into force for Australia on 28 January 1993, recognising the competence of the UN Human Rights Committee ('the Committee') to accept complaints against Australia made by other Parties to the ICCPR.
2. Australia acceded to the *First Optional Protocol to the ICCPR* ('the First Optional Protocol') on 25 September 1991.² The Protocol entered into force for Australia on 25 December 1991, recognising the competence of the Committee to accept complaints against Australia made by individuals.
3. Australia acceded to the *Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty* ('the Second Optional Protocol') on 2 October 1990.³ The Protocol entered into force in international law and for Australia on 11 July 1991.
4. Australia submitted its first periodic report under Article 40 of the ICCPR in 1981. It was considered by the Committee in 1982.⁴
5. Australia's Second Report was submitted to the Committee in 1987. It was considered in 1988.⁵
6. The Third Report was submitted in 1998.⁶ It covered the period March 1987 to December 1995. The Fourth Report was submitted in 1999,⁷ covering the period January 1996 to December 1996. The Third and Fourth Reports were considered together by the Committee in 2000.
7. Australia's Fifth Report ('the Fifth Report'), submitted in 2006, is presently before the Committee for consideration.⁸ The Fifth Report covers the period 1 January 1997 to 26 June 2006.
8. The period covered by this report essentially coincides with the years of the Howard government. This period was one of great economic prosperity in Australia. However, it was also a period in which human rights were consistently ignored. It was a period in which:
 - racial discrimination legislation was overridden by federal Parliament and in which the 'races power' of the Constitution was relied upon by the federal government to pass legislation that was detrimental to Indigenous Australians;
 - Australian troops entered East Timor under the auspices of the United Nations to assist in the formation of the new nation of Timor Leste;
 - mandatory immigration detention was vastly expanded and in which findings by the Committee on the arbitrary nature of such detention were ignored;
 - the Australian navy was deployed to interdict and turn back asylum seekers attempting to reach Australia in boats;
 - the 'Pacific Solution' saw asylum seekers diverted to Pacific island nations to have their refugee claims assessed;

- incarceration rates in Australia's prisons climbed dramatically, due in part to a shift away from a presumption in favour of bail;
 - new supermaximum prisons were built in NSW and Victoria and inmates subjected to cruel and degrading punishment;
 - Australian troops joined the UN forces in Afghanistan and, later, the unsanctioned invasion of Iraq;
 - the so-called 'war on terror' commenced and draconian new legislation was rushed through Parliament without any regard for human rights; and,
 - there was a significant deterioration in Australia's opposition to the death penalty.
9. CCL notes that, since the Fifth Report was submitted, a new Australian federal government has been elected. While, Prime Minister Kevin Rudd has made major international speeches about the human rights records of other countries, he has made no major speeches committing to the comprehensive protection of human rights in Australia. CCL also notes that neither major Australian political party has a comprehensive human rights policy and that neither actively supports the adoption of the ICCPR into domestic law.
10. The ICCPR contains a broad range of civil and political rights. This Shadow Report does not attempt to address all of these rights. Instead, the Report identifies and examines a number of concerning issues.
11. CCL has had the benefit of reading the Shadow Reports produced by the Law Council of Australia and the National Association of Community Legal Centres. CCL endorses those NGO reports. CCL commends the good work of these NGOs to the Committee.

2. Executive Summary

12. Australia has not adopted the ICCPR or the Second Optional Protocol into domestic law, which means that domestic courts cannot, in a comprehensive fashion, adjudicate on breaches of the substantive rights contained therein. There is piecemeal legislation implementing some of the ICCPR rights; and some jurisdictions have introduced statutory Charters of Rights based on the ICCPR. However, there is no comprehensive, federal, constitutionally-entrenched Bill of Rights.
13. The State Party should take steps to amend its Constitution to enshrine all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy.
14. While the death penalty is abolished throughout Australia, there is no legal or constitutional impediment to the States reintroducing capital punishment.
15. The State Party should entrench the abolition of capital punishment in the Constitution. In the meantime, the State Party should legislate to adopt the Second Optional Protocol into domestic law, binding the States.
16. In the name of the 'war on terror' Australia has failed on several occasions with respect to its ICCPR obligations. For example, Australian officials knew about abuse at Abu Ghraib but Australia ignored their reports. The government also still refuses to investigate the extraordinary rendition of Mr Mamdouh Habib to Egypt for torture. The government has left Mr Habib to pursue his claims in the civil courts, where the government is resisting his compensation claim.
17. The State Party should establish a Royal Commission with a full mandate to investigate the serious allegations of torture and mistreatment made by Mamdouh Habib and David Hicks. The State Party should also consider appropriate compensation.
18. The treatment of indigenous Australians under the law and policy continues to be problematic. The Australian Constitution permits the parliament to make laws for the benefit *and detriment* of indigenous Australians. While there is legislation prohibiting racial discrimination, there is no constitutional guarantee of equality before and under the law. This means that parliament can discriminate on the grounds of race.
19. The State Party should remove the races power from its Constitution.
20. The State Party should amend its Constitution to guarantee equality, regardless of race.
21. Not all expression is protected by the Australian Constitution, which only protects 'political communication'. There has been an increase in censorship over the last ten years.
22. The State Party should move to guarantee freedom of expression in the federal Constitution.

23. Several cases have emerged over the last seven years in which Australian police have been authorised to assist in death penalty cases abroad. This is in breach of Australia's obligation to ensure that it exposes no one to the real risk of execution.
24. The State Party should enact legislation to ensure that its agents acting abroad do not, by action or inaction, expose anyone to the risk of execution or torture.
25. Despite many adverse individual complaints against Australia under the First Optional Protocol to the ICCPR, Australia has consistently ignored the conclusions and recommendations of the UN Human Rights Committee.
26. The State Party should review its implementation of the First Optional Protocol and take steps to ensure that the issues raised by the Committee in adverse findings are addressed and complainants afforded an effective remedy and, if appropriate, adequate compensation.

3. Article 2: jurisdiction, effect and remedy

3.1 Extraterritoriality: 2(1)

27. CCL is concerned that Australia is seeking to avoid its obligations under the international human rights treaties it has ratified by taking a very narrow view of jurisdiction. This concern is reflected in the Australian government's failure to thoroughly investigate the torture allegations of Mamdouh Habib and David Hicks, its failure to accept any responsibility for the advice of the Australian military lawyer who endorsed the interrogation techniques at Abu Ghraib as consistent with the Geneva Conventions, and Australia's continued support for operations involving Australian police working abroad in death penalty cases. In all of these cases, Australia claims it has no jurisdiction.
28. The Australian government has taken a very narrow view of jurisdiction under international law. With the exception of Australia's obligations under the *Rome Statute of the International Criminal Court*, Australia's Fifth Report refers only to jurisdiction within Australia's borders.⁹
29. CCL is concerned that Australia does not accept that the actions of its agents abroad fall necessarily within its jurisdiction. This has been illustrated by the transnational operations of the Australian Federal Police (AFP) with respect to Australia's obligations under the ICCPR and its Second Optional Protocol (2OP).
30. Having examined documents obtained under Freedom of Information, and which are heavily censored, it appears to CCL that the government has concluded that its obligations under the ICCPR and Second Optional Protocol do not extend beyond Australia's borders.¹⁰ The advice was obtained in the context of the investigation and prosecutions of the Bali bombings. The government's legal advice concludes that Australian agents working on that case were not subject to Australia's human rights obligations under the ICCPR or 2OP. Specifically the advice states:

...the ICCPR and OP do not apply to individuals outside of Australia's territory or not subject to Australia's jurisdiction. In the Bali attacks, the issue of Australia's obligations under the ICCPR and OP do not arise.
31. This legal advice was used to formulate government policy with respect to Australian agents working on death penalty cases abroad. The policy states that cooperation is acceptable so long as four conditions are met:
 - a. all criminal charges are laid by foreign police;
 - b. the accused are not Australian citizens;
 - c. the accused have not been removed from Australia's territory or jurisdiction; and,
 - d. the accused are adults.

These are extraordinary conditions that authorise Australian agents to participate in the violation of the human rights of adult non-citizens in the custody of foreign agents. The distinction between citizens and non-citizens is a mockery of human rights law, which applies to everyone and not just state-party citizens. Presumably this policy authorises Australian agents to violate the rights of Australian permanent residents and visa holders when they are charged abroad.

32. CCL has attempted to obtain a copy of the legal advice the Australian government has received about its international obligations with respect to capital punishment.¹¹ The federal Attorney-General has refused to release this advice, on the grounds that the subject matter is 'sensitive'. The Attorney-General has even refused to provide CCL with a list of the caselaw to which the advice refers.

3.1.1 Australian Federal Police and the death penalty

33. AFP officers operate in countries which retain the death penalty, particularly in Asia. Australia has ratified the Second Optional Protocol to the ICCPR¹² and therefore has an international obligation to ensure that it does not expose anyone to the death penalty.¹³ Nevertheless, AFP officers can and do cooperate with foreign police in investigations that will lead to people being executed.¹⁴ The police exercise their own discretion in these cases and are not required to consider the human rights implications of their actions or to obtain a guarantee that no one will be executed as a result of any cooperation or information sharing.
34. For example, the AFP assisted Indonesian police to identify, arrest and investigate nine Australians who have been convicted for drug trafficking in Bali, three of whom have been sentenced to death.¹⁵
35. Once a suspect is charged abroad with a capital offence, important human rights safeguards, such as the requirement to obtain a guarantee that no one will be executed, are engaged in Australia.¹⁶ However, prior to a suspect being charged, the AFP is free to cooperate without these safeguards.
36. This distinction between pre-charge and post-charge situations is artificial and it fails to protect the rights of individuals. Even after charges are laid, the Attorney-General can authorise continued police-to-police cooperation in death penalty cases. Such authorisation has been granted in cases in Indonesia, Malaysia and Tonga. It is not clear whether anyone has been executed as a result of these authorisations.
37. While Australia clearly should cooperate with its regional neighbours in matters of transnational crime, Australia should do so in a manner consistent with its international obligations. For example, information should be shared with foreign agencies under the express condition that no one will be executed or tortured as a result of the cooperation.
38. The State Party should enact legislation to ensure that its agents acting abroad do not, by action or inaction, expose anyone to the risk of execution or torture.

3.2 Failure to adopt and give effect to ICCPR: 2(2)

The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.

UN Human Rights Committee, *Concluding Observations: Australia* (2000),
UN Doc CCPR A/55/40, [514].

The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy.

UN Human Rights Committee, *Concluding Observations: Australia* (2000),
UN Doc CCPR A/55/40, [515].

39. As the Committee has previously observed, Australia has no constitutional Bill of Rights; nor has Australia given effect to the ICCPR in domestic law. While some State and Territory jurisdictions have adopted statutory Charters of Rights based on the ICCPR, other jurisdictions remain hostile to the idea.
40. Treaties are not self-executing under Australian law. For a treaty to have domestic legal effect, Parliament must adopt the treaty into domestic law through legislation.¹⁷ The federal Parliament has a constitutional power to adopt treaties into domestic law,¹⁸ which it has chosen not to exercise with respect to the ICCPR and Second Optional Protocol.
41. Australians have never been given the opportunity to vote for or against a comprehensive federal constitutional Bill of Rights. The Australian Constitution can only be altered by national referendum.¹⁹ To succeed, a referendum question must achieve a 'double majority': an absolute majority of votes nationally *and* in a majority of the States. Such success is notoriously difficult without bipartisan political support for a referendum question. In 1944, the Australian people were given the opportunity at enshrine *inter alia* freedom of speech in the Constitution (for a period of five years only). The proposal was defeated because it was bundled into one referendum question with many unpopular post-war reconstruction powers.²⁰ In 1988, voters rejected a proposal to bind the States to guarantee the rights to trial by jury, religious freedom and acquisition of property on 'just terms' was rejected. That proposal was incomplete and was also bundled with unpopular questions such as extending parliamentary terms. There has never been a referendum to enshrine the substantive rights of the ICCPR into the federal Constitution.
42. The current federal government promises to announce soon an inquiry into the protection of rights in Australia. However, it is unlikely to recommend a referendum. It is unlikely that such a referendum would achieve bipartisan support. It is more likely to recommend a statutory Charter of Rights rather than a constitutional Bill of Rights.
43. Since 2002, Victoria and the Australian Capital Territory have enacted statutory Charters of Rights.²¹ Based loosely on the UK *Human Rights Act*, the model is designed to respect the sovereignty of Parliament and does not

permit courts to invalidate legislation that breaches human rights. From 2009, the ACT Charter will provide a cause of action allowing individuals to take an action in the Supreme Court against a public authority for violation of human rights.²² Both Charters were enacted after extensive community consultation. In 2007, Tasmania and Western Australia undertook similar public consultation processes, which resulted in recommendations for similar legislative Charters.²³

44. Parliamentary inquiries in Queensland (in 1998) and New South Wales (in 2001) rejected the need for a Bill of Rights in those States.²⁴ Instead of a Bill of Rights, NSW established a Legislation Review Committee (LRC) which is completely ineffectual and which Parliament completely ignores. The LRC scrutinises every Bill brought before Parliament and reports on whether the legislation 'trespasses unduly on personal rights and liberties'.²⁵ Legislation can be passed by Parliament and receive Royal Assent even before the LRC has published its report on a Bill.²⁶ Once a Bill is passed there is no way for a citizen to seek redress if the legislation breaches their fundamental rights. This model provides no judicial review.
45. CCL also notes that there is considerable and powerful opposition in Australia to allowing the courts to adjudicate on human rights. For example, prominent members of the previous federal government, including the former Prime Minister and former Attorney-General opposed the creation of a federal Bill of Rights.²⁷ The NSW Attorney-General has made it clear that he does not support a Charter of Rights for New South Wales.²⁸
46. The common law rules of statutory interpretation provide presumptions in favour of civil rights.²⁹ However, these presumptions are rebuttable and can be overridden by Parliament in legislation with express and clear language.³⁰
47. All of this means that Australian parliaments can authorise violations of the ICCPR, leaving victims with no legal remedy. An example of this is the system of indefinite mandatory immigration detention (see Article 9 below).
48. The State Party should take steps to amend its Constitution to enshrine all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy.

3.3 Lack of effective remedies: 2(3)

The Committee is of the opinion that the duty to comply with Covenant obligations should be secured in domestic law. It recommends that persons who claim that their rights have been violated should have an effective remedy under that law.

UN Human Rights Committee, *Concluding Observations: Australia* (2000), UN Doc CCPR A/55/40, [525].

49. The UN Human Rights Committee has confirmed that a State Party to the ICCPR is obliged to "ensure that individuals...have accessible, effective and enforceable remedies to vindicate [their Covenant] rights".³¹
50. In *Faure v Australia* (2005), the UN Human Rights Committee found that Australia had breached Article 2(3) because it failed to ensure that the applicant had a domestic remedy for a potential breach of her ICCPR rights.³²

51. Because there has been no comprehensive adoption of Covenant rights into Australian domestic law, there are no competent judicial, administrative or legislative authorities to remedy all breaches of Covenant rights. There are remedies for some violations, in limited circumstances. For example, anti-discrimination legislation in some jurisdictions affords remedies for discrimination in the workplace or by government. However, there is no general mechanism for the adjudication and remedy of human rights breaches.
52. Although the federal Human Rights and Equal Opportunity Commission (HREOC) is responsible for monitoring Australia's compliance with international human rights treaty obligations,³³ its findings are not legally binding because it cannot exercise federal judicial power.³⁴
53. Various jurisdictions have administrative oversight bodies, e.g. the Commonwealth Ombudsman and the NSW Ombudsman, however these authorities have no enforcement powers. This means that governments can, and do, ignore their recommendations and findings. For example, when the NSW Ombudsman recommended that police should stop using drug detection sniffer dogs as an excuse to randomly stop, detain and search citizens on NSW streets, the NSW government simply ignored the Ombudsman.³⁵ Similarly, the numerous recommendations by HREOC to end mandatory immigration detention continue to be ignored.³⁶

4. Article 6: Right to Life

4.1 euthanasia

54. In 1995, the democratically-elected parliament of the self-governing Northern Territory passed legislation regulating medically-assisted voluntary euthanasia, under very strict conditions, for terminally-ill mentally-competent adults for whom palliative care is no longer an option.³⁷ Improper conduct under the legislation is punishable by up to 4 years imprisonment. The safeguards are extensive and require the consensus of two doctors and a psychiatrist.
55. In 1997, the federal Parliament used its constitutional power to remove the power of the legislative competence of territory parliaments in the field of euthanasia.³⁸ This effectively overrode the Northern Territory's voluntary euthanasia law, removing the rights of the terminally-ill to assistance in voluntary euthanasia.
56. CCL notes the comments of the Committee with respect to voluntary euthanasia laws in the Netherlands.³⁹ The Northern Territory law contained all the safeguards required by the Committee to ensure against abuse, misuse and undue influence. While the federal Parliament's actions were a valid exercise of its constitutional power, the federal legislation removed rights from terminally-ill Territorians without any opportunity for an affected person to seek a human rights review by a court.

4.2 death penalty

57. This issue is covered in detail in the chapter on the *Second Optional Protocol to the ICCPR*, which starts on page 67 below.

5. Article 7: torture

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

ICCPR, Article 7

...all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards.

UN General Assembly, *Human Rights and Terrorism* (13 February 2002)

UN Doc. A/RES/56/160.

5.1 The “war on terror”

5.1.1 acquiescence and failure to investigate torture

The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.

UN Human Rights Committee, *General Comment 20* (1992), [14].

58. Australian citizen, Mr Mamdouh Habib, makes serious allegations that Australian officials were aware he was being tortured and mistreated. He also alleges that Australian officials were present during some of this abuse.
59. CCL is deeply concerned that Australia has refused to investigate these allegations of Australian complicity and acquiescence. CCL is also concerned that Australia has never demonstrated a willingness to prosecute and punish Australians who are complicit, or who acquiesce, in torture or ill-treatment.
60. The State Party should investigate, prosecute and punish Australians who commit, or are complicit in the commission of, torture.
61. CCL notes the Committee against Torture’s view that where there is an immediate risk that someone will be tortured or ill-treated and where the agents of a State Party are present and fail to act to prevent a violation of the *Convention against Torture* (CAT), then these violations are committed with the acquiescence of the State Party and constitute a violation of CAT by that State Party.⁴⁰
62. It appears that Australia was aware of, and acquiesced in, the mistreatment of detainees at Guantanamo Bay, prisons run by the Coalition Provisional Authority in Iraq, and the practice of extraordinary rendition of individuals for torture. CCL notes the Committee against Torture’s view that rendition to states that torture constitutes refoulement.⁴¹
63. CCL is deeply concerned that Australia’s willingness to ignore, and Australia’s failure to protest, violations of CAT by other States amounts to acquiescence in this torture and ill-treatment.
64. The State Party should acknowledge its responsibility to investigate in good faith all allegations of torture, ill-treatment and refoulement by other States. The failure to do so amounts to acquiescence and is itself a violation of the Covenant.

