



**Comments of the**

**HUMAN RIGHTS AND EQUAL OPPORTUNITY  
COMMISSION (HREOC)**

**on**

**AUSTRALIA'S COMPLIANCE WITH THE  
CONVENTION AGAINST TORTURE AND CRUEL,  
INHUMAN AND DEGRADING TREATMENT**

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## Introductory comments

1. The Human Rights and Equal Opportunity Commission (HREOC) is Australia's national human rights institution. HREOC provides this information to the United Nations Committee Against Torture (the Committee) in response to the Committee's request for information HREOC considers relevant to Australia's implementation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* (CAT).
2. HREOC understands that this information, along with information from other sources such as NGOs, will be used by the Committee to develop a list of issues concerning the implementation of CAT in Australia. The Australian Government delegation to the 39<sup>th</sup> session of the Committee (to be held from 5-23 November 2007) will be asked to address this list of issues.
3. HREOC understands that during this session the Committee will also consider the third period report of Australia concerning the implementation of CAT. While the third periodic report addresses the period from 1997-2004, HREOC understands the Committee will consider issues that have arisen since the Australian Government submitted the third Report.

## HREOC's role in monitoring compliance with the CAT

4. Under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act), HREOC has statutory functions and responsibilities for the protection and promotion of human rights. Among other functions, HREOC can:
  - Examine whether enactments are inconsistent with human rights (s11(1)(e));
  - Inquire into acts and practices that may be inconsistent with or contrary to human rights in Australia (s11(1)(f); and
  - Promote an understanding, acceptance and public discussion of human rights in Australia (s11(1)(g).
5. Under these functions HREOC can conduct inquiries into human rights issues such as 2004 National Inquiry into Children in Immigration Detention.
6. Under section 11(1)(f) of the HREOC Act, the President of HREOC can inquire into and attempt to conciliate complaints that concern alleged breaches of 'human rights' by, or on behalf of, the Commonwealth Government of Australia. HREOC does not have the jurisdiction to inquire into acts by or on behalf of state governments who are responsible for the administration of prisons in Australia. However, HREOC can inquire into the treatment of federal prisoners held in state prisons. If the investigation of a complaint discloses a breach of 'human rights', the President must report these findings to the Commonwealth Attorney-General for tabling in the Commonwealth

Parliament. The President's recommendations for remedies are not enforceable.

7. The term 'human rights' is defined in the HREOC Act as rights and freedoms contained in the international instruments scheduled to or declared under the HREOC Act. These instruments are:
  - (a) the *International Covenant on Civil and Political Rights* (ICCPR);
  - (b) the *Declaration on the Rights of the Child*;
  - (c) the *Declaration on the Rights of Mentally Retarded Persons*;
  - (d) the *Declaration on the Rights of Disabled Persons*;
  - (e) the *Convention on the Rights of the Child* (CRC); and
  - (f) the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief*.
8. The CAT is not scheduled to the HREOC Act. This means that, although Australia has ratified that instrument, HREOC has no direct jurisdiction to ensure the protection and promotion of the rights under CAT. However, Article 7 of the ICCPR and Article 37(a) of the CRC proscribe torture and cruel, inhuman and degrading treatment (which is the subject of article 16(1) of CAT). Therefore HREOC has the authority to examine the acts and practices of the Commonwealth (and its agents) in relation to the prohibition of torture, cruel, inhuman and degrading treatment pursuant to the ICCPR and CRC, but not pursuant to CAT.
9. Article 10(1) of the ICCPR and article 37(c) of the CRC impose positive obligations towards persons who are deprived of their liberty. These articles complement the proscriptions on torture or other cruel, inhuman or degrading treatment or punishment contained in Article 7 of the ICCPR and Article 37(a) of the CRC.<sup>1</sup> Similar concerns are reflected in articles 10 and 11 of CAT and in the Optional Protocol to the CAT (the Optional Protocol).
10. HREOC has made twelve findings of a breach of one or both of articles 7 and 10 of the ICCPR or article 37(a) of the CRC. These reports are listed in Appendix A. Most of these findings relate to treatment and conditions in immigration detention.
11. The United Nations Human Rights Committee (UNHRC) has found that Australia has violated one or both of articles 7 and 10 of the ICCPR on three occasions. A summary of the decisions of UNHRC are set out in Appendix B.
12. In *Elmi v Australia*<sup>2</sup> the Committee found that the expulsion of Mr Elmi, a Somali nation who sought asylum in Australia, would constitute a violation of article 3 of CAT. Following the Committee's finding, the Minister of

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1 Human Rights Committee, General Comment 21, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994).