65. CCL is also deeply concerned about Australia's practice of referring complaints about torture and ill-treatment to the alleged perpetrators for investigation. For example, allegations of the torture and mistreatment of Mr Mamdouh Habib were referred to the US military, Egypt and Pakistan for investigation.
66. The State Party should cease its practice of referring allegations of torture to the alleged perpetrators for investigation.

5.1.2 torture of Australian citizens abroad

67. The State Party should establish a Royal Commission with a full mandate, along the lines of the Canadian Arar Commission, to investigate the serious allegations of torture and mistreatment made by Mamdouh Habib and David Hicks. The State Party should also consider appropriate compensation.
68. Mr Mamdouh Habib, a dual Australian-Egyptian citizen, has made serious allegations that he was tortured and mistreated in Pakistan, Egypt and Guantanamo Bay. None of these allegations have been investigated in good faith by the Australian government. Mr Hicks has been forced to seek a remedy through the common law courts, where the federal government continues to deny that Australia knew anything about Mr Habib's extraordinary rendition.
69. Mr David Hicks, an Australian citizen captured in Afghanistan, has also made serious allegations that he was tortured and mistreated by US officials in Afghanistan and at Guantanamo Bay. The Australian government referred these allegations to the US military for investigation.

5.1.2.1 Mamdouh Habib

70. Mr Mamdouh Habib was captured and detained in Pakistan in October 2001, where he was interviewed *inter alia* by officers of the Australian Federal Police and ASIO.⁴² During his interviews with the AFP in Pakistan, Mr Habib made allegations that he had been kidnapped and tortured, but Australian officials did not take those allegations seriously and they were not investigated.⁴³
71. Mr Habib also alleges that an Australian official was present when he was interrogated by American officials in Pakistan.⁴⁴
72. At no time did the Australian government ask the Pakistani or US governments to return Mr Habib to Australia.⁴⁵ However, it appears that an Australia Federal Police agent was present, on 22 October 2001, when US officials discussed sending Mr Habib to Egypt.⁴⁶ The AFP agent apparently expressed the view that Mr Habib should be sent to Australia.
73. Mr Habib soon after 'disappeared' from Pakistan. According to the Interior Minister of Pakistan, Mr Makhdoom Syed Faisal Saleh Hayat, Mr Habib was sent to Egypt at the request of the United States.⁴⁷ Mr Habib alleges that an Australian official was present at the Pakistani airport where Mr Habib, bound and gagged, was placed on a plane for extraordinary rendition to Egypt.⁴⁸

74. Mr Habib was held in Egypt for six months, where he was tortured. He was *inter alia* repeatedly beaten, attacked by dogs and subjected to electric shocks.⁴⁹ According to Mr Habib's US lawyer, Professor Joe Margulies of the MacArthur Justice Centre at the University of Chicago:⁵⁰

The torture was unspeakable. Mr Habib described routine beatings. He was taken into a room, handcuffed, and the room was gradually filled with water until the water was just beneath his chin. Can you imagine the terror of knowing you can't escape?

75. Mr Habib alleges that an Australian official was present during at least one of his interrogation sessions in Egypt.⁵¹ Mr Habib alleges that his Egyptian torturers had access to information, including telephone records, that could only have been obtained from Australian sources.⁵² It is unclear who handed this information to Egyptian security forces. The Australian media has reported that ASIO shared with the CIA information about Mr Habib and, possibly, information obtained coercively in Australia from the execution of a search warrant of Mr Habib's Sydney home.⁵³

76. Australian officials denied they knew for a fact that Mr Habib was ever in Egypt. According to the Howard government: despite repeated requests by Australian consular officials, the Egyptian government never admitted Mr Habib was in Egypt.⁵⁴

77. However, in May 2008, the new federal Attorney-General revealed the existence of a meeting on 23 October 2001 between senior officials of ASIO, the AFP, the Department of Foreign Affairs, the Department of Prime Minister and Cabinet, and the Attorney-General's Department.⁵⁵ In that meeting, it was decided that ASIO would convey to the United States of America its view that Australia did not agree to Mr Habib's transfer to Egypt.⁵⁶

78. The AFP Commissioner has given evidence to a Senate Committee that, on 19 November 2001, Australia's top diplomat in Pakistan told an AFP agent that it was his understanding that Mr Habib had been transferred to Egypt.⁵⁷

79. The CIA agent responsible for establishing the extraordinary rendition programme, Mr Michael Scheuer, told an Australian TV journalist that, because of the close relationship between Australia and the US, it was unlikely that Australian officials were not informed by the CIA of Mr Habib's rendition to Egypt.⁵⁸

80. In November 2001, ASIO 'suspected' Mr Habib was in Egypt.⁵⁹ ASIO has never revealed how it came by this knowledge. ASIO unsuccessfully requested the permission of Egyptian intelligence services to interview Mr Habib in Egypt.⁶⁰

81. Within days of Mr Habib's rendition, the Department of Foreign Affairs and Trade sent a cable stating as fact that Mr Habib had 'been transferred to Egypt'.⁶¹ Australian officials also wrote to Mr Habib's wife informing her that 'we believe that your husband is now detained in Egypt' and 'we are not aware of the details of his movement to Egypt from Pakistan'.⁶²

82. From Egypt, Mr Habib was transferred to the US military base at Bagram in Afghanistan and then on to Guantanamo Bay.⁶³ ASIO admits to becoming aware that Mr Habib had been transferred into US custody at Guantanamo Bay at some point prior to 17 April 2002.⁶⁴
83. Mr David Hicks, another Australian detainee at Guantanamo Bay, alleges that he was shown a photograph of Mr Habib who was so badly beaten that Mr Hicks said:⁶⁵

I thought it was a photo of a corpse. I was told I'd be sent to Egypt and suffer the same fate if I didn't co-operate with my US interrogators.
84. In May 2002 at Guantanamo Bay, during an interview with AFP officers, Mr Habib raised allegations that he had been tortured by people who 'spoke the Egyptian language'.⁶⁶ The AFP, believing it was the responsibility of the Department of Foreign Affairs and Trade (DFAT) to investigate, informed DFAT of Mr Habib's allegations of torture.⁶⁷
85. US military officials holding Mr Habib at Guantanamo Bay claimed that he 'knew about the September 11 attacks in advance, had trained in martial arts with two of the core terrorists [groups] and planned to later hijack a plane himself'.⁶⁸ Despite these serious allegations, Mr Habib was released from Guantanamo Bay shortly after his allegations of torture and rendition were made public in a US court.⁶⁹
86. In January 2005, after three years in Guantanamo Bay, Mr Habib returned to Australia.⁷⁰ It is important to note that Mr Habib was released from Guantanamo Bay by the Americans without charge, and Mr Habib has never been charged with any terrorism offences in Australia.
87. None of these allegations of torture made by Mr Habib have been thoroughly or effectively investigated by the Australian government or an independent commission. Unlike Canada, where a Commission of Inquiry was established to investigate the extraordinary rendition and torture of a citizen,⁷¹ there has been no independent judicial inquiry into Mr Habib's claims. Such a commission could seek answers to some of the many unanswered questions, such as: who told ASIO that Mr Habib was in Egypt; and, why do Australians officials still have Mr Habib under surveillance?
88. The Australian government, instead, has satisfied itself with investigations made by the very people Mr Habib alleges tortured him: the governments of Egypt, Pakistan and the United States of America.
89. The former federal Attorney-General, Mr Philip Ruddock, considered it futile to ask the Americans about whether Mr Habib was rendered and tortured, because "I don't think I'd get an answer".⁷² Nevertheless, the Australian government chose to refer Mr Habib's allegations of torture by Egyptians to the United States for investigation.⁷³ In the context of allegations by Mr David Hicks of torture, the former Australian Foreign Minister, Mr Alexander Downer, stated his view that 'people from al-Qaeda always claim to be tortured – always'.⁷⁴

90. Given what is now known about the American practice of extraordinary rendition⁷⁵ and given the findings of the Canadian Arar Commission,⁷⁶ Mr Habib's allegations that Australian officials knew he was in Egypt and being tortured are credible and need to be thoroughly investigated.
91. Australia has a mechanism for investigating such serious breaches of human rights: the Royal Commission.⁷⁷ A Royal Commission is headed by a judicial officer with the power to subpoena witnesses and documents. This is the only appropriate mechanism for examining the serious allegations of Mr Habib. Such a Royal Commission must be given a full mandate to investigate the actions of all Australian officials (including politicians) with respect to Mr Habib.
92. Mr Habib has been forced to sue the Australian government in the common law courts, where the government continues to oppose his claim.⁷⁸

5.1.2.2 David Hicks

93. Mr David Hicks was captured by Northern Alliance forces in Afghanistan in November 2001.⁷⁹ He was later transferred to Guantanamo Bay. In 2007, after almost six years at Guantanamo, Mr Hicks pleaded guilty before a US military commission to being a terrorist sympathiser.
94. As part of his plea bargain, Mr Hicks agreed not to speak to the media for 12 months and that he would not sue the US government. Mr Hicks also recanted allegations of torture and abuse by signing a document stating that he had always been treated humanely while in US custody. This contrasts starkly with allegations that surfaced before the plea bargain.
95. In a sworn affidavit filed in the United Kingdom in early May 2007, Mr Hicks revealed details of his treatment at Guantanamo Bay.⁸⁰ He alleges that he was beaten and subjected to sleep deprivation. He was only allowed 15 minutes exercise every week. He was kept in isolation for almost eight continuous months.
96. Like Mr Habib, there has been no official Australian investigation into these allegations of torture. The Australian government referred allegations of torture and mistreatment of Mr Hicks at Guantanamo Bay to the US military for investigation. In July 2005, a US report found no evidence that Mr Hicks had been mistreated at Guantanamo Bay.⁸¹ Former Australian Prime Minister Howard responded by saying:⁸²

We have allegations of abuse, those allegations are investigated. We have a response from the Americans. I have nothing to add to that except to remind you of the nature of the allegations that have been made about Mr Hicks. Let us not lose sight that these are very serious allegations.
97. Mr Hicks was returned to Australia in May 2007.⁸³ He served a nine-month sentence, imposed by the US Military Commission, in a maximum security prison in Adelaide, South Australia. He is now the subject of a counter-terrorist control order.⁸⁴ In mid-2008, the former head prosecutor at

Guantanamo said that political pressure was applied on his office to ensure that Mr Hicks was offered a plea bargain and released.⁸⁵

5.1.3 no compensation for victims of torture

98. As already noted, Mr Mamdouh Habib and Mr David Hicks have not been compensated by the Australian government.
99. Mr Habib has never been compensated for his rendition and torture. Former Prime Minister John Howard made it clear in January 2005 that Mr Habib would not receive an apology or compensation from the Australian government.⁸⁶ Mr Habib has been forced to seek compensation by launching a costly court case against the Australian government. The Rudd government has given no indication that it will move to compensate Mr Habib.
100. In contrast, CCL notes that, after a full judicial inquiry, the Canadian government compensated Mr Maher Arar in the sum of \$10 million Canadian.⁸⁷

5.1.4 Australian support for Guantanamo Bay

101. CCL notes that the Committee against Torture has called on the United States of America to close the detention centre at Guantanamo Bay.⁸⁸
102. Australia has been a strong supporter of the US military prison at Guantanamo Bay in Cuba. Despite the serious allegations of torture and mistreatment there, at no time did the Australian government ask for the release of Mr Habib or Mr Hicks. At no time did Australia undertake an independent investigation into these allegations. At no time has Australia called for the detention centre to be closed and the detainees released.
103. Australia has also ignored the report of the UN Special Rapporteurs, which documented allegations of torture and mistreatment and which called for the immediate closure of Guantanamo Bay.⁸⁹

5.1.5 Australian indifference to abuse at Abu Ghraib

104. The State Party should establish an independent public inquiry to investigate what its agents knew about abuse in prisons run by occupying forces in Iraq and Afghanistan, and what actions were taken to protect the victims.
105. In July 2003, Amnesty International raised concerns about allegations of torture at Abu Ghraib prison and in other installations under the control of the Coalition Provisional Authority in Iraq.⁹⁰ The Australian government was aware of these allegations, but did not investigate them.⁹¹
106. An Australian military lawyer, Colonel Mike Kelly, who was posted to the Coalition Provisional Authority in Baghdad, reported Amnesty's concerns to Ambassador Paul Bremer and the Australian government.⁹² After resigning from the Australian Army in May 2007 to run as an opposition candidate in the upcoming federal election, Colonel Kelly revealed that he had started visiting Abu Ghraib and other detention facilities in Iraq in June 2003 (before

the Amnesty report) and had sent detailed situational reports back to Canberra about abuse in Coalition-run prisons and camps.⁹³ Colonel Kelly's reports were ignored and their full extent was not revealed by defence officials to the Australian Senate when it investigated what Australia knew about abuse at Abu Ghraib.⁹⁴ Mike Kelly is now a member of parliament.

107. In October 2003 the International Committee of the Red Cross (ICRC) raised its concerns about abuses in Iraqi prisons with the United States and the United Kingdom. The ICRC's report stated that some detainees in Abu Ghraib were subjected 'to both physical and psychological coercion (which in some cases was tantamount to torture)'.⁹⁵ There were allegations of sleep deprivation, keeping detainees naked and handcuffing detainees to the bars of their cells for 3-4 hours. The ICRC did not send Australia a copy of this report, but the report was available to some Australian officials.
108. On 4 December 2003, Australian military lawyer Major George O'Kane attended the Abu Ghraib prison to interview 'various people who were involved in the interrogation processes' for the purpose of addressing 'issues of mistreatment allegations and the accuracy of contents of draft reply by US Army military police and military investigators'.⁹⁶
109. The extent of Major O'Kane's inquiry into the abuses alleged in the October 2003 ICRC report was that 'he raised the contents of the report "paragraph by paragraph" with the appropriate military officials and that the allegations were denied'.⁹⁷
110. It is not clear whether the draft letter prepared by Major O'Kane was edited or changed by superior officers before it was sent to the ICRC by the United States, as detaining power. However, the Australian Defence Minister has confirmed that Major O'Kane's opinion at the time was that 'internees were not being held or interrogated contrary to the Geneva Convention'.⁹⁸
111. In August 2004, US Major General George Fay reported that the ICRC's October 2003 allegations 'were not believed, nor were they adequately investigated'.⁹⁹ Major General Fay noted that Major O'Kane was sent to Abu Ghraib to help 'craft a response to the ICRC memo'.¹⁰⁰ He went on to find that:¹⁰¹

The only response to the ICRC was a letter signed by [Brigadier General] Karpinski, dated 24 December 2003. According to [Lieutenant Colonel] Phillabaum and [Colonel] Warren (as quoted above) an Australian Judge Advocate officer, [Major] O'Kane, was the principal drafter of the letter. Attempts to interview MAJ O'Kane were unsuccessful. The Australian Government agreed to have MAJ O'Kane respond to written questions, but as of the time of this report, no response has been received. The section of the BG Karpinski letter pertaining to Abu Ghraib primarily addresses the denial of access to certain detainees by the ICRC. It tends to gloss over, close to the point of denying the inhumane treatment, humiliation, and abuse identified by the ICRC. The letter merely says: Improvement can be made for the provision of clothing, water, and personal hygiene items.

112. The Australian government did not make inquiries of the United States, its Coalition partner in Iraq, about Colonel Kelly's allegations of abuse. The Australian government did not ask the United States about the ICRC's October 2003 report. Nor did the Australian government make inquiries of the United States when further allegations surfaced in January 2004. Nor did the Australian government investigate allegations of mistreatment and harsh interrogations of Iraqi prisoners by a senior analyst who participated in interrogations in Iraq, Mr Rod Barton.¹⁰² It was only after the publication of the graphic photographs of abuse in April 2004 that government officials began to investigate Australian involvement.¹⁰³
113. An inquiry by a Senate committee in 2005 was given only limited access to government documents¹⁰⁴ and, therefore, it falls far short of a thorough investigation. For example, the Committee was not given access to the situation reports ('sit reps') sent back from Iraq by Australian officers, or to the authors of those sit reps.¹⁰⁵ Consequently, the Committee concluded that the first Australian officials knew about allegations of abuse was in November 2003 from reports of Major O'Kane.¹⁰⁶ However, the Senate Committee was not given access to the reports of Colonel Kelly, who reported abuse as early as June 2003.¹⁰⁷ In fact Colonel Kelly is not mentioned once in the Committee's report.
114. The Howard government denied any state responsibility for the abuse that occurred in Coalition-run facilities in Iraq. It relied on the fact that Australia was not named as one of the Occupying Powers in UN Security Resolution 1483.¹⁰⁸ It relied on the fact that Abu Ghraib, and other facilities, were under American jurisdiction.¹⁰⁹ In May 2007, Australia's then Defence Minister, Dr Brendan Nelson, said that it is unhelpful to keep raising these allegations of Australian knowledge of the abuse at Abu Ghraib because it is 'ancient history'.¹¹⁰
115. The Rudd government is satisfied that the Senate has investigated this matter fully.¹¹¹
116. Australia has failed to meet its international obligations, under article 7 of the Covenant, to investigate thoroughly these allegations of torture and ill-treatment.

5.2 Rehabilitation of victims of torture

117. Counselling for victims of trauma and torture is available to all refugees, whether they are on temporary or permanent protection visas.¹¹² The story is very different for men, women and children held in immigration detention centres or released into the community on 'bridging visas' pending the determination of their visa applications.