2 Committee Against Torture, Communication No 120/1998, Un Doc. CAT/C/22/D/120/1998.

Immigration and Multicultural Affairs exercised his discretion to allow Mr Elmi to make a subsequent application for a protection visa. The Minister's delegate rejected the application; a decision which was upheld by the Refugee Review Tribunal. Mr Elmi left Australia in 2001.

### ***Issue 1: the implementation of the Optional Protocol***

13. In 2004, HREOC made submissions to the Joint Standing Committee on Treaties' Inquiry into the Optional Protocol to the CAT. HREOC's submission's supported the Optional Protocol's objective to:
  - ...establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel inhuman and degrading treatment or punishment.
14. HREOC submitted that the ratifying the Optional Protocol would help ensure Australia's compliance with CAT and the related provisions of the ICCPR and the CRC. The Optional Protocol would help overcome shortcomings in the existing protection scheme, including:
  - (a) That HREOC can not investigate complaints of a breach of a person's human rights under CAT;
  - (b) That HREOC's complaint handling function does not cover most acts or practices that occur in state or territory prisons;
  - (c) That HREOC's complaints handling function is reactive rather than preventative because it deals with individual complaints which occur after the breach;
  - (d) That HREOC has no power to compel entry into places of detention.<sup>3</sup>
- The Joint Standing Committee on Treaties recommended against the Australian Government taking binding treaty action at that time.<sup>4</sup> To date, the Australian Government has not signed the Optional Protocol.

### ***Issue 2: conditions in immigration detention***

15. In 2004 HREOC published *A last resort? The Report of the National Inquiry into Children in Immigration Detention*. The report considered whether the practice of detaining children asylum seekers contravened Article 37(a).<sup>5</sup> HREOC found a breach of Article 37 (a) for the following reasons:

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<sup>3</sup> HREOC, Submission to the Joint Standing Committee on Treaties' Inquiry into the Optional Protocol to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, available at <http://www.hreoc.gov.au/legal/submissions/jscot.html>.

<sup>4</sup> Joint Standing Committee on Treaties, *Report 58: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, March 2004, Canberra.

<sup>5</sup> Article 37(a) of the CRC provides that '[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Children in immigration detention for long periods of time are at high risk of serious mental harm. The Commonwealth'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, inhumane and degrading treatment of those children in detention.<sup>6</sup>

16. HREOC acknowledges the improvements to Australia's immigration detention laws which were made in 2005. In particular, HREOC commends the government for amendments incorporating the principle that children be detained in immigration detention centres as a measure of last resort.
17. HREOC periodically inspects conditions in immigration detention centres. HREOC acknowledges the improvements to conditions in immigration detention centres since the *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* by Mick Palmer AO in July 2005. However, HREOC continues to receive some complaints from detainees in immigration detention centre.
18. The Commonwealth Ombudsman has also published a number of reports critical of immigration detention practices since 2005. The report of HREOC's 2006 visits to immigration detention centres, including recommendations for improvements, is available at:  
[http://www.humanrights.gov.au/human\\_rights/asylum\\_seekers/inspection\\_of\\_mainland\\_idf.html](http://www.humanrights.gov.au/human_rights/asylum_seekers/inspection_of_mainland_idf.html)

### **Issue 3: condition in prisons**

19. In 2001 the Committee recommended that Australia 'continue its efforts to reduce overcrowding in prisons' and expressed concern about:
  - (a) The use by prison authorities of instruments of physical restraint that may cause unnecessary pain and humiliation;
  - (b) Allegations of excessive use of force or degrading treatment by police forces or prison guards;
  - (c) Allegations of intimidation and adverse consequences faced by inmates who complain about their treatment in prisons.<sup>7</sup>

### **Monitoring prison conditions**

20. HREOC can not provide commentary on the experiences of prisoners because there is no regular program of prison visits by HREOC. HREOC has no power to compel entry to prisons and no jurisdiction to receive complaints from state prisoners about breaches of human rights under the ICCPR or the CRC.