5.2.1 children

118. In 2004, HREOC reported that torture and trauma counselling was not provided to children in immigration detention. This was because ACM, the private company contracted to run immigration detention centres,¹¹³ refused

to escort detainees to offices of the specialist agency STARTTS (Service for the Treatment and Rehabilitation of Torture and Trauma Survivors), which are outside the facilities.¹¹⁴

119. HREOC also found that 'the failure to make routine assessments regarding the mental health of children on arrival in order to ensure that the appropriate services were provided (for instance torture and trauma assessments)' was inconsistent with the *UN Rules for the Protection of Juveniles Deprived of their Liberty*.¹¹⁵ Furthermore, HREOC found that Australia failed to ensure that children in detention 'were treated with "humanity and respect for [their] inherent dignity", taking into account the needs of their age, in accordance with article 37(c) of the [Convention on the Rights of the Child]'.¹¹⁶

5.2.2 victims on bridging visas

120. Asylum seekers who arrived as unlawful non-citizens, usually by boat, can be released from immigration detention, pending a decision on their application for protection, on a Bridging Visa E subclass 051 (BVE). According to DIMIA, 167 BVE (subclass 051) were granted between 2001 and December 2005.¹¹⁷
121. Another class of BVE (subclass 050) is granted to unlawful non-citizens who entered Australia lawfully but whose entry visa has expired. This BVE is granted to permit unlawful non-citizens to remain in the community, rather than being detained. As at February 2006, there were approximately 7000 people on these Bridging Visas.¹¹⁸
122. All asylum seekers on BVEs are ineligible for federally-funded torture and trauma counselling, and so must rely on state-based services if they are available.¹¹⁹ BVE holders also have no automatic right to work, no access to Medicare and no access to federally-funded mental health services. The federal government has recently undertaken a review of Australia's bridging visa system. The report has not been publicly released, but was leaked to the media in March 2008.¹²⁰ In response, the Immigration Minister said that the right to work was under consideration.

5.3 Domestic Prisons

5.3.1 indigenous over-representation

123. CCL notes that the Committee against Torture and Committee for the Elimination of Racial Discrimination have expressed concern about the over-representation of indigenous Australians in prison.¹²¹
124. Despite making up only 2.4% of Australia's total population,¹²² indigenous Australians made up 24.3% of the nation's prison population on 30 June 2007,¹²³ which is up from 21% as at 30 June 2004.¹²⁴ The national rate of imprisonment of indigenous Australians in 2007 was 2,142.2 per 100,000 of the adult indigenous population,¹²⁵ which is up from 2,024 in December 2005.¹²⁶ In 2006/2007, the national rate of imprisonment of indigenous Australians was 13 times higher than the rate for non-indigenous people,¹²⁷ which is up from 12 times higher in 2005.¹²⁸

125. The rate of the incarceration of indigenous women has accelerated at an alarming rate. Aboriginal and Torres Strait Islander women are currently the fastest-growing group of inmates in NSW prisons.¹²⁹
126. There is widespread concern that indigenous youth are disproportionately represented in juvenile detention.¹³⁰ In 2003, indigenous children between 10 and 14 were 30 times more likely to be incarcerated than non-indigenous children of the same age.¹³¹
127. In 2003-2004 in NSW, 24% of juveniles under the supervision or control of the Department of Juvenile Justice were indigenous (Aboriginal and Torres Strait Islanders make up only 2% of the NSW population).¹³² In South Australia the rate of detention in 2002-2003 of indigenous children aged between 10 and 17 reached 538.1 per 100,000. In Western Australia the rate has grown alarmingly and was 671.8 in 2003-04: more than twice the national rate. The national figures are shown in the following table:¹³³

Average rate of detention of Indigenous and non-Indigenous people aged 10–17 yrs in juvenile detention, per 100 000 people

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Indigenous									
1999-2000	343.5	181.9	250.8	624.1	266.2	na	284.1	97.6	315.1
2000-01	324.9	142.4	222.2	565.4	265.9	na	524.7	121.4	294.5
2001-02	351.4	135.8	221.1	555.6	388.2	na	624.4	119.9	307.9
2002-03	353.8	173.6	212.0	604.7	538.1	na	458.6	182.6	326.6
2003-04	339.3	231.0	202.6	671.8	333.2	158.7	503.2	108.6	310.1
2004-05	368.5	179.4	189.0	616.3	508.3	181.9	696.8	174.9	322.8
2005-06	405.9	168.0	246.5	570.9	256.1	148.3	594.8	146.3	324.1
Non-Indigenous									
1999-2000	23.6	10.9	13.4	18.7	21.9	na	24.6	31.8	17.8
2000-01	19.9	10.7	8.7	15.1	29.3	na	36.4	26.6	16.0
2001-02	17.9	10.7	8.8	17.3	23.0	na	35.7	23.7	15.0
2002-03	17.5	10.3	10.3	12.2	23.8	na	36.9	30.9	14.9
2003-04	17.5	9.1	8.9	13.8	20.3	39.6	39.4	12.2	13.9
2004-05	15.4	7.8	8.6	10.8	19.2	49.8	25.4	17.4	13.0
2005-06	16.7	7.8	12.7	15.4	15.8	40.6	22.0	6.9	14.1

128. The daily average population of indigenous children aged 10-17 in juvenile detention centres is also increasing:¹³⁴

Daily average population of Indigenous people aged 10–17 yrs in juvenile detention

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
1999-2000	91	8	60	77	13	na	2	10	261
2000-01	86	7	53	71	13	na	4	12	246
2001-02	92	7	53	71	19	na	5	12	259
2002-03	98	10	54	80	28	na	4	19	295
2003-04	98	14	54	92	18	6	4	12	298
2004-05	111	12	53	87	28	7	6	19	322
2005-06	127	11	73	82	14	6	5	16	334

5.4 Supermaximum prisons

The Committee is concerned over the harsh regime imposed on detainees in “supermaximum prisons”. In particular, the Committee is concerned about the prolonged isolation periods to which detainees, including those pending trial, are subjected and the effect such treatment may have on their mental health.

Committee against Torture, *Conclusions and Recommendations: Australia* (May 2008) CAT/C/AUS/CO/3, [24].

Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress.

UN Human Rights Committee, *General Comment 20* (1992), [14].

129. summary – rise of supermax prisons – increasing harshness & arbitrariness of incarceration. Lack of rehab. punitive, rather than rehab. Purpose is for security and good order of facilities, but not being used only for this purpose. Also no judicial review of placement – and no arbitrary procedures for entry & exit. Harsh regime. Has spread to Victoria.

5.4.1 background

130. Australia’s first ‘supermax’ prison was opened in June 2001.¹³⁵ The High Risk Management Unit (‘HRMU’), a prison within a prison, was built inside the Goulburn Correctional Centre at a cost of \$25.188 million (\$US20.7m).¹³⁶
131. From the day it was opened the HRMU has attracted controversy. The regime within the HRMU is very strict and involves the routine segregation of inmates. Inmates are unable to appeal their placement in the facility. Remand and convicted inmates with mental illnesses have been, and are still, housed in the HRMU: a situation which the Human Rights and Equal Opportunity Commission found was contrary to Articles 7 and 10 of the ICCPR; and which a parliamentary inquiry and a coronial inquest considered unsatisfactory. The NSW Ombudsman has reported and verified some of the complaints made by inmates about conditions within the HRMU. The NSW courts have recognised the harshness of conditions inside the supermax prison. There have also been allegations of political interference in the operation of the facility.
132. Despite the weight of criticism, the NSW government maintains that the HRMU does not contravene the Convention against Torture.¹³⁷ CCL is concerned that conditions in the ‘supermax’ facility could constitute a violation of Article 16 of the Convention and this Addendum details those concerns. CCL reiterates its recommendation from its Shadow Report to the UN Committee against Torture:¹³⁸
133. The State Party should invite the Special Rapporteur on Torture to visit the ‘supermax’ prison-within-a-prison (High Risk Management Unit) at the Goulburn Correctional Centre.

134. The Special Rapporteur should take the opportunity to speak to the inmates, their families and their legal representatives, as well as representatives of the NSW Ombudsman, HREOC and non-government organisations representing civil society.

5.4.2 'the worst of the worst': placement in the HRMU as retribution

135. In 1996, the US National Institute of Corrections defined a 'supermax' facility as:¹³⁹

A freestanding facility, or a distinct unit within a freestanding facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated. Such inmates have been determined to be a threat to safety and security in traditional high-security facilities and their behavior can be controlled only by separation, restricted movement, and limited access to staff and other inmates.

136. The Goulburn HRMU satisfies this definition of an American 'supermaximum' prison. According to the NSW Department of Corrective Services' own operations manual:¹⁴⁰

The High Risk Management Unit (HRMU) at Goulburn Correctional Complex is a 75-bed purpose-built maximum-security facility to accommodate male inmates who have been assessed as posing a high security risk to the community, correctional centre staff and/or other correctional centre inmates or present a serious threat to the security and good order of a correctional centre.

137. When considering the placement of an inmate in the HRMU, the Department considers the following factors:¹⁴¹

- (a) escape risk beyond the management capacity of secure correctional centres
- (b) high public interest due to extremely serious criminal activities
- (c) organising or perpetrating serious criminal activity whilst in custody

138. When opening the HRMU, NSW Premier Bob Carr stated that the HRMU would house:¹⁴²

...the worst [inmates] in the NSW prison system...these are the psychopaths, the career criminals, the violent standover men, the paranoid inmates and gang leaders.

139. CCL is concerned that some inmates are being placed in the HRMU for other than legitimate reasons. CCL submits that, while it is legitimate to separate from the general prison population those inmates who present a serious physical risk to prison staff and to other inmates, it is not legitimate to place

inmates in the HRMU because they present a 'high security risk to the community' or because there is 'high public interest due to extremely serious criminal activities'. Placing people in the HRMU because of the nature of, or public interest in, the crimes they have committed amounts to double punishment. Nor is it appropriate to place inmates in the HRMU simply because they are deemed to be 'psychopaths', 'career criminals' or 'paranoid'. Some HRMU placements seem to be motivated by retribution, rather than any legitimate concern for prison security. Other placements seem to be motivated by a desire on the part of some populist politicians to be seen to be 'tough on crime'.

140. CCL endorses the following statement of illegitimate purpose for supermax prisons, which was published in a recent US report:¹⁴³

The purpose of such facilities is not, or should not be, to exact additional punishment. Nor should such a facility be used as the repository for inmates who are simply bothersome, self destructive, or mentally ill; who need protection; or who have an infectious disease.

141. CCL also notes that the Nagle Royal Commission into NSW prisons in 1978 called for the closure of the Katingal prison-within-a-prison, which in many ways was a prototype of today's supermaximum prisons. The Royal Commissioner recommended that 'the most dangerous prisoners should be dispersed throughout the corrections system rather than concentrated in one place'.¹⁴⁴ By creating the HRMU, NSW authorities appear to have forgotten or ignored the lessons of the Royal Commission.

5.4.3 segregation

The Committee is of the view that solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant.

UN Human Rights Committee, *Concluding Observations: Denmark* (2000)
CCPR/CO/70/DNK, [12].

142. When inmates first arrive at the HRMU, they are placed in "Unit 7" for assessment by prison staff.¹⁴⁵ During the course of this assessment inmates are the subject of a 'segregated custody direction'.¹⁴⁶ The process of assessment is meant to take two weeks, but it has been known to take 'significantly longer' in some cases.¹⁴⁷ In two reported cases, this process took over one month.¹⁴⁸
143. HRMU inmates can also be the subject of a segregation custody direction at the discretion of prison staff.
144. In segregation, all of an inmate's personal items are taken from them. They are kept in a cell measuring 2 by 3 metres. Inmates are not allowed to associate with other inmates.¹⁴⁹ However, segregated inmates can converse 'relatively freely' in the rear caged yards of their cells,¹⁵⁰ when prison staff permit inmates to enter the rear yards and only then for a limited number of

hours. Under segregation, inmates are generally kept in their cells for 22 hours a day.

145. In 2006, a NSW parliamentary inquiry established that some inmates were held in segregation, denied the right to associate with other inmates, without the appropriate legal procedure of placing the inmate under a segregated custody direction.¹⁵¹ The significance of this is that those inmates had no avenue to appeal their segregation, because they are not the subject of an official administrative direction and therefore the courts have no power to intervene. In 2005, the NSW Ombudsman reported that two inmates had been illegally held in segregation without segregated custody orders.¹⁵²
146. The parliamentary committee recommended that all HRMU inmates denied association with other inmates should be placed under a segregated custody direction.¹⁵³ It is encouraging that the Department of Corrective Services advised the committee that it supported this recommendation.¹⁵⁴

5.4.4 the mental health of HRMU inmates generally

147. Most mentally ill inmates in NSW are kept in the general prison population. They are not automatically transferred to hospitals, because of a lack of hospital resources to cope with the increasing numbers of mentally ill inmates. In 2006, the Department of Corrective Services admitted to a NSW parliamentary committee that some HRMU inmates are mentally ill.¹⁵⁵
148. CCL is concerned that the administrators of the HRMU do not take the mental health of those in their care seriously enough. In 2005, the Clinical Director at the HRMU was asked about the impact of confinement on the mental health of inmates and in reply he stated his belief that:¹⁵⁶
 - ...in terms of evidence that long-term incarceration or incarceration in more restricted conditions contributes to poorer mental health, I don't think there's a great deal of evidence to support that. ...Where there have been studies done even on, say, 60-day segregation orders or something like that, there has been no deterioration in the mental health status of inmates on those kind of orders. Longer term I think the jury's still out.
149. This opinion is contrary to the evidence provided by psychiatric experts in the NSW Coroner's Court:¹⁵⁷

All of the psychiatrists who gave evidence stated that prolonged periods in solitary confinement would most likely exacerbate an inmate's mental illness, particularly if he were suffering from paranoia. As Dr Lewin commented,

"Solitary confinement is not a medical treatment. There is no circumstance in which that is appropriate in the care of a mentally ill person. ...I regard it as fundamentally inappropriate for someone as disturbed as this man [Scott Simpson] to be in solitary confinement outside hospital."

150. A recent report of the Inspector of Custodial Services in Western Australia suggests that the 'studies' to which the HRMU's Clinical Director refers simply do not exist.¹⁵⁸

A review of the literature by Haney could find no study where a significant negative impact was not seen when solitary confinement was enforced for prolonged periods. Further, the more isolated and punitive the confinement, the more negative the impact was found to be. This has even been found in segregations of relatively short duration. The risk of negative complications has been found to be greatest in the mentally ill and those with a predisposition for mental illness but has been shown to impact on all prisoners. Severe punishment or restrictions on prisoners have also not been associated with meaningful reductions in prisoners' disruptive behaviour. The available prison studies (most of which are of questionable rigour and design) show a strong negative impact on the prisoner.

151. CCL is concerned that the conditions in the HRMU are having an adverse impact on the mental health of its inmates. The situation is even more dire for inmates in the facility who suffer a mentally illness.

5.4.5 placement of the mentally ill in the HRMU

I would rather be dead than get this torcher every day 24/7 non stop.

Scott Simpson, HRMU inmate (May 2003)

...the Commission submits that Mr Simpson's protracted detention in isolation from all other inmates was inconsistent with the right to be treated with humanity and dignity within article 10(1) and the prohibition on inhuman and degrading treatment and punishment within article 7 of the ICCPR.

Human Rights and Equal Opportunity Commission,
Submission to Inquest into the Death of Scott Simpson (2006), [4.16].

152. In 2006, the Department of Corrective Services admitted to a NSW parliamentary committee that some HRMU inmates are mentally ill.¹⁵⁹ More widely, the solitary confinement of mentally ill inmates is practiced across Australia to varying degrees.¹⁶⁰
153. In 2006, a NSW parliamentary committee recommended a review of the policy of referring mentally ill inmates to the HRMU.¹⁶¹ The NSW government ignored this recommendation. Instead, the government pointed to evidence (given by departmental officers) that staff at the HRMU cooperate with health professionals to monitor the mental health of HRMU inmates. The effectiveness of that 'cooperation' was put into serious question by the findings of the NSW Deputy Coroner when her Honour conducted a coronial inquest in 2006 into the death of Mr Scott Simpson.
154. The case of Mr Scott Simpson illustrates the plight of the mentally ill in NSW prisons. Mr Simpson, a paranoid schizophrenic, was held *on remand* in the HRMU for almost 12 months. For a considerable amount of that time, Mr Simpson was held in segregation and denied association with other inmates.

155. On 30 March 2002, Scott Simpson was refused bail and placed in a cell with Andrew Parfitt in the MRRC, a remand facility in Sydney. Within 15 minutes Mr Simpson had brutally attacked his cell mate, inflicting fatal injuries.¹⁶² Two years later, Mr Simpson was found not guilty of Mr Parfitt's murder by reason of mental illness, based on psychiatric evidence that Mr Simpson suffered from paranoid schizophrenia and was suffering a psychotic episode when he attacked Mr Parfitt.¹⁶³ Within weeks of the verdict, Mr Simpson was found dead, having hanged himself, in a prison cell in Sydney's Long Bay Gaol. The corrective services officers who discovered Mr Simpson hanging from the bars of his cell did not immediately attend him or attempt to resuscitate him, because they feared for their own safety if Mr Simpson was feigning his hanging.¹⁶⁴
156. Throughout his remand and after, Mr Simpson was never transferred to the specialised 'D Ward', the acute psychiatric wing in the prison hospital at Sydney's Long Bay Gaol. Instead, Mr Simpson was kept in Goulburn prison, where he was only given anti-psychotic medication and offered no therapeutic treatment.¹⁶⁵ The Human Rights and Equal Opportunity Commission detailed Mr Simpson's treatment in this way:¹⁶⁶

In April 2002, Mr Simpson was transferred from the MRRC to the Goulburn correctional centre. He was initially housed in the Multi Purpose Unit ('MPU') at Goulburn where he was placed on consecutive segregation orders.

In April 2003, he was transferred to the High Risk Management Unit ('HRMU') where, for the most part, he remained on a segregation order. The HRMU houses inmates who require a higher level of security and management than can be provided by mainstream maximum security institutions. During the periods 17 June 2003 to 21 September 2003 and 11 October 2003 to 6 November 2003, Mr Simpson was allowed to associate with one other inmate. However, in the later of those two periods, the association took place through a secure barrier. The decision to terminate all associations in November 2003 was made for security reasons, as the Deputy Governor of the HRMU considered that Mr Simpson posed a risk to other inmates.

At the HRMU, Mr Simpson was allowed out of his cell into the 'day yard' for 2.5 hours each day and on occasion from 9am to 2.30pm. Again, the 'day yard' is an open air caged in area at the rear of the inmate's cell. It is a little larger than a cell, and contains only a concrete bench. Certain cells have access to a larger 'day yard' (three to four times the size of a cell). Inmates are moved every 28 days to allow them occasional access to these larger yards.

...

157. From his HRMU prison cell, in April and May 2003, Mr Simpson wrote:¹⁶⁷

They took all my property. I'm in a cell with nothing. They are trying to blackmail me by saying, 'see the sych and take the medication he wants you to take and we give you a radio and TV etc'... I will talk to

sychs just not jail sychs. I will not take any medication as what I am experiencing is due to the fact certain Agencies mainly ASIO are TORCHERING me and all other Inmates with "REMOTE MIND CONTROL". Everyone knows this is no secret.

...

I would rather be dead than get this torcher every day 24/7 non stop. The very fact I'm speaking about this shows how despret I am for this TORCHER to stop. They can kill me with what I said by transmitting a compensating demodulated waveform from a remote location witch in tern effects the neurological (nervis system) and any region of the brain, thoughts and emotions with a single measurement. Better known as "REMOTE MIND CONTROL".

158. The Human Rights and Equal Opportunity Commission, as *amicus curiae*, submitted to the NSW Deputy Coroner that Mr Simpson's treatment amounted to inhuman and degrading treatment and punishment.¹⁶⁸

The Commission submits that Mr Simpson's detention in isolation from all other inmates, for almost two years, was not compatible with the standard of treatment required in respect of a seriously mentally ill person detained on remand, and later as a forensic patient. In all the circumstances, the Commission submits that Mr Simpson's protracted detention in isolation from all other inmates was inconsistent with the right to be treated with humanity and dignity within article 10(1) and the prohibition on inhuman and degrading treatment and punishment within article 7 of the ICCPR.

159. The Department of Corrective Services operations manual states that the inmate referral process to the HRMU includes input from health professionals.¹⁶⁹ That policy statement is seriously undermined by evidence at Mr Simpson's coronial inquiry and the findings of the NSW Deputy Coroner.
160. Evidence at the coronial inquiry established that psychiatric and nursing staff at Goulburn repeatedly recommended Mr Simpson's transfer to hospital.¹⁷⁰ One nurse even wrote to the director of mental health at Justice Health, the government agency responsible for the health of NSW inmates, concerned that the Department was breaching its duty of care to Mr Simpson by keeping him at the HRMU.¹⁷¹
161. The NSW Deputy Coroner was blunt in her assessment. Her Honour found that:¹⁷²
- ...the HRMU is solely the domain of DCS. All decisions about an HRMU inmate, including segregation, are made without any input from Justice Health.
162. The NSW Deputy Coroner recommended that the Department of Corrective Services adopt the policy that inmates diagnosed with a mental illness should be placed in segregation only in exceptional circumstances and for a limited period.¹⁷³ The NSW government has responded by launching an inquiry to

review the treatment of mentally ill inmates and forensic patients in NSW prisons.¹⁷⁴ The inquiry is headed by the President of the Mental Health Review Tribunal. To date, the inquiry has not reported.

5.4.6 conditions

163. Each cell in the HRMU measures two-by-three metres. Each cell contains a bed, shelf, toilet and basin.¹⁷⁵ Inmates remain alone in their cells from 16 to 22 hours a day.¹⁷⁶ Inmate complaints about lack of fresh air and natural light have been investigated by the NSW Ombudsman, who reported that:¹⁷⁷

The entire unit is air-conditioned and most cells have both yards and day rooms. Except for lock downs, inmates have access to their day room during 'out of cell hours'. They also have access to the yards attached to the cells for a number of hours on most days. These yards are open to the fresh air. There is also some access to sports yards, but that depends on staff availability, inmate privilege and association levels.

164. The Ombudsman also reported that there were problems with the air conditioning and that vents are placed immediately above inmates' beds.¹⁷⁸ The Ombudsman also reported that a strip window in each cell allows in natural light.
165. During evidence to a parliamentary committee, the Corrective Services Commissioner was asked about whether the conditions in the HRMU meet the UN *Standard Minimum Rules for the Treatment of Prisoners*. Mr Woodham expressed the view that the UN rules are out-of-date and that it 'was not intended that all of the rules would be applicable to all countries at all times'.¹⁷⁹
166. Though NSW courts are extremely reluctant to intervene in the administration of NSW prisons,¹⁸⁰ the courts have accepted that the harsh regime in the HRMU may constitute a mitigating circumstance on sentence, especially for remand inmates.¹⁸¹
167. Inmates in the HRMU are subject to a 'hierarchy of privileges and sanctions':¹⁸²

All inmates in the HRMU are managed on the basis of a behaviour modification program which links behaviour changes to a hierarchy of privileges and sanctions and progression criteria. Inmates can progress through a number of stages: stages 1, 2, and 3 are conducted at the HRMU.

168. The NSW Ombudsman made these observations about the hierarchy of privileges and sanctions:¹⁸³

All inmates in the HRMU are subject to a hierarchy of sanctions and privileges. This hierarchy governs things like the property they can have in their cell, how many phone calls they can make each week, how often they can have visitors, and whether or not they are allowed to associate with anyone other than staff.

169. This system of privileges also governs whether inmates can associate with other inmates. At first, inmates cannot associate with others. Gradually, inmates can associate only with inmates nominated by prison staff. Later, some inmates can choose with whom they will associate. However, only two inmates may associate at any one time and they will always be outnumbered by prison staff.¹⁸⁴
170. CCL notes that the Nagle Royal Commission into NSW prisons in 1978 was highly critical of the scaled system of rewards and privileges used in the Katingal supermax facility.¹⁸⁵ Despite this criticism by the Royal Commissioner, the hierarchy of sanctions and privileges implemented in the HRMU closely resembles the flawed and discredited system used in Katingal. It appears that the lessons of the Royal Commission have been forgotten.

5.4.7 no right of review of placement in the HRMU

171. HRMU inmates can complain about their conditions to the governor of the facility, the NSW Ombudsman and the Official Visitor. Though, those held on terrorism-related charges are not permitted to see the Official Visitor.¹⁸⁶
172. The NSW Ombudsman began receiving complaints about the HRMU almost as soon it was opened. In December 2001, a complaint was received by the first remand prisoner placed in the HRMU, who was subjected to the same tough restrictions as convicted inmates: namely, one visit a week from his family.¹⁸⁷ After the Ombudsman's intervention, the remand prisoner was permitted two family visits a week.
173. The Ombudsman sends officers to the HRMU twice a year to inspect records and interview inmates.¹⁸⁸ Over recent years the Ombudsman has noted a drop in complaints from HRMU inmates, which the Ombudsman attributes to disaffection with the complaints procedure rather than any improvement in conditions:¹⁸⁹

The number of complaints from inmates in the high risk management unit...dropped slightly in the past year. It is likely that a contributing factor to this is the fact that we have no power to help them with their major complaint, which is their continued placement in the HRMU, and inmates are becoming aware of this.

174. There is no mechanism for HRMU inmates to challenge their placement and continued detention in the facility.¹⁹⁰ The courts have no power to intervene. The Ombudsman has expressed concerned that good behaviour in the facility will not necessarily be enough to lead to placement elsewhere.¹⁹¹ The Corrective Services Commissioner is of the view that some HRMU inmates will remain in the facility for the term of their natural lives.¹⁹²

5.4.8 political interference

175. Allegations of political interference in the running of the HRMU are often raised. CCL is concerned that this interference is illegitimate and that there is no remedy available to inmates who are adversely affected by it.

176. One example of political interference occurred in June 2006, when a tabloid newspaper ran a front-page campaign against one inmate who had been granted access to a sandwich-maker and television in his cell at the HRMU.¹⁹³ These privileges were the result of his good behaviour in the facility. The inmate concerned was a sentenced serial murderer and had attempted to escape from prison on several occasions. In response to the tabloid campaign, the state Opposition spokesman described conditions in the HRMU as akin to 'holiday units' and victim support groups expressed their outrage.
177. The very same day, the NSW Premier called a media conference to announce that the television and sandwich-maker had been taken off the inmate.¹⁹⁴ Premier Lemma was reported to be 'disturbed' that the inmate had been given the items.¹⁹⁵ The Premier ordered the Corrective Services Commissioner to review the hierarchy of privileges and sanctions in the HRMU. The inmate concerned threatened to kill himself and was placed on suicide watch.¹⁹⁶ After a review of the privileges system, these items were returned to the inmate – about four weeks after they were removed.¹⁹⁷
178. There have also been a constant stream of selective government and departmental leaks from the HRMU to the popular media. So much so, that an opposition spokesman accused the government of using the HRMU as a 'freak show to generate stories proving it is tough on violent criminals'.¹⁹⁸ One high-profile inmate of the HRMU, convicted of aggravated sexual assault in company, was the subject of several of these leaks to the media.¹⁹⁹ Government officials released CCTV footage of the inmate's mother accepting letters from the inmate during a visit; and, they also released some of the inmate's correspondence to the media. Another inmate's x-rays were released to the media.²⁰⁰ When the NSW Privacy Commissioner suggested that these breaches of privacy might lead to compensation for these inmates and their families, the NSW government rushed legislation through Parliament to change the law to ensure that they could not be compensated.²⁰¹ According to the government:²⁰²
- ...criminals whose crimes are so serious that they warrant incarceration should not enjoy the full range of remedies available to others when their rights are infringed. In particular, the Government...believes that the right to damages for breaches of privacy is not a right that should be extended to prisoners or their relatives, friends or associates.
179. Even the parliamentary committee enquiring into the HRMU was not immune from the political controversy that attaches to the facility. On 23 March 2006, members of the parliamentary committee visited the HRMU (but they did not meet any of the inmates). Significantly, committee members from both major political parties combined to deny the Greens MP, Ms Lee Rhainnon who is a long-time critic of the facility, the right to join the visiting delegation to the HRMU.²⁰³

5.4.9 other supermax prisons in Australia

180. Australia's second supermax prison, the Melaleuca High Security Unit, was opened in Victoria in August 2007.²⁰⁴ Victoria has a statutory bill of rights which prohibits cruel, inhuman or degrading treatment or punishment.²⁰⁵ As a consequence, the Melaleuca facility is not expected to exhibit the problems inherent in the HRMU at Goulburn in NSW.
181. In 2005, an independent inquiry into prisons in Western Australia concluded that that State did not immediately need a supermax facility.²⁰⁶ A parallel inquiry by the WA Inspector of Custodial Services concluded that a supermax facility should be built, but rejected the 'separation, isolation and restrictive movement' model used by US supermax facilities (and at the HRMU).²⁰⁷ Western Australia is also considering the introduction of a statutory bill of rights.²⁰⁸
182. Neither New South Wales nor the federal Commonwealth of Australia have bills of rights and there is, therefore, no statutory or constitutional prohibition of cruel, inhuman or degrading treatment or punishment in those jurisdictions.
183. During a recent high-profile criminal case in Victoria, the trial judge found that the conditions under which the accused were held and transported to court was impacting on the fairness of their trial. The judge found that the accused were being strip-searched on a daily basis and shackled. The judge ordered that the inmates be treated more humanely or the prosecution would be stayed.²⁰⁹

6. Article 9: arbitrary arrest or detention

6.1 mandatory immigration detention

The Committee considers that the mandatory detention under the Migration Act of "unlawful non-citizens", including asylum-seekers, raises questions of compliance with article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right.

The Committee urges the State party to reconsider its policy of mandatory detention of "unlawful non-citizens" with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The Committee recommends that the State party inform all detainees of their legal rights, including their right to seek legal counsel.

UN Human Rights Committee, *Concluding Observations: Australia* (2000), UN Doc CCPR A/55/40, [526]-[527].

184. This section traces the policy of mandatory immigration detention as practiced in Australia until very recently.
185. The Rudd government has abandoned the Pacific Solution and closed the immigration detention camps in the Pacific.²¹⁰ The Rudd government has also announced an end to the policy of indefinite mandatory immigration detention.²¹¹ Asylum seekers and other 'unlawful non-citizens' will now only be held in detention as long as is necessary to establish their identity and for routine health checks. People who arrive by boat without a visa will still be detained at Christmas Island, however they will have access to legal assistance and to review of adverse decisions. The 'temporary protection visa' has been abolished, so that all refugees are now treated equally and have access to the same government support.²¹²
186. While these changes are exceedingly welcome and long-overdue, this is essentially only a change in policy. For example, there is no constitutional impediment to the restoration of the past policy of indefinite detention, because the High Court has made it clear that indefinite administrative detention of non-citizens is lawful. This is yet another compelling reason why Australia should adopt the ICCPR into domestic law without delay and protect fundamental rights in the federal Constitution.

6.1.1 immigration detention: cruel, inhuman and degrading

187. Any person who enters Australia without a valid visa is, according to law, an 'unlawful non-citizen'.²¹³ All unlawful non-citizens *must* be detained in immigration detention centres, until they are granted a visa or forcibly deported.²¹⁴ Unlawful non-citizens can be detained indefinitely.
188. Australia's mandatory immigration detention system is cruel, inhuman and degrading; and it is most obviously so for children. Despite changes to the

policy of detaining children in 2005, the legal power remains to detain children in immigration detention.

189. Disturbingly, in 2004, the High Court of Australia ruled that courts cannot release detainees simply because of the appalling conditions in the detention centres. Australia does not have a Bill of Rights, and therefore all the courts can do is review a decision as to whether someone is or is not an unlawful non-citizen. Ultimately, Parliament can authorise the detention of unlawful non-citizens under cruel, inhuman and degrading conditions. As one High Court Justice put it:²¹⁵

Conditions of detention cannot invalidate the grant and exercise of the power to detain in immigration detention.

190. A national inquiry into children in immigration detention, conducted by the Australian Human Rights and Equal Opportunity Commission ('HREOC') in 2004, found that the federal government's 'failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents amounted to cruel, inhuman and degrading treatment of those children in detention'.²¹⁶
191. In July 2002, after visiting Australia's immigration detention centres, the Special Envoy of the UN High Commissioner for Human Rights, his Honour Justice P. N. Bhagwati, handed down a damning report.²¹⁷ The former Chief Justice of India wrote that 'from a human rights perspective it might be useful to ask whether the current approach to illegal immigration is the correct one'.²¹⁸
192. Justice Bhagwati wrote that conditions at the Woomera immigration detention centre 'could, in many ways, be considered inhuman and degrading'.²¹⁹ (The Woomera centre was finally closed in 2003.) Justice Bhagwati's report continues:²²⁰

[He] was considerably distressed by what he saw and heard in Woomera IRPC. He met men, women and children who had been in detention for several months, some of them even for one or two years. They were prisoners without having committed any offence. Their only fault was that they had left their native home and sought to find refuge or a better life on the Australian soil. In virtual prison-like conditions in the detention centre, they lived initially in the hope that soon their incarceration will come to an end but with the passage of time, the hope gave way to despair. When Justice Bhagwati met the detainees, some of them broke down. He could see despair on their faces. He felt that he was in front of a great human tragedy. He saw young boys and girls, who instead of breathing the fresh air of freedom, were confined behind spiked iron bars with gates barred and locked preventing them from going out and playing and running in the open fields. He saw gloom on their faces instead of the joy of youth. These children were growing up in an environment, which affected their physical and mental growth and many of them were traumatized and led to harm themselves in utter despair.

193. In October 2002 the UN Working Group on Arbitrary Detention reported on its visit to the immigration detention centres.²²¹ The group's report observed that 'a system combining mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practised by any other country in the world'.²²²
194. In *C v Australia* the UN Human Rights Committee found Australia to be in violation of ICCPR article 7 ('cruel, inhuman or degrading treatment or punishment') because it had continued to detain Mr C in immigration detention even after becoming aware that his mental deterioration was the direct result of his detention.²²³
195. On six occasions the UN Human Rights Committee has found that Australia's immigration detention regime is arbitrary and a violation of the right to liberty.²²⁴ The UNHRC notes that 'arbitrary' means more than just 'unlawful', as the Australian courts are forced to interpret it:²²⁵
- ...the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice.
196. As the Human Rights Committee points out in a recent case:²²⁶
- ...in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification. It observes that the authors were detained in immigration detention for three years and two months. Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated that their detention was justified for such an extended period. It has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by resorting to, for example, the imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances.
197. The Human Rights Committee has also criticised the lack of judicial review of, and compensation for, human rights abuses in Australia.
198. Australia's immigration detention regime and treatment of asylum seekers has also been criticised by the UN Committee against Torture,²²⁷ the Committee on the Elimination of Racial Discrimination,²²⁸ the Committee on the Rights of the Child²²⁹ and the Committee on the Elimination of Discrimination against Women.²³⁰

6.1.2 general conditions in immigration detention centres

199. Detention centre conditions have come under much scrutiny and criticism. In 2002, the UN Working Group on Arbitrary Detention reported that:²³¹
- ...the conditions of detention are in many respects similar to prison conditions; detention centres are surrounded by impenetrable and

closely guarded razor wire; detainees are under permanent supervision; if escorted outside the centres they are, as a rule, handcuffed; escape from a centre constitutes a criminal offence under the law and the escapee is prosecuted.

200. The Working Group on Detention also reported a number of practices which it believed to create stressful conditions for detainees. These include:
- constant video surveillance robbing detainees of all privacy;
 - the practice of handcuffing detainees when making visits outside the centres;
 - frequent roll calls and reference to detainees by their identity numbers rather than names;
 - language problems creating barriers of communication;
 - collective isolation – where groups of detainees are isolated from other groups to prevent experienced detainees from sharing information with new arrivals.
201. The Working Group also reported that DIMIA statistics supported claims of self-harm in the detention centres:²³²

In the eight months between 1 March 2001 and 30 October 2001 there were 264 incidents of self-harm reported (238 males and 26 females). The rates of self-harm were extremely high for people in the 26-35 age range: 116 people (105 men and 11 women). Of those aged 20-25 years, 103 had self-harmed (98 males and 5 females). Twenty-nine children and young people up to the age of 20 were recorded as having self-harmed.

202. There have been a number of reported disturbances within the Woomera, Curtin and Port Hedland detention centres that have posed significant threats to the physical health of detainees. There have been riots and fires in which tear gas and water cannons were used as control measures.²³³ There have also been demonstrations, protests, suicide attempts, self-mutilations (including sewing lips together and swallowing shampoo and detergents), hunger strikes where detainees have been forcibly fed and acts of violence, such as tearing down fences.²³⁴
203. In 2002, HREOC found that, in December 2000 at the Port Hedland detention centre, five asylum-seekers had been arbitrarily detained for six and a half days.²³⁵ During those six and half days, the detainees were allowed outdoors for a total of 20 to 25 minutes, and only two of the five detainees were given a change of clothes after five days.