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<sup>6</sup> See [http://www.humanrights.gov.au/human\\_rights/children\\_detention/index.html](http://www.humanrights.gov.au/human_rights/children_detention/index.html)

<sup>7</sup> *Concluding Observations of the Committee Against Torture: Australia*, 25<sup>th</sup> session, 13-24 November 2000, CAT A/56/44/2001.

21. While HREOC does not have the resources or the jurisdiction to investigate whether conditions in state prisons comply with CAT (in particular, the prohibition on cruel, inhuman and degrading treatment), HREOC is concerned about human rights conditions in Australian prisons. In expressing these concerns, HREOC emphasizes the importance of preventative actions to reduce the risk of people in detention being subjected to cruel, inhuman or degrading treatment.
22. In particular, HREOC is concerned about the protection of the rights of the mentally ill in Australian prisons.<sup>8</sup> HREOC notes with concern a 2006 report by the *Anti-Discrimination Commission Queensland* found:
  - (a) many women with mental illness are inappropriately detained in prison while their mental health needs are left unintended; and
  - (b) Indigenous women are especially at risk of discrimination in prison.<sup>9</sup>

### **Case Study: the death of Scott Simpson**

23. Mr Simpson hanged himself at the Long Bay Correctional Centre, Malabar, New South Wales on 7 June 2004. He had paranoid schizophrenia.
24. HREOC intervened in the Coroner's inquest into Mr Simpson's death. HREOC made submissions that the treatment of Mr Simpson during his incarceration was inconsistent with both article 7 and article 10(1) of the ICCPR in the following respects:
  - (a) the prolonged detention of Mr Simpson in segregated custody, particularly in light of his serious mental illness;
  - (b) the failure to transfer Mr Simpson to 'D ward', contrary to the recommendations of numerous psychiatrists that Mr Simpson required hospital treatment; and
  - (c) the failure to provide adequate medical care, including psychiatric care, to Mr Simpson while he remained in the correctional environment.<sup>10</sup>
25. The Coroner found that:
  - (a) Mr Simpson was not provided with adequate medical treatment during his incarceration;
  - (b) the time Mr Simpson spent in segregation lead inevitably to a deterioration of his mental state until the crisis point was reached on 7 June 2004;

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<sup>8</sup> *Not for Service, Experiences of injustice and despair in Mental Health Care in Australia: a report of the consultations by the Mental Health Council of Australia and the Brain Institute in association with the Human Rights and Equal Opportunity Commission*, 2005, available at <http://www.mhca.org.au/notforservice/>.

<sup>9</sup> For a full list of the report's findings see: *Anti-Discrimination Commission Queensland, Women in Prison: a report by the Anti-Discrimination Commission Queensland*, 2006.

<sup>10</sup> HREOC, Submission to the Coroner's Inquest into the Death of Scott Simpson, available at <http://www.humanrights.gov.au/legal/intervention/simpson.html>.

- (c) more could have been done to secure a hospital bed for Mr Simpson, but wasn't;
- (d) Justice Health administrators were reluctant to admit Mr Simpson to D ward, whether unconvinced of the clinical urgency or because of security considerations or a combination of both.

## **Mandatory minimum sentencing**

- 26. In 2001 the Committee recommended that Australia ‘...keep under careful review legislation imposing mandatory minimum sentences, to ensure that it does not raise questions of compliance with its international obligations under the Convention and other relevant instruments, particularly with regard to the possible adverse effect upon disadvantaged groups’.
- 27. HREOC notes that although the Northern Territory (NT) Parliament made changes to the ‘mandatory sentencing’ laws for property offences effective from 22 October 2001, the *Sentencing Act 1995* (NT) still contains forms of mandatory sentencing in cases involving offences of violence.<sup>11</sup>
- 28. Mandatory sentencing laws are still in place in Western Australia (WA).<sup>12</sup> Like the NT provisions, the WA laws have resulted in situations of injustice