6.1.3 mental health crisis in immigration detention centres

204. The mental health of people in immigration detention has long been of concern. In 2001, a joint parliamentary committee recommended that 'a review be carried out by the Department of Immigration and Multicultural Affairs...into the adequacy of psychological services provided to detainees'.²³⁶

205. In 2002, the UNHRC expressed concern about the deterioration of the mental health of 'Mr C',²³⁷ an Iranian asylum seeker, in immigration detention. The Committee found that Australia treated Mr C in a cruel, inhuman or degrading manner, because it had continued to detain Mr C in immigration detention even after becoming aware that his mental deterioration was the direct result of his detention.
206. In 2004, the UNHRC expressed concern about the deterioration of the mental health of Mr Madafferi in immigration detention.²³⁸ Mr Madafferi was detained because he was an unlawful non-citizen who had overstayed his visa. Australia's decision to return Mr Madafferi to immigration detention, in the full knowledge that his first admission to such detention had led to mental illness, was a violation of article 10 of the ICCPR (the humane treatment of people in detention).²³⁹
207. The mental health issues of people in immigration detention only really gained national attention in 2005 when the Cornelia Rau and Vivien Alvarez-Solon scandals broke. Mrs Alvarez immigrated to Australia from the Philippines and became an Australian citizen in 1986.²⁴⁰ In 2001, she was injured when she fell into a deep drain in the NSW country town of Lismore. At the local hospital she was committed to the psychiatric ward. Immigration officials, who were unable to establish her identity, concluded that she was an unlawful non-citizen and she was deported to the Philippines. Over the next few years, several DIMIA officials become aware that Ms Solon was an Australian citizen and that she had been deported: they did nothing. In fact nothing was done until, in sheer desperation in April 2005, Ms Solon's ex-husband emailed the Minister to alert her to Ms Solon's unlawful deportation. An independent inquiry into Ms Solon's unlawful deportation concluded that she had been unlawfully detained in immigration detention because the officers who detained her had failed to make sufficient enquiries to enable them to form a reasonable suspicion that Ms Solon was an unlawful non-citizen.²⁴¹
208. Ms Cornelia Rau, an Australian citizen, disappeared from the psychiatric wing of a Sydney hospital in March 2004. About two weeks later she was stopped by police in Far North Queensland. She identified herself variously as Anna Brotmeyer and Anna Schmidt, a German tourist who had overstayed her visa. She was detained as an unlawful non-citizen. She was transferred to a Queensland prison, where she spent six months in detention with convicted criminals, and then transferred to the Baxter immigration detention centre. In February 2005, Ms Rau's true identity was established when her family contacted police after reading an article in the *Sydney Morning Herald* entitled 'Aid sought for ill, nameless detainee'.²⁴² She was finally released from detention into the care of a psychiatric hospital in South Australia. The inquiry into Ms Rau's treatment noted that detainees require a higher level of mental health care than the general community, and yet a consulting psychiatrist was flown to Baxter on an infrequent basis.²⁴³
209. In May 2005 a Federal Court judge found that the Commonwealth government owed a non-delegable duty of care to detainees to provide

adequate health care.²⁴⁴ The judge concluded that detainees did not 'have to settle for a lesser standard of mental health care because they were in immigration detention'.²⁴⁵ His Honour called upon the government to review the outsourcing of mental health services.²⁴⁶ His Honour found that the provision of mental health services in the Baxter detention centre was 'clearly inadequate'.²⁴⁷

210. Following the Alvarez-Solon and Rau inquiries, DIMIA created a Detention Health Advisory Group consisting of medical experts.²⁴⁸ Mental health screening is now available to all detainees from the day they enter detention. Following another report into the private management of detention centres,²⁴⁹ DIMIA has taken away the responsibility of the provision of mental health care from the private contractors who run the detention centres
211. In January 2007, HREOC again called for the repeal of Australia's mandatory detention laws.²⁵⁰ In relation to the mental health crisis in immigration detention, it noted that the situation had improved over the past few years, but that the underlying issues remain:²⁵¹

The fundamental reasons for mental health problems in immigration detention are the same as they have always been:

- the fact of detention itself
- the long periods of detention
- uncertainty regarding the length of detention
- uncertainty regarding the future
- past torture and trauma.

6.1.4 children in detention

212. Australia's mandatory immigration detention policy has an enormous impact on children. As at December 2003, the average length of detention for a child was one year, eight months and 11 days.²⁵² Between 1999 and June 2003, 2184 children arrived in Australia unlawfully to seek asylum and were detained in immigration detention.²⁵³ Most of these children were from Iraq, Afghanistan and Iran.²⁵⁴ More than 92% of these children were found to be refugees.
213. In 1998, HROEC released a 250-page report called *Those who've come across the seas* about Australia's mandatory immigration detention regime.²⁵⁵ HREOC was especially concerned that children were being detained as a matter of course, rather than only in exceptional circumstances.²⁵⁶ HREOC found that 'the detention regime in the Migration Act violates the ICCPR and CROC and is therefore a breach of human rights'.²⁵⁷ HREOC essentially recommended that the Australian government adopt the view of arbitrary detention given by the UN Human Rights Committee in *A v Australia*.²⁵⁸ HREOC proposed a detailed alternative to mandatory immigration detention.²⁵⁹

214. The then Immigration Minister, Mr Philip Ruddock, labelled HREOC's 1998 findings as 'totally unacceptable'.²⁶⁰ He stressed that Australia does not 'as a matter of policy, ...detain asylum seekers who have entered Australia unlawfully, ...although I stress we will continue detaining people arriving here without valid documents'.
215. In 2004, HREOC released a 900-page report called *Last Resort* about children in immigration detention in Australia. It found that Australia's mandatory immigration detention system was 'fundamentally inconsistent with the *Convention of the Rights of the Child*'.²⁶¹ The report found that the combination of Australia's immigration policy and the limited judicial review of detention amounted to the 'automatic, indeterminate, arbitrary and effectively unreviewable detention of children'.²⁶²
216. HREOC's report also found that 'children in immigration detention for long periods of time are at high risk of serious mental harm' and that the government's failure to address this issue 'amounted to cruel, inhuman and degrading treatment of those children in detention'.²⁶³ The report detailed disturbing reports from psychologists and psychiatrists, who had all concluded that the mental health of children in detention is a serious and prevalent problem.²⁶⁴ The report also detailed accounts of actual and attempted self-harm by children, including children as young as nine (9) cutting themselves with razor blades, drinking bottles of shampoo, going on hunger strike, sewing their lips up and hanging themselves from playground equipment and fences.²⁶⁵
217. HREOC called for all children to be released from detention.²⁶⁶
218. In a joint media release, the then Attorney-General Phillip Ruddock and the then Immigration Minister Senator Amanda Vanstone rejected the major findings of the report.²⁶⁷ They described HREOC's report as 'unbalanced and backward looking'. They expressed disappointment that HREOC would recommend that children be released from immigration detention and that family unity should be preserved, because it 'would in practice encourage the inclusion of children in people smuggling operations'. They also repeated the former government's mantra that:
- Australia has the right under international law to determine who it admits to its territory and under what conditions.
219. The abuses of children in immigration detention continued. In one case in 2005, two children aged six and eleven were seized from school and held in detention for four months, where they were exposed to the despair of adults who are at risk of being deported and where they witnessed an attempted suicide.²⁶⁸ Children in detention have also witnessed the slow decline into clinical depression of adult detainees who have been held for long periods in detention, and the refusal of authorities to take appropriate action to provide proper diagnosis and medical care for those adults.
220. It was not until July 2005, after government MPs threatened to introduce legislation releasing children from detention, that Prime Minister Howard agreed to change the law to ensure that the detention of children is a

'measure of last resort'.²⁶⁹ The then Minister ordered that all families in detention be released into Residential Housing Centres (RHC).²⁷⁰ Children now have the opportunity to attend community schools.²⁷¹ While this is an improvement, families living in RHCs are still living in detention, as HREOC recently noted:²⁷²

it is important to remember that the housing centres are still detention facilities. People are not free to come and go as they please.

The mental health problems associated with restricted movement and uncertainty as to the future also apply to the detainees in these facilities, although they all acknowledge the improvement as compared to the main facilities.

221. It should also be observed that the Minister makes the decision to release someone into RHC. The Minister must make the decision personally and the Minister cannot be compelled to make a decision.²⁷³ The Minister's decision is not judicially reviewable.²⁷⁴
222. Despite the changes in July 2005, children can still be held in detention. In 2007, HREOC published a disturbing report that unaccompanied minors are still being kept in immigration detention.²⁷⁵ According to HREOC, thirteen (13) unaccompanied Indonesian boys found on illegal fishing boats were held in immigration detention for between 8 and 15 days.
223. The UN Committee on the Rights of the Child, after acknowledging the July 2005 changes, expressed serious concern about the Australian immigration detention system:²⁷⁶

...the Committee remains concerned that children who are unlawfully in Australian territory are still automatically placed in administrative detention - of whatever form - until their situation is assessed. In particular, the Committee is seriously concerned that:

- (a) Administrative detention is not always used as a measure of last resort and does not last for the shortest appropriate period of time;
- (b) Conditions of immigration detention have been very poor, with harmful consequences on children's mental and physical health and overall development;
- (c) There is no regular system of independent monitoring of detention conditions.

224. The UN Human Rights Committee has been highly critical of Australia's immigration detention. In the case of *Bakhtiyari*, the Committee examined the treatment of children.²⁷⁷
225. In October 1999, Mr Bakhtiyari arrived in Australia from Afghanistan on a boat as an asylum seeker. He was detained in an immigration detention centre. In May 2000 Mr Bakhtiyari was granted refugee status and released into the community.

226. In January 2001 Mrs Bakhtiyari arrived in Australia by boat with their children. They were detained in an immigration detention centre. Mrs Bakhtayari was refused refugee status. Mr Bakhtayari only found out that his family was in Australia in July 2001.
227. In December 2002, Mr Bakhtiyari's refugee visa was cancelled on the grounds that he had allegedly lied in his application for refugee status. In January 2003, the family was reunited – in an immigration detention centre. The psychological health of the children deteriorated and they self-mutilated. UN requests to release the Bakhtiyari family from detention, while there were outstanding court cases, were rejected.
228. In June 2003 the Family Court of Australia ordered that the Bakhtiyari children be released from detention.²⁷⁸
229. The Human Rights Committee found that the detention of Mrs Bakhtayari and the children for over 2 years was a violation of ICCPR articles 9(1) and 9(4) (freedom from arbitrary detention and right to judicial review of detention). The violation, with respect to the children, came to an end when the Family Court ordered their release.
230. The Human Rights Committee found that Australia, by keeping the children in detention for so long when it was well-documented that they were suffering in detention, failed to protect the rights of the Bakhtiyari children in violation of ICCPR article 24(1) (protection of children).
231. The Human Rights Committee concluded by stating that:²⁷⁹
- ...the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State... The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children...in circumstances where that detention was arbitrary and in violation of article 9...of the Covenant.
232. The Australian government rejected the Human Rights Committee's determinations in *Bakhtiyari*. In April 2004, the High Court overturned the decision of the Family Court to release the Bakhtiyari children. On 30 December 2004, Australia deported the Bakhtiyari family to Pakistan.

6.1.5 length of detention

6.1.5.1 generally

233. A period of immigration detention is usually terminated by the issuing of a valid visa to, or the removal from Australia of, an unlawful non-citizen. For stateless people, immigration detention can be indefinite.
234. The UN Working Group on Arbitrary Detention found 'particularly worrying the lengthy detention of unlawful non-citizens, especially those whose

application (for asylum or for permission to remain in Australia) has been refused by a final decision and who are awaiting removal or deportation'.²⁸⁰ The Australian government contemptuously replied to this concern by restating its position that unlawful non-citizens are 'free to leave detention and return home at any time'.²⁸¹

235. The processing of asylum claims takes time and, as a matter of course, asylum seekers who arrived by boat have been forced to remain in detention until *after* their claims are heard. However, the Bridging Visa E (subclass 051) permits the release of asylum seekers into the community.²⁸² BVE holders have only very limited access to government services. Very few of these subclass visas are issued: there were only 167 issued between 2001 and 2005.
236. According to the government, most people are in detention for no more than three months.²⁸³ However, for a significant number of people it can extend into years – especially for stateless asylum seekers in indefinite detention. Justice Bhagwati observed that 'detention for unduly long periods of time is sometimes due to complications in the refugee status determination procedure itself, and sometimes due to lengthy and cumbersome appeal procedures and unnecessary delays in disposal of the proceedings'.²⁸⁴
237. Under section 196(3) of the *Migration Act 1958* (Cth), Australian courts cannot order the release of a detainee other than for the purposes of removal or deportation, or where a visa has been granted. There is no limit on how long DIMIA may take in assessing a visa application. In 2003–2004 the Refugee Review Tribunal (RRT) took as long as 22 weeks to process the applications lodged by detainees. In this same time frame only 65% of detainee applications were processed within the RRT's own recommended time frame of 70 calendar days.²⁸⁵ By 2004–2005 the average time to process an application had grown to 39 weeks.²⁸⁶

6.1.5.2 statelessness and indefinite detention

238. A period of immigration detention is usually terminated by the issuing of a valid visa to, or the removal from Australia of, an unlawful non-citizen. However, detention can be indefinite. This adds yet another significant stressor impacting on the mental health of immigration detainees who are stateless.²⁸⁷
239. Mr Ahmed Al-Kateb, a stateless man held indefinitely in immigration detention, describes the effects of indefinite detention this way:²⁸⁸

We can't work and we can't study. And we can't have any benefits [from] the government or Centrelink or Medicare. Nothing. We [are] just walking in a big detention. And we are all the time worried that they will send us back to detention again. All the time scared and worried. When you do not know about your future it's very crazy. I feel I am dying. They cannot deport us [because] we haven't a country to go back [to]. They don't want to give us a visa. That means that we have to stay in detention forever. It's like a death punishment.

In September 2004, after almost four years in immigration detention, Mr Al-Kateb was finally released on a Removal Pending Bridging Visa.²⁸⁹

240. In 2004, the High Court confirmed that it is constitutional for Parliament to authorise the indefinite detention of a stateless person.²⁹⁰ In dissent in that case, the Chief Justice of Australia pointed out that the majority's conclusion authorises the administrative detention of an alien for the rest of their life.²⁹¹
241. A stateless person has no recourse to the courts to challenge his or her arbitrary and indefinite detention. As Amnesty International Australia observes:²⁹²

...review of indefinite detention of stateless asylum-seekers is...entirely a matter for the Minister for Immigration, on the basis of a non-enforceable, non-compellable, non-reviewable discretion.

242. The case of Mr Peter Qasim illustrates this point.²⁹³ Mr Qasim was held in immigration detention from 1998 until 2005. He was Australia's longest serving immigration detainee and is considered a stateless person as no country is willing to accept him as a national. Mr Qasim's original application for refugee status was rejected on the grounds that he did not have a well founded fear of persecution in his native Kashmir. Mr Qasim applied unsuccessfully to the Federal Court of Australia to have his detention reviewed on the basis that there was no reasonable chance of his removal. After some time in detention, he unsuccessfully applied to the Indian Government for a passport. No country has been willing to accept him. On 17 July 2005, after much petitioning by prominent Australians, Mr Qasim was granted a temporary visa by the then Minister of Immigration until his situation is resolved.²⁹⁴

6.1.6 privatisation of immigration detention centres

243. In 1997 the Australian government announced the contracting out of the running of immigration detention centres to Australasian Correctional Management ('ACM'), a subsidiary of Wackenhut Corrections Corporation.²⁹⁵ ACM already ran private prisons in Australia.
244. ACM's management of detention centres was heavily criticised. As a commercial enterprise, they were concerned with maximising profit, not conforming to the strictures of the humane treatment of individuals under international human rights law. When the UN Working Group on Arbitrary Detention asked for a copy of the contract between ACM and the Australian government, it was denied access on the grounds that it was a 'business secret'.²⁹⁶
245. The Inspector of Custodial Services in Western Australian, Mr Richard Harding, accused the government of privatising the immigration detention centres in an effort to evade its international human rights obligations:²⁹⁷

I think that the government in a sense, was trying to purchase some kind of moral immunity for the fact that it was setting in train regimes that really could not, and would not, conform with international obligations. Of course, there is no way that any government can

contract out of its international obligations and its duty of care. But the government wanted this to be out of sight and out of mind.

246. The Auditor General estimated that, over the six years in which ACM ran the detention centres, the Australian government paid more than half a billion dollars to ACM.²⁹⁸ The *Migration Act* allows the government to recover the costs of detention from a non-citizen.²⁹⁹ These provisions were inserted by the Labor government in 1992.³⁰⁰ The UN Working Group on Arbitrary Detention expressed its concern about this levy on detainees:³⁰¹

Payment of a daily fee (A\$ 60-114) for detention for those detainees leaving the country, either voluntarily or by expulsion. This measure seems aimed at dissuading arrivals, as the money is not payable unless the alien returns – even legally – to Australia. However, this is not always made clear in the bill given to the detainee; the document, of which the delegation saw many examples, only mentions that such “arrangements” are possible. The shock felt at the sudden receipt of this bill is all the more striking as the persons concerned are generally destitute. The delegation was informed of two bills for A\$214,346 and A\$37,685.50, respectively.

247. It should be noted that an unsuccessful applicant who is charged for their stay in detention and then deported cannot return to Australia until they have repaid the debt to the Commonwealth.³⁰² A constitutional challenge to the law levying this accommodation fee on detainees was unsuccessful in the Federal Court.³⁰³
248. In August 2003, under increasing public pressure, the government awarded the contract to run the centres to Group 4 Falck Global Solutions Pty Ltd.³⁰⁴ Group 4 later changed its name to Global Solutions Limited (GSL). The contract between the government and Group 4 is now publicly available.³⁰⁵ The immigration detention centres are still privately run.
249. The privatisation of immigration detention centres does not mean that the Australian government is not responsible for violations therein of Australia's international obligations under the Convention against Torture. The UN Human Rights Committee has observed this principle, with respect to the *International Covenant on Civil and Political Rights*:³⁰⁶

[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...

6.2 preventative detention and terrorism

250. In 2005, preventative detention laws were introduced.³⁰⁷ Preventative detention orders allow for a person to be detained without charge for up to 14 days, and potentially indefinitely if subsequent orders are sought. In order to obtain a preventative detention order, police must reasonably suspect that a person is preparing to commit a terrorist act. A person may

not be interviewed by ASIO or police while in detention. These powers will cease in 2015.

251. UN Special Rapporteur Scheinen expressed concern that preventative detention orders can be based on secret information that neither the detainee or their lawyer can see.³⁰⁸ The Special Rapporteur also expressed concern that such information could potentially be 'contrary to the right to a fair trial'.
252. Detainees must be treated humanely, however they may only contact one relative and a work colleague to tell them that they are 'safe but unable to be contacted for the time being'.³⁰⁹ In some Australian States it is a criminal offence to tell relatives or work colleagues that you are being detained; in other States a detainee is allowed to tell their relative that they are being detained. It is an offence for the person contacted to tell anyone else.
253. All conversations between a lawyer and detainee will be monitored by police. The content of the conversations may not be used in evidence against a detainee.³¹⁰

6.3 ASIO detention

254. In 2003 the Australian Security Intelligence Organisation (ASIO) was given the power to detain a person for questioning for up to 7 days.³¹¹ Written permission must be obtained from the federal Attorney General, and a warrant then obtained from a list of former judges. Further warrants can be issued if new information arises. A detainee need not be a terrorist suspect, they need only be in possession of information that will 'substantially assist the collection of intelligence' related to a terrorism offence.
255. It is a criminal offence, punishable by up to five (5) years imprisonment, for a detainee not to answer questions put to them by ASIO.³¹² However, the answers are not admissible against a detainee in criminal proceedings.³¹³
256. UN Special Rapporteur Martin Scheinin observed that, while the information obtained under these ASIO warrants cannot be used to prosecute a detainee, such information could be used by police to further their own investigations.³¹⁴ The Special Rapporteur recommended that 'police officers should not be present at ASIO hearings' and a 'clear demarcation should exist and be maintained between intelligence gathering and criminal investigations'.³¹⁵
257. Detainees must be treated 'with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment'.³¹⁶ A detainee can complain to the Inspector General of Security Services, who can report to the Parliament. Juveniles under the age of 16 may not be the subject of a detention warrant. All contact between a detainee and lawyer is monitored by security officials.³¹⁷ It is a criminal offence for anyone (including the detainee and lawyers) to disclose 'operational information' not only during the period of the warrant, but for a period of two years after the expiry of the warrant.³¹⁸

258. All of these provisions are subject to a sunset-clause and these powers cease on 22 July 2016.³¹⁹
259. The detainee, even when only suspected of having information, has fewer rights than a person actually charged with a serious offence. There is no guarantee of access to the lawyer of your choice or even, in some cases, no right to contact a spouse or family member.
260. CCL's Vice President, Mr David Bernie, has observed that:³²⁰

...the laws relating to ASIO detention and questioning are based not on being a suspected terrorist, but on being suspected of having information about a terrorist act whether in the past or future. These laws therefore have great potential to be used against those whose professions, such as journalists and lawyers, usually involve the collection of information.

...The laws give automatic secrecy to actions of ASIO and the police, irrespective of whether the secrecy is needed or not, stopping the parties and their lawyers from objecting in the public to government spin which may be freely placed in the media...

6.4 bail laws

...It shall not be the general rule that persons awaiting trial shall be detained in custody...

ICCPR, Article 9(3)

261. There has been a general trend in Australia to legislate ever harsher bail laws. These laws make it harder and harder for accused to be granted bail. As a direct consequence of these stricter bail laws, remand populations have increased significantly. The remand of unsentenced prisoners has risen annually over the last ten years in:³²¹

year	sentenced	unsentenced	% on remand	annual increase
1997	16,522	2,606	16%	-
1998	17,118	2,788	16%	7%
1999	18,332	3,206	17%	13%
2000	17,929	3,785	21%	15%
2001	18,123	4,335	24%	13%
2002	18,078	4,414	24%	2%
2003	18,738	4,817	26%	8%
2004	19,236	4,935	26%	2%
2005	20,220	5,133	25%	4%
2006	20,209	5,581	28%	8%
2007	21,128	6,096	29%	8%

262. The situation is particularly grim in New South Wales, where presumptions *against* bail have proliferated. In 2007, NSW accounted for more than one third of the country's entire remand population:³²²

2000	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	total
Sentenced	7,057	2,717	3,781	943	2,630	310	462	176	17,929
Unsentenced	1,490	436	701	356	494	80	173	63	3,785
2007	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	total
Sentenced	7,985	3,375	4,265	1,152	3,117	402	748	184	21,128
Unsentenced	2,300	808	1,302	619	730	126	158	53	6,096

263. In 2004, for the first time in federal law, a bail law was passed. Federal offenders are usually granted bail under the State in which they are being detained. The new federal law has a presumption *against* bail for those charged with terrorism-related offences. The law is particularly harsh because it states that bail should only be granted when the accused proves that 'exceptional circumstances exist to justify bail'.³²³
264. The increasing harshness of bail laws across the country, and the resulting increase in remand rates, appears to be contrary to the requirement of Article 9(3) of the ICCPR. This is particularly so, when it is recalled that crime rates have remained relatively static as remand rates have increased.³²⁴
265. The State Party should review its bail laws to ensure that they are consistent with Article 9(3).

7. Article 10: treatment in detention

7.1 juveniles

266. The UN Human Rights Committee has examined a case involving the treatment of a juvenile in the *adult* prison at Parklea in Sydney, New South Wales.³²⁵
267. In February 1999 Mr Brough, a 17 year old Aboriginal male, was sentenced to 8 months prison for burglary and assault. In March 1999, after he participated in a riot and held a guard hostage at the Kariiong Juvenile Justice Centre in a protest against conditions, Mr Brough was transferred to the adult prison at Parklea. In Parklea, Mr Brough began to self-harm and was placed in a solitary confinement cell for 72 hours, where the artificial lights were on all the time and where he was stripped to his underwear and his blanket was taken away from him. Mr Brough suffers from a mild intellectual disability.
268. In 2006 the UN Human Rights Committee published its determination in Mr Brough's case. The Committee found that:³²⁶
- In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal.
269. The UNHRC determined that Australia had breached articles 10(1) (humane treatment), 10(3) (segregation of juveniles and adults) and article 24(1) (protection of children) of the ICCPR.³²⁷

7.2 treatment of terrorist suspects

7.2.1 adults

270. People charged with federal terrorist offences can only receive bail in exceptional circumstances.³²⁸ UN Special Rapporteur Scheinen found this situation to be contrary to article 9(3) of the ICCPR (right to a presumption in favour of bail).³²⁹
271. In New South Wales, all people charged with terrorist offences and refused bail are kept, initially at least, in maximum security prisons. Terrorist suspects who are, in the opinion of the NSW Corrective Services Commissioner, 'a special threat to national security', are given a security classification of "AA" (for men) or "Category 5" (for women).³³⁰ This decision of the Commissioner is not reviewable in a court of law. UN Special Rapporteur Scheinen commented that there should be 'appropriate avenues available for the remanded person to seek an independent review of the classification'.³³¹

272. All inmates charged with, or convicted of, committing terrorist offences are automatically classified AA/5 when they are received by the Department of Corrective Services.³³² They then undergo a classification procedure, which can take up to two weeks and during which time each remandee is housed in a separate cell in an isolation wing of a high security prison.³³³ In one instance, two AA inmates were housed in segregation at the High Risk Management Unit ('HRMU') in Goulburn for 'significantly longer than 2 weeks', until the classification process was complete.³³⁴
273. CCL notes that from October 2006, terrorist suspects are no longer kept in segregation while undergoing this initial assessment.³³⁵
274. Visitors to the AA/5 remandees are photographed and are subjected to criminal background checks and to biometric testing.³³⁶
275. AA/5 remandees are excluded from the jurisdiction of the Official Visitor by the Crimes (Administration of Sentences) Regulation 2001 (NSW).³³⁷ This means that they cannot make complaints about their treatment to the Official Visitor, as is the right of all other remand and prison inmates.
276. CCL is concerned that the policy behind the AA/5 classification is oppressive and violates Australia's international human rights obligations. The *UN Standard Minimum Rules for the Treatment of Prisoners*³³⁸ permit remand inmates to be treated differently from other remand inmates only on the grounds that it is 'necessary in the interests of the administration of justice and of the security and good order of the institution'.³³⁹ National security, however, is *not* a legitimate ground on which to discriminate against remand inmates. In fact, it is hard to see how someone could be a threat to national security while in prison.
277. A NSW parliamentary committee recommended that the Minister for Justice review the application of the AA/5 classification to remandees.³⁴⁰ The Minister refused because, in his view:³⁴¹
- The classification is based on risk. No evidence has been produced to suggest that a risk to national security can only arise from a convicted inmate and not from a remand inmate; or that the risk from a convicted inmate is greater than a risk from a remand inmate.
278. CCL notes that terrorist suspects, like all unconvicted accused, should be presumed innocent³⁴² and be treated differently from convicted inmates.³⁴³ Furthermore, bail-refused terrorist suspects should be housed, like other accused people, in a general remand facility, unless they represent a rational threat to the security and good order of the institution.
279. CCL is also concerned about media reports that NSW Police, AFP and ASIO officers raided terrorist suspect Omar Baladjam's cell at the HRMU on 8 March 2006 and seized *inter alia* notes intended to brief his lawyer the following day about his alleged mistreatment in prison.³⁴⁴ This is a serious breach of client-solicitor privilege and adds weight to allegations that conditions in the HRMU are oppressive.³⁴⁵

280. While the courts are generally reluctant to intervene in the operation of prisons, a recent Victorian decision criticised conditions in Victoria.³⁴⁶

7.2.2 juveniles

281. The NSW government has decided that juveniles held under preventative detention orders will be held in the Kariong Juvenile Correctional Centre for serious juvenile offenders.³⁴⁷ To date, there has not been a case of a juvenile being held under a preventative detention order.

282. As at June 2005, Kariong held 11 youths on remand and 28 sentenced offenders.³⁴⁸ There is no segregation of juveniles on remand and sentenced juveniles in Kariong.³⁴⁹

283. There are nine juvenile justice centres in NSW. Eight are run by the Department of Juvenile Justice.³⁵⁰ In November 2004, management of the ninth centre, Kariong Juvenile Justice Centre for serious male offenders over 16 years of age, was transferred from the Department of Juvenile Justice to the Department of Corrective Services, which is responsible for adult prisons.³⁵¹ In December 2004, it was renamed the Kariong Juvenile Correctional Centre.

284. In July 2005, the NSW Parliament's Select Committee on Juvenile Offenders recommended that the state government consider returning management of Kariong to the Department of Juvenile Justice in the longer term.³⁵² The NSW government rejected this recommendation.³⁵³

8. Article 12: freedom of movement

8.1 Cronulla Riots laws

285. In response to race riots in Sydney's southern suburbs in December 2005, the NSW Parliament enacted emergency legislation granting police extraordinary powers to:³⁵⁴
1. cordon off public areas and roads;
 2. detain and search all people and vehicles entering or exiting the area;
 3. seize property from anyone in the area;
 4. demand that anyone in the area identify themselves to police; and to,
 5. deny people entry to and exit from the target area.
286. Only the Police Commissioner and Assistance Commissioner may declare a 'target area'. Before doing so they must be satisfied that there is a reasonable threat of 'large scale disorder'. If the Police Commissioner wishes to extend the exercise of these powers beyond 48 hours, then he or she must apply to the court for an extension.
287. These extraordinary powers can even be exercised outside of the 'target area'.³⁵⁵
288. The powers have been used on four occasions. The first and second were during the immediate aftermath of the Sydney race riots in December 2005, during which the target area was so large it granted police the power to exercise these power over more than 1.3 million people.³⁵⁶ In January 2006, the powers were used for a third time in a predominately indigenous residential area in the mid-western town of Dubbo. The fourth occasion was unlawful.
289. In September 2007, the NSW Ombudsman reviewed the operation of the laws and made 14 recommendations, te most important of which the government simply ignored.³⁵⁷ For example, the Ombudsman recommended an explicit 'right of peaceful assembly' be enacted to counter-balance these powers. The Ombudsman also recommended that police should be required to form reasonable suspicion before searching someone in a target area.
290. In December 2007, when these extraordinary laws were due to expire, the NSW Parliament chose to entrench them in law.³⁵⁸ No express right of peaceful assembly or requirement for reasonable suspicion was enacted.
291. These laws impinge on freedom of movement, the right to free assembly and expression. The power to authorise the exercise these powers is placed in the hands of police. However, this power should be authorised by a court because it can potentially affect the civil liberties of millions of people.

8.2 passport cases

292. After the 11 September 2001 attacks on the United States of America, the Australian government began cancelling and refusing to issue passports and

travel documents to Australian citizens whom it deemed to be 'likely to engage in conduct that might...prejudice the security of Australia or of a foreign country'.³⁵⁹ Invariably, these refusals were based on adverse security assessments made by the Australian Security and Intelligence Organisation (ASIO). There have been more than 42 such cancellations.³⁶⁰ This includes Mr Mamdouh Habib,³⁶¹ who has never been charged with any offence, and Mr Zak Mallah,³⁶² who was charged and acquitted of terrorist offences.

293. There is an administrative process to challenge an adverse security assessment, but the Minister has the power to exclude the applicant and his legal team from viewing or hearing any evidence in such proceedings.³⁶³ This means that the person denied his or her passport is unable to defend themselves against charges that they are security risk, because they do not know what they are accused of. The federal courts have concluded that this denial of procedural fairness is constitutional.³⁶⁴
294. While the restriction of freedom of movement is permitted (where necessary) under article 12(3) of the ICCPR, the unfair process by which it is challenged is a violation of Article 14(1) of the Covenant. The violation arises because the government intervenes to deny the applicant access to the information on which the decision to cancel his passport was based, leading to an unfair process – a point conceded by the government in court.³⁶⁵ Because Australia has no Bill of Rights, it is not possible under any Australian law to challenge this denial of Covenant rights, which is itself a denial of Covenant rights under Article 2(3).³⁶⁶

9. Article 14: due process

9.1 control orders and the 'war on terror'

295. In December 2005, the federal and States parliaments passed legislation introducing 'control orders',³⁶⁷ which are intended "to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act".³⁶⁸ These orders impose parole-like conditions on people who might not have been charged with (let alone convicted of) an offence. Alternatively, the orders can be imposed on a person who has been convicted and served his or her sentence in full.
296. A constitutional challenge to these laws failed.³⁶⁹ The High Court concluded that Parliament has the power to legislate for control orders. Because Australia does not have a Bill of Rights, the High Court did not have to consider whether the laws violate fundamental human rights. The only High Court judge who did consider human rights law found the law invalid.³⁷⁰
297. As at 30 September 2008, only Mr Jack Thomas and Mr David Hicks have been made subject to control orders. UN Special Rapporteur Mr Martin Scheinen expressed concern that Mr Thomas was only made subject of a control order *after* he was acquitted of terrorism charges by a jury and that this control order might offend the *ne bis in idem* principle (no one should be tried or punished twice for an offence).³⁷¹ The same *ne bis in idem* criticism applies to Mr Hicks, who was made the subject of an order *after* he had served in full his sentence for a terrorism-related offence. The Special Rapporteur was also critical of
298. Special Rapporteur Scheinen also urged Australia to reconsider provisions denying access to evidence against the subject of the order.³⁷² Mr Scheinen observed that similar legislation in the UK had been found to be in violation of the guarantees to a fair trial and liberty of the person contained in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.
299. CCL submits that control orders are a disproportionate response to the threat of terrorism and are open to abuse. Control orders very likely place Australia in breach of its obligations under the ICCPR and the *Convention on the Rights of the Child*. The substance of the orders violate article 9 of the ICCPR (the right to liberty and security of person and freedom from arbitrary arrest or detention), article 14 (right to a fair hearing), article 17 (freedom from arbitrary or unlawful interference with privacy), article 18 and 22 (freedom of thought and freedom of association) and article 12 (freedom of movement).

9.1.1 control order legislation

300. Control orders may include:³⁷³
- (a) a prohibition or restriction on the person being at specified areas or places;
 - (b) a prohibition or restriction on the person leaving Australia;
 - (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
 - (d) a requirement that the person wear a tracking device;
 - (e) a prohibition or restriction on the person communicating or associating with specified individuals;
 - (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);
 - (g) a prohibition or restriction on the person possessing or using specified articles or substances;
 - (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
 - (i) a requirement that the person report to specified persons at specified times and places;
 - (j) a requirement that the person allow himself or herself to be photographed;
 - (k) a requirement that the person allow impressions of his or her fingerprints to be taken; and,
 - (l) a requirement that the person participate in specified counselling or education.
301. While all of these are provisions represent an unacceptable incursion on the rights of a person who has not been charged with any criminal offence, item (c) is of the greatest concern. It permits indefinite house arrest, without trial, on the basis only of reasonable belief about what a person *might* do. Rolling orders can be made. Item (e) also could be misused, for example by preventing a person from consulting the lawyer of their choice.
302. Obtaining a control order is a three-stage process. **First**, a senior member of the AFP, if he or she considers on reasonable grounds that the control order would substantially assist in preventing a terrorist act or that the person has provided training to or received training from a listed terrorist organisation, applies to the Attorney-General for consent.³⁷⁴
303. Of great concern is that together with the draft request that must submitted to the Attorney General in seeking his or her consent, there is no requirement for evidence upon which the reasonable grounds are founded. All that is required is a statement of the facts relating to why the orders should be made, together with an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person.³⁷⁵ Any previous requests and outcomes in relation to control orders or preventative detention orders should also be provided.³⁷⁶

304. If the Attorney General consents to the request, then the AFP agent can proceed to the **second** stage and seek an interim order in the federal court.³⁷⁷ The issuing court may make an order only if it is satisfied on the *balance of probabilities* of two things, specifically that:
- a. making the order would substantially assist in preventing a terrorist act or that the person has provided training to, or received training from, a listed terrorist organisation; and
 - b. the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.³⁷⁸
305. The interim order can be made in the absence of the subject. The order must be served on the subject within 48 hours and then they can begin preparing for the **third** stage in this process: a court hearing to confirm the control order, in which the court uses the legal tests from the second stage.
306. The subject of an order has the right to contact, communicate or associate with their lawyer *unless* their lawyer is a 'specified individual'.³⁷⁹ This could operate to exclude the individual's lawyer of choice without there being any valid or reasonable grounds for doing so. The right to engage a lawyer of choice is, it is submitted, an important one in ensuring a fair process.
307. A court may confirm an interim control order if the subject fails to appear in court, provided he or she was properly served with notice of the hearing.³⁸⁰ Consequently, a person who did not understand the nature of the order because of failure to understand the language, by reason of their age, mental capacity or other valid reason, then the issuing court may confirm the order. This is a denial of natural justice and an abrogation of a basic right.
308. Successive control orders may be made in relation to the same person.³⁸¹ Therefore, although the time limit of a control order is twelve months, there is nothing to prevent further successive control orders of twelve months duration being made. In effect, the control order could extend indefinitely.
309. Even the limited information required to be provided to the subject of a control order (or his or her representative) can be withheld on national security grounds.³⁸² This raises the prospect of a person being subject to indefinite house arrest (due to successive control orders) without any information on the reasons for their detention. This is in breach of the right to a fair hearing, guaranteed in article 14(1).
310. There are special rules for young people.³⁸³ A control order cannot apply to a person who is under the age of sixteen years. If a person is sixteen but under eighteen, then the control order cannot be in force for longer than three months at a time. Again, however, successive control orders in relation to the young person can be made. This means that a young person between the ages of sixteen to eighteen may be subject to a control order for an indefinite period by the imposition of successive three months of control orders. Consequently, these provisions are in breach of the *Convention on the Rights of the Child*.

9.2 double jeopardy

9.2.1 introduction of 'exceptions to the rule'

311. In October 2006, despite opposition from civil society, the legal profession and the Office of the NSW Director of Public Prosecutions,³⁸⁴ NSW abolished the rule against double jeopardy in cases where:³⁸⁵
- someone acquitted of a 'life sentence offence' (murder, violent gang rapes, large commercial supply or production of illegal drugs) where there is 'fresh and compelling' evidence of guilt;
 - someone acquitted of a '15 years or more sentence offence' where the acquittal was tainted (by perjury, bribery or perversion of the course of justice); and,
 - someone acquitted in a judge-only trial or where a judge directed the jury to acquit.
312. Subsequently, Queensland and South Australia have passed similar legislation.³⁸⁶ Tasmania is considering similar legislation.³⁸⁷
313. CCL is concerned that this legislation offends the *ne bis in idem* principle of article 14(7) of the ICCPR. A person, once acquitted, should not be subject to re-trial.
314. The State Party should explain how the introduction of exceptions to the double jeopardy rule is consistent with Article 14(7).

9.2.2 continuing detention orders for sex offenders

315. In Queensland, Western Australia and New South Wales, it is possible for a sex offender to be detained, on the grounds of perceived future dangerousness, beyond the term of his or her court-imposed sentence.³⁸⁸ These prisoners are detained by a 'continuing detention order', issued by a court.
316. In 2004, the High Court upheld the constitutionality of this form of detention.³⁸⁹ However, because Australia has not adopted the ICCPR into domestic law, the High Court was not able to consider whether this form of detention breaches fundamental human rights.
317. CCL is concerned that this legislation offends the *ne bis in idem* principle of article 14(7). A person who has served his or her sentence should not be punished again for past offences. Nor, as the UN Human Rights Committee has previously observed, should a person be detained 'on suspicion of being about to commit an offence' as this contrary to article 9 of the Covenant.³⁹⁰
318. The State Party should explain how these continuing detention orders are consistent with Articles 9 and 14(7).

10. Article 17: right to privacy

10.1 phone tapping

319. An Australian telephone is 23 times more likely to be intercepted by law enforcement officials than an American telephone.³⁹¹ Phone tapping is only permitted after obtaining a warrant to intercept telecommunications services.³⁹²
320. In 2006/2007, Australia issued 3,280 phone tap warrants, compared to the United States, where courts issued 2,119 phone tap warrants.³⁹³ An analysis of the figures shows that, on a *per capita* basis, an Australian telephone was 23 times more likely to be bugged than an American telephone.
321. It is also worth noting that in the United States only judges may issue telecommunications warrants, while in Australia, almost all warrants (93%) are issued by non-judges. This is despite the fact that judges make up 58% of all the people authorised to issue warrants in Australia.³⁹⁴ The vast majority of warrants are being issued by lawyers who sit as members of the Administrative Appeals Tribunal (AAT). AAT members do not have tenure, are appointed by the government and work on contract. This means that AAT members are less likely to be as fearless as a judicial officer, which might explain why most warrants are issued by non-judges. Judges simply would not issue so many warrants: as is evidenced by the figures in the United States of America, where only judges may issue warrants and the per capita figures are vastly lower.
322. The State Party should account for the excessive number of telecommunication warrants being issued and to justify why non-judges can issue these warrants.

10.2 drug detection sniffer dogs

323. In New South Wales, police can use drug detection sniffer dogs to sniff people (rather than objects) in many public places, including train stations, pubs and clubs and at street parades.³⁹⁵ If a dog indicates that someone is carrying prohibited drugs, then police have the statutory authority to search that person.
324. According to the NSW Ombudsman, 74% of all indications by a dog are false.³⁹⁶ This means that 74% of the people who are stopped and searched are completely innocent – and yet they are detained, searched and have their personal details recorded by police. The NSW Ombudsman also found that 'there is little or no evidence to support claims that drug detection dog operations deter drug use, reduce drug-related crime, or increase perceptions of public safety'.³⁹⁷
325. The NSW Ombudsman recommended that NSW consider stop using the dogs.³⁹⁸ The NSW government dismissed the Ombudsman's report and

sniffer dogs continue to patrol the streets of NSW.³⁹⁹ CCL continues, on a regular basis, to get complaints from citizens about the use of sniffer dogs.

326. This underlines the powerlessness of Australian ombudsmen to provide any effective remedy for violation of rights: governments can simply ignore the ombudsmen.
327. When in 2001, after the courts ruled the use of sniffer dogs contrary to common law, Parliament introduced legislation to override the common law and authorising police to use sniffer dogs to sniff people in public. NSW has no Bill of Rights and so the citizens of NSW can do nothing about these violations of their right to privacy or from unreasonable searches. This constitutes a breach of article 2(3) of the ICCPR.
328. The law regarding drug detection sniffer dogs is disproportionate. They were introduced to assist police in catching suppliers of prohibited drugs. However, the dogs rarely catch drug suppliers. Seventy-four per cent of the people 'caught' by the dogs have no drugs on them. Of the 26% who do have prohibited drugs, most only have small amounts of cannabis for personal use.
329. When people are detained by police, they are told that they have a right to silence. Then police start asking the person for personal details, which are recorded on the police database – even when no drugs are found on the person. Police call this 'consensual policing', because people 'volunteer' this information. Given the circumstances, it is hard to characterise the answers as being provided with informed consent. Most people are not told that the information will remain on the police database for years.⁴⁰⁰ Suspects are also invariably surrounded by at least two police officers, and they are in full view of the public and so are embarrassed and confused. CCL is aware of cases where NSW police have used the fact that a person was previously (falsely) indicated by a sniffer dog against that person.
330. The State Party should explain how the use of drug detection dogs is consistent with articles 17 and 2(3) of the ICCPR.

11. Article 19: freedom of expression

11.1 Increasing censorship in Australia

331. Over the last ten years many films, books, computer games, internet sites and other media have been banned. Australia does not have a 'censorship' regime, but rather a 'classification' system. This means that Australia does not black-out or remove offending passages or scenes, but simply refuses to classify the *entire* work in question. Refusal of classification means that it is a criminal offence to import, distribute or sell the work.
332. Books like *The Peaceful Pill Handbook* and *Join the Caravan* have been refused classification because they allegedly promote criminal activity (euthanasia and terrorism, respectively).⁴⁰¹ Films like *Ken Park* and *Baise-Moi* have also been completely banned.⁴⁰² Only computer games suitable for 15 year-olds can be sold in Australia.⁴⁰³ It is against the law for any Australian website to contain sexually-explicit material.⁴⁰⁴
333. Because Australia does not have a Bill of Rights, Australians cannot challenge this censorship in any court as breach of their freedom of expression. Free speech is not constitutionally protected. This is a violation of both articles 19 and 2(3) of the ICCPR.
334. The State Party should move to guarantee freedom of expression in the federal Constitution.

11.2 Freedom of information & lack of accountability

335. Freedom of Information legislation in Australia is expensive and woefully inadequate. We provide the following experience as an example.
336. It appears that the Australian government has legal advice to the effect that Australia's international human rights obligations with respect to the death penalty do not extend beyond our borders. There are three legal advices provided to the Australian government by the Office of International Law within the federal Attorney-General's Department.⁴⁰⁵
337. When CCL requested a copy of these advices under freedom of information, the Department refused to release the information by claiming legal professional privilege. CCL wrote to the former Attorney-General Philip Ruddock, and to the present Attorney-General Robert McClelland, requesting that they waive legal professional privilege. Both Attorneys-General refused and also refused our request for a list of legal authorities cited by the advices.
338. In CCL's view, the legal advice provided to the government is plainly wrong. It does not accord with current jurisprudence.⁴⁰⁶ If the advice is made in good faith, it cannot endanger Australia's national security, international relations or operational policing because it simply amounts to Australia's interpretation of its international human rights obligations. The public has a right to know how its government interprets our human rights obligations.

339. A liberal democracy cannot function effectively without an informed citizenry. Freedom of information legislation is intended to ensure that information about how the people are governed is available. Unfortunately, governments are increasingly concluding that embarrassing or controversial information should not be released because it is 'not in the public interest'.
340. The Rudd government has announced that it will 'reform' federal freedom of information law. But details are still unclear.

11.3 Expansion of sedition offences

341. Despite vocal opposition, in 2005 the federal government expanded the criminal offences of sedition.⁴⁰⁷ This was despite a recommendation by the Senate Legal and Constitutional Committee that the changes not be made.⁴⁰⁸
342. In 2006, after reviewing the sedition laws, the Australian Law Reform Commission recommended that these offences be significantly amended, including repealing several of the sedition offences.⁴⁰⁹ The government ignored the recommendations and the offences are still on the books.
343. The 2005 amendments extended the operation of sedition into many unchartered areas and the potential impact on freedom of speech in Australia is immense.
344. The 2005 Amendments introduced *recklessness* into the crime of sedition, which is a crime of simply spoken words or urging. More so than any other area of the criminal law, there should be a requirement for clear criminal intent. An exception is given in relation to humanitarian aid, but it is arguable that a mere demonstration against the Iraq war is giving moral support to the insurgency and therefore constitutes assistance.
345. The new sedition laws also introduce a "good faith" defence, however the accused bears the onus of proof.⁴¹⁰ While the good faith defences may have been designed to protect political expression, they clearly fail to do this. First, the good faith defences are far too narrowly defined and again make reference to the requirement of good faith without defining that expression. Second, it is incumbent upon the defendant to raise these defences, meaning that a person has to prove their innocence.
346. Clearly, if sedition laws must exist then they should be addressed to intentional urgings to violence coupled with a real possibility of that violence occurring. The new law turns legitimate political activity and dissent into prima facie criminal behaviour. For example, organisations such as the Australian Republican Movement, which advocate to remove the monarchy from the constitution, could be declared an unlawful association under the new laws. There would also appear to be no defence available to journalists, academics, teachers, cartoonists and satirists who would be criminalised under what is clearly intended to be an overarching and broad provision.
347. The State Party should implement the recommendations of the Australian Law Reform Commission. The State Party should also consider repealing the sedition offences completely.

12. Article 26: equality

12.1 the 'Races Power'

348. CCL is concerned that, in the 21st century, the federal Constitution still grants parliament the power to pass laws based on race. Section 51(xxvi) states that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to... the people of any race for whom it is deemed necessary to make special laws.

349. It is unclear whether this power permits parliament to pass a Nazi-style race law. But it is open to argument that the constitution permits laws that are detrimental to people of a particular race. The power should be repealed and replaced with a guarantee of racial equality.

350. The State Party should remove the races power from its Constitution.

12.2 Overriding the Racial Discrimination Act

351. Most jurisdictions have laws against racial discrimination. However, the federal government has shown itself willing to override those laws without reference to human rights standards.

352. For example, the *Native Title Act* overrides the *Racial Discrimination Act* (RDA) to the extent that it validates the extinguishment of native title by any action subsequent to the passing of the RDA.⁴¹¹ The RDA was most recently 'suspended' to ensure the legality of the 'Northern Territory Intervention', in which laws that apply only to indigenous Territorians were passed.⁴¹²

353. Such actions contrary to Australia's international obligations is possible because Australia has no constitutional guarantee of equality.

354. The State Party should amend its Constitution to guarantee equality, regardless of race.

12.3 marriage: same-sex discrimination

355. Another example of discrimination involves the bipartisan amendment of the *Marriage Act* to state expressly that marriage was for opposite-sex couples exclusively.⁴¹³ While the Rudd government is committed to ending discrimination against same-sex couples at federal level, it has made it clear that discrimination will continue in relation to access to marriage. This is despite several foreign jurisdictions finding that this constitutes discrimination, as a denial of equality under the law.⁴¹⁴

356. The federal Attorney-General, like his predecessor Philip Ruddock, intervened to prevent the government of the Australian Capital Territory from passing laws to recognise same-sex civil unions.⁴¹⁵

357. This official government opposition to same-sex marriage *and* civil unions leaves gay and lesbian Australians without access to any formal legal

ceremony recognising and registering their relationships. This discrimination is based solely on sexual orientation. The discrimination has no rational basis in a secular society.

358. Again, there is no Bill of Rights guaranteeing equality to all Australians and so these discriminatory laws and policies cannot be challenged in Australia.⁴¹⁶
359. The State Party should amend the Marriage Act to ensure that *all* adult Australians can marry the partner of their choice, regardless of gender or sexual orientation.

13. First Optional Protocol: response to communications

The Committee is concerned over the approach of the State party to the Committee's Views in Communication No. 560/1993 (A. v. Australia). Rejecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications.

UN Human Rights Committee, *Concluding Observations: Australia* (2000), UN Doc CCPR A/55/40, [520].

360. As the UN Human Rights Committee will be acutely aware, Australia has ignored all but one of the adverse conclusions from the Committee. There is no statutory mechanism for ensuring that Parliament addresses, or is even made aware of, the Committee's adverse conclusions.
361. The State Party should implement legislation to ensure that all adverse conclusions are tabled in Parliament by the Attorney-General for debate. A report from the Human Rights and Equal Opportunity Commission should also be commissioned to write a report on the issues involved and offer policy options to address the breaches. The HREOC report and a report on action taken to address the violation should be sent to the UN Human Rights Committee within 12 months of the finding. Adequate compensation should also be assessed by a court and paid by the government.
362. The State Party should review its implementation of the First Optional Protocol and take steps to ensure that the issues raised by the Committee in adverse findings are addressed and complainants afforded an effective remedy and, if appropriate, adequate compensation.

14. Second Optional Protocol to the ICCPR

14.1 Second Optional Protocol

363. By 1985, all Australian jurisdictions had abolished the death penalty. The last execution was in 1967. Australia acceded to the *Second Optional Protocol* on 2 October 1990.⁴¹⁷ The Protocol entered into force in international law on 11 July 1991.
364. The Second Optional Protocol has not been adopted into domestic law and therefore is not legally binding in Australian courts. This means that there is no legal or constitutional impediment to a State government reintroducing the death penalty. In 1990, when the Protocol was ratified, the adoption of the Protocol into domestic law was not considered necessary because all Australian jurisdictions had abolished the death penalty. However, over the last few years, there have been voices calling for the reintroduction of capital punishment in Australia.⁴¹⁸
365. The State Party should entrench the abolition of capital punishment in the Constitution. In the meantime, the State Party should legislate to adopt the Second Optional Protocol into domestic law, binding the States.

14.2 Australia's death penalty double standard

366. While official Australian policy remains opposed to the death penalty in all circumstances, the Australian and international media have reported prominent Australian politicians refusing to condemn the death penalty for terrorists and dictators.
367. In March 2003 on US television, Prime Minister John Howard stated that "everybody would" welcome the death penalty for Osama Bin Laden.⁴¹⁹ The Foreign Minister supported those comments.⁴²⁰
368. Prime Minister Howard has, on more than one occasion, said that Australia would not protest the death penalty under Indonesian law for the Bali bombers.⁴²¹ Prime Minister Rudd has said he will not ask for clemency for the Bali Bombers.⁴²² In fact, many state and territory leaders support the death penalty for Bali bomber Amrozi.⁴²³
369. Neither Prime Minister Howard nor his opposition counterpart condemned the execution of Saddam Hussein.
370. This change in policy has been much criticised in civil society. The main criticism is that Australia is applying a double standard by call for clemency only when Australians are on death row, but failing to do so for non-Australians.

14.3 Gaps in foreign assistance law

371. There are three ways in which Australia assists foreign agencies in criminal matters: extradition; mutual legal assistance (to provide evidence for court); and, agency-to-agency assistance (informal non-court matters).

372. There are gaps in existing foreign assistance law with respect to Australia's human rights obligations and these need to be addressed.
373. Under the Mutual Assistance Act, a request for assistance from another country *must* be refused if it relates to a capital prosecution or punishment *unless* the Attorney-General is satisfied that there are 'special circumstances'.⁴²⁴ Traditionally, 'special circumstances' only applies when the evidence is exculpatory or a guarantee that no one will be executed is provided. In 2006, it was revealed that a third 'special circumstance' had been created to permit the AFP to gather evidence for death penalty sentence proceedings.⁴²⁵ This is a clear violation of Australia's international obligations, because such evidence assists in the conviction and sentencing of an individual facing the death penalty.⁴²⁶ The traditional definition of 'special circumstances' should be inserted into the Act.
374. With respect to extradition, an Australian court cannot review whether a foreign guarantee is iron-clad.⁴²⁷ All that is required is that a guarantee is sought and provided. With respect to mutual legal assistance, a foreign government can provide 'cogent advice not amounting to a death penalty undertaking but making it clear that there is no reason to expect that the death penalty would be carried out',⁴²⁸ which falls short of a guarantee. Guarantees are often supplied by foreign prosecutors or Attorneys-General, which raises constitutional issues about whether the guarantees bind foreign courts. Ideally, death penalty guarantees should be provided by the person with the constitutional power to grant clemency in the case. Thus, no matter the judicial outcome, no one will be executed.
375. Another problem with foreign assistance law is the Minister's discretion to provide assistance – even though someone might be executed. In the Mutual Assistance Act, the Minister can decide to provide assistance in pre-charge situations.⁴²⁹ The Minister also has an overriding discretion to extradite an individual.⁴³⁰ Parliament should lay down strict boundaries for the exercise of this discretion, essentially in terms that it should only be used in cases of an imminent threat to human life.
376. Another gap in foreign assistance law is that there are no express safeguards to ensure that no one will be exposed to the real risk of torture. These safeguards should be added.
377. The State Party should review its laws with respect to extradition and mutual legal assistance to ensure they are consistent with the Second Optional Protocol and the ICCPR.

14.4 Agency-to-agency cooperation

Paragraph 1 of article 6 [of the ICCPR], which states that “Every human being has the inherent right to life...” is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. ...For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application.

UN Human Rights Committee,
Judge v Canada (2003) UN Doc CCPR/C/78/D/829/1998, [10.4].

378. Australian agencies are increasingly cooperating and sharing information with foreign agencies in the fight against transnational crime. The Howard government was of the view that Australian agents acting abroad are not bound by all of Australia’s international human rights obligations when acting overseas.
379. In 2005, the Australian Federal Police (AFP) provided Indonesian police with information that led to the arrest in Indonesia of nine young Australians for heroin trafficking.⁴³¹ Three of the nine have been sentenced to death.
380. When cooperating with foreign agencies in a death penalty case, AFP agents can assist at their own discretion prior to charges being laid.⁴³² Once charges are laid, police can only assist with the permission of the Attorney-General. Since 2002, the government has expressly authorised the AFP to assist in death penalty prosecutions (*after* charges were laid) in Indonesia, Malaysia and Tonga. The Indonesian case involved the AFP preparing victim impact statements for sentence proceedings in which the Bali Bombers were sentenced to death.
381. It is government policy that the AFP can assist in death penalty cases where the following conditions are met:⁴³³
- all charges are laid by foreign authorities abroad;
 - the persons charged are not Australian citizens,
 - the persons charged have not been extradited or otherwise removed from Australia's territory or jurisdiction; and
 - the persons charged are 18 years or over.
382. This policy relies on legal advice from government lawyers. That advice is based on a very narrow interpretation of extraterritorial application of the ICCPR and Second Optional Protocol.⁴³⁴ In essence, the advice concludes that international human rights treaties do not have extraterritorial effect and therefore agents acting extraterritorially are not bound by them.
383. This legal advice is flawed. It cannot be reconciled with the UN Human Rights Committee’s observation that, under the ICCPR and Second Optional Protocol, Australia is obliged to ensure that it exposes no one in any circumstances to the real risk of execution.⁴³⁵ Furthermore, if the flawed legal advice is followed to its logical conclusion, then it authorises Australian police and security agents to assist their foreign counterparts in violating fundamental human rights – so long as they do it abroad, so long as their

victims are adults, and so long as their foreign counterparts are the ones detaining the victim.

384. The Australian government refuses to release this legal advice, which means that it cannot be scrutinised by the public.⁴³⁶
385. The State Party should enact legislation to ensure that all agency-to-agency cooperation complies with Australia's obligation to ensure that no one is exposed to the real risk of execution or torture.

15. Notes

- ¹ [International Covenant on Civil and Political Rights](#) [1980] ATS 23 (entry into force for Australia on 13 November 1980).
- ² [First Optional Protocol to the International Covenant on Civil and Political Rights](#) [1991] ATS 39 (entry into force for Australia on 25 December 1991).
- ³ [Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty](#) [1991] ATS 19 (entry into force for Australia on 11 July 1991).
- ⁴ Australia, First Report, UN Doc. CCPR/C/14/Add.1 (submitted: 27 Aug 1991; considered: 25 October -2 November 1982).
- ⁵ Australia, Second Report, UN Doc. CCPR/C/42/Add.2 (considered: 5-6 April 1988).
- ⁶ Australia, Third Report, UN Doc. CCPR/C/AUS/98/3 (submitted: 28 August 1998; considered: 20-28 July 2000).
- ⁷ Australia, Fourth Report, UN Doc. CCPR/C/AUS/98/4 (submitted: 24 August 1999; considered: 20-28 July 2000).
- ⁸ Australia, Fifth Report, UN Doc. CCPR/C/AUS/98/3 (to be considered: March 2009). Note: the Fifth Report is incorporated in: *Common Core Document: forming part of the reports of States Parties (Australia): incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights* (June 2006).
- ⁹ Australia, Fifth Report, n 8, [208].
- ¹⁰ material obtained under FOI is available at: <http://www.nswccl.org.au/docs/pdf/dbfoi.pdf>.
- ¹¹ see [337].
- ¹² *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* [1991] ATS 19 (entry into force: 11 July 1991).
- ¹³ *Judge v Canada* (2002) UN Doc. CCPR/C/78/D/829/1998, [10.4] (UN Human Rights Committee): 'For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application'.
- ¹⁴ Australian Federal Police, *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (August 2006).
- ¹⁵ see *Rush v Commissioner of Police* [2006] FCA 12.
- ¹⁶ predominately via the *Mutual Assistance in Criminal Matters Act 1987* (Cth) ss.8 & 9.
- ¹⁷ *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ).
- ¹⁸ *Constitution* s.51(xxix).
- ¹⁹ *Constitution* s.128.
- ²⁰ see: George Williams, *The Federal Parliament and the Protection of Human Rights* (1999) Parliamentary Research Paper No. 20, <<http://www.aph.gov.au/library/pubs/rp/1998-99/99rp20.htm>>.
- ²¹ *Charter of Rights and Responsibilities Act 2006* (Vic); and, *Human Rights Act 2004* (ACT). For more information see CCL, 'Bills of Rights: other States', <http://www.nswccl.org.au/issues/bill_of_rights/other.php>.
- ²² *Human Rights Amendment Act 2008* (ACT) per s.2, Part 5A commences 1 January 2009.
- ²³ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (October 2007) <http://www.law.utas.edu.au/reform/docs/Human_Rights_A4_Final_10_Oct_2007_revised.pdf>; *Report of the Consultation Committee for a proposed WA Human Rights Act* (November 2007), <http://www.humanrights.wa.gov.au/documents/Human_Rights_Final_Report.pdf>.
- ²⁴ Queensland Legal, Constitutional and Administrative Review Committee, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?* (November 1998) Report No 12, <<http://www.parliament.qld.gov.au/view/committees/documents/lcsrc/reports/Bill%20of%20Rights%20report%20-%20Report%20No%2012.pdf>>. NSW Standing Committee on Law and Justice, *A NSW Bill of Rights* (3 October 2001),

<[http://www.parliament.nsw.gov.au/prod/parliament/Committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/\\$FILE/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf](http://www.parliament.nsw.gov.au/prod/parliament/Committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/$FILE/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf)>.

²⁵ *Legislation Review Act 1987* (NSW) s.8A.

²⁶ *Legislation Review Act 1987* (NSW) s.8A(2).

²⁷ e.g. John Howard, (Speech delivered at the Ceremonial Sitting to mark the Centenary of the High Court of Australia, Melbourne, 6 October 2003),

<<http://www.pm.gov.au/media/speech/2003/speech514.cfm>>: "As part of the ongoing political debate about our institutions there is frequent debate as to whether or not this nation should endeavour in some way to entrench formally in its law a bill of rights. I belong to that group of Australians who is resolutely opposed to such a course of action". See also, Rhianna King, 'Ruddock rejects rights charter', *The West Australian* (Perth) 27 April 2007, 6.

²⁸ Jonathan Pearlman, 'Attorney-General rejects charter of rights for NSW', *Sydney Morning Herald* (Sydney) 18 April 2007, <<http://www.smh.com.au/news/national/attorneygeneral-rejects-charter-of-rights-for-nsw/2007/04/17/1176696838711.htm>>.

²⁹ Australia, Fifth Report (2006) n 8, [56]. Also, e.g.: The Hon. J. J. Spigelman, Chief Justice of New South Wales, 'The Common Law Bill of Rights' (speech delivered as First Lecture in the 2008 McPherson Lectures, University of Queensland, Brisbane, 10 March 2008), <[http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman100308.pdf/\\$file/spigelman100308.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman100308.pdf/$file/spigelman100308.pdf)>.

³⁰ see Spigelman, 'The Common Law Bill of Rights', n 29, 23.

³¹ *Kazantzis v Cyprus* (2003) UN Doc CCPR/C/78/D/972/2001, [6.6].

³² *Faure v Australia* (2005) UN Doc CCPR/C/85/D/1036/2001, [7.4].

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- ³⁶⁴ *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128 (15 July 2008). See also: *Traljesic v Attorney-General of the Commonwealth of Australia* [2006] FCA 125.
- ³⁶⁵ *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128 [136].
- ³⁶⁶ *Faure v Australia* (2005) UN Doc CCPR/C/85/D/1036/2001.
- ³⁶⁷ *Anti-Terrorism Act (No. 2) 2005* (Cth); and similar legislation in the States.
- ³⁶⁸ *Criminal Code Act 1995* (Cth) s.104.1.
- ³⁶⁹ *Thomas v Mowbray* [2007] HCA 33.
- ³⁷⁰ *Thomas v Mowbray* [2007] HCA 33 (Kirby J dissenting).
- ³⁷¹ Special Rapporteur Scheinin, *Australia* (2006), n 314, [38] & [40].
- ³⁷² Special Rapporteur Scheinin, *Australia* (2006), n 314, [39].
- ³⁷³ *Criminal Code Act 1995* (Cth) s.104.5(3).
- ³⁷⁴ *Criminal Code Act 1995* (Cth) s.104.2(2).
- ³⁷⁵ *Criminal Code Act 1995* (Cth) s.104.2(3).
- ³⁷⁶ *Criminal Code Act 1995* (Cth) s 104.2(3).
- ³⁷⁷ *Criminal Code Act 1995* (Cth) s.104.3.
- ³⁷⁸ *Criminal Code Act 1995* (Cth) s.104.4(1)(c).
- ³⁷⁹ *Criminal Code Act 1995* (Cth) s.104.5(3).

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- ³⁸⁰ *Criminal Code Act 1995* (Cth) 104.14(4).
- ³⁸¹ *Criminal Code Act 1995* (Cth) s.104.5.
- ³⁸² *Criminal Code Act 1995* (Cth) ss.104.2(3A), 104.5(2A), 104.12A(3) & 104.23(3A).
- ³⁸³ *Criminal Code Act 1995* (Cth) s.104.28.
- ³⁸⁴ CCL, 'Attorneys-General fail to reach agreement on double jeopardy reform', <<http://www.nswccl.org.au/uCCL/issues/double%20jeopardy%20cth.php>>.
- ³⁸⁵ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW).
- ³⁸⁶ *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld); and, *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (SA).
- ³⁸⁷ Criminal Code Amendment Bill 2008 (Tas). As at 30 September 2008, this Bill was in parliamentary committee: <http://www.parliament.tas.gov.au/bills/Bills2008/46_of_2008.htm>.
- ³⁸⁸ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Dangerous Sex Offenders Act 2006* (WA).
- ³⁸⁹ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.
- ³⁹⁰ UN Human Rights Committee, *Report* (2000) UN Doc. A/55/40, [436] (Observations on Ireland).
- ³⁹¹ CCL, 'Australian phones 24-times more likely to be bugged than an American phone' (media release, 21 May 2006), <http://www.nswccl.org.au/news/show_pr.php?relNum=4&relYear=2006>.
- ³⁹² *Telecommunications (Interception) Act 1979* (Cth).
- ³⁹³ Administrative Office of the US Courts, *2007 Wiretap Report* (2007), Table 7, <<http://www.uscourts.gov/wiretap07/contents.html>>; and, Attorney-General's Department, *Telecommunications (Interception and Access) Act 1979: Annual Report for the year ending 30 June 2007* (2008), [4.6], <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Telecommunications\(InterceptionandAccess\)Act1979-AnnualReportfortheyearending30June2007](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Telecommunications(InterceptionandAccess)Act1979-AnnualReportfortheyearending30June2007)>. Please note that these figures do not include the controversial warrants issued by US presidential order.
- ³⁹⁴ TIA Act Annual Report (2008), n 393, Table 42 (on page 53): 52 of the 90 issuing authorities are judges, while 38 are AAT members.
- ³⁹⁵ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) Pt 11 Div 2.
- ³⁹⁶ NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001* (2006) 29, <<http://www.ombo.nsw.gov.au/show.asp?id=431>>.
- ³⁹⁷ NSW Ombudsman (2006), n 396, viii.
- ³⁹⁸ NSW Ombudsman (2006), n 396, recommendation 54.
- ³⁹⁹ Tim Dick, 'Sniffer dogs program barking up wrong tree: report' (15 September 2006) *Sydney Morning Herald* (Sydney) 5.
- ⁴⁰⁰ NSW Ombudsman (2006), n 396, chapter 11.
- ⁴⁰¹ *NSW Council for Civil Liberties Inc v Classification Review Board (No. 2)* [2007] FCA 896. See also: Classification Review Board, *Decision: Peaceful Pill Handbook* (7 February 2007) <<http://www.classification.gov.au/resource.html?resource=989&filename=989.pdf>>.
- ⁴⁰² Classification Review Board, *Decision: Ken Park* (6 June 2003) <<http://www.classification.gov.au/resource.html?resource=230&filename=230.pdf>>; and, Classification Review Board, *Decision: Baise-Moi* (10 May 2002) <<http://www.classification.gov.au/resource.html?resource=92&filename=92.pdf>>.
- ⁴⁰³ there are no "R18+" or "X18+" classifications for computer games: see CCL, *Submission: Content Services Bill 2007* (2007) 15, <<http://www.nswccl.org.au/docs/pdf/content%20service%20submission.pdf>>.
- ⁴⁰⁴ CCL, *Submission: Content Services Bill 2007* (2007), [18], <<http://www.nswccl.org.au/docs/pdf/content%20service%20submission.pdf>>.
- ⁴⁰⁵ the first is dated in 1991, around the time that Australia acceded to the Second Optional Protocol. The other two advices are dated 14 November 2002 and 12 December 2002.
- ⁴⁰⁶ "For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application": *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998, [10.4].
- ⁴⁰⁷ *Criminal Code Act 1995* (Cth) s.80.2, as added by *Anti-Terrorism Act (No. 2) 2005* (Cth).

- ⁴⁰⁸ Senate Legal and Constitutional Committee, *Provisions of the Anti-Terrorism Act No.2* (2005), recommendation 27, <http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/terrorism/report/index.htm>.
- ⁴⁰⁹ Australian Law Reform Commission, *Fighting Words: a review of sedition laws in Australia* (2006), <<http://www.austlii.edu.au/au/other/alc/publications/reports/104/ALRC104.pdf>>.
- ⁴¹⁰ *Criminal Code Act 1995* (Cth) s.80.3.
- ⁴¹¹ *Native Title Act 1993* (Cth) s.7.
- ⁴¹² see Standing Committee on Legal and Constitutional Affairs, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response* (2007) [2.20]-[2.24].
- ⁴¹³ *Marriage Amendment Act 2004* (Cth), amending the *Marriage Act 1961* (Cth).
- ⁴¹⁴ see CCL, 'Australian Parliament Bans Same-Sex Marriage', <<http://www.nswccl.org.au/issues/glbtphp#marriage>>.
- ⁴¹⁵ ABC News Online, 'ALP policy dictates civil union laws: McClelland' (30 May 2008), <<http://www.abc.net.au/news/stories/2008/05/30/2260106.htm>>.
- ⁴¹⁶ while it is noted that the UN Human Rights Committee has examined this issue with respect to Article 23 (*Joslin v New Zealand* (2002) UN Doc CCPR/C/75/D/902/1999), it is noted that the Committee has not been asked to consider this issue with respect to Article 26 equality. It is submitted that the Committee's decision could be different if the issue was addressed in article 26 terms. This is particularly so where Australia provides alternative to marriage for same-sex couples.
- ⁴¹⁷ the process of 'accession' involves the simultaneous signing and ratification of a treaty.
- ⁴¹⁸ see NSWCCCL, *Background Paper: Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* (2008, 3rd ed) BP 2005/4, [46], <<http://www.nswccl.org.au/docs/pdf/bp4%202005%20op%20paper.pdf>>.
- ⁴¹⁹ FoxNews, "John Howard, Australian Prime Minister", *Your World with Neil Cavuto*, 6 March 2003, <<http://www.foxnews.com/story/0,2933,80534,00.html>>.
- ⁴²⁰ Ross Peake, "PM – bin Laden's death welcome", *Canberra Times* (Canberra), 8 March 2003.
- ⁴²¹ e.g. ATV Channel 7, "Interview with John Howard (Part 2)", *Sunday Sunrise*, 16 February 2003, <http://seven.com.au/sundaysunrise/politics_030216_two>.
- ⁴²² Samantha Maiden, "Against death penalty, but 'no plea for Bali bombers'" (11 August 2008) *The Australian* (Sydney) <<http://www.theaustralian.news.com.au/story/0,25197,24158945-5013871,00.html>>.
- ⁴²³ Roger Martin, "States back death penalty", *The Australian* (Sydney), 12 August 2003, 6 (support from premiers of Victoria & Queensland; and opposition leaders of WA, SA, Victoria, Queensland, NSW, Tasmania and NT).
- ⁴²⁴ *Mutual Assistance in Criminal Matters Act 1987* (Cth) s.8(1A).
- ⁴²⁵ Joint Standing Committee on Treaties, *Hansard* (19/6/2006) 34 (evidence of Joanne Blackburn, First Assistant Secretary): '...where the information to be provided goes to the impact of a crime on the victims'. See also: NSW Council for Civil Liberties, *Shadow Report for CAT* (2007), n 138, [85].
- ⁴²⁶ see: NSWCCCL, *Australia and the Death Penalty: A guide to confidential government documents obtained under FOI* (2008) [40]-[47], <<http://www.nswccl.org.au/docs/pdf/dpfoi%20guide.pdf>>.
- ⁴²⁷ *McCrea v Minister for Customs & Justice* [2004] FCA 1273 (North J).
- ⁴²⁸ Confidential departmental submission to the Attorney-General, *Bali bombings – Australian involvement in criminal investigation and prosecution* (15 November 2002), [31].
- ⁴²⁹ *Mutual Assistance in Criminal Matters Act 1987* (Cth) s.8(1B).
- ⁴³⁰ *Extradition Act 1988* (Cth) s.22(3)(f). See also: *McCrea v Minister for Customs & Justice* [2004] FCA 1273, [22].
- ⁴³¹ see *Rush v Commissioner of Police* [2006] FCA 12.
- ⁴³² *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (Nov 2007).

⁴³³ Letter from Justice Minister Chris Ellison to AFP Commissioner Mick Keelty (20 February 2003). See: NSWCCCL, *Australia and the Death Penalty*, n 426, [31].

⁴³⁴ see [30].

⁴³⁵ *GT v Australia* (1997) UN Doc CCPR/C/61/D/706/1996; and *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998. See also: NSWCCCL, *Second Optional Protocol*, n 418, [29]-[35].

⁴³⁶ see [337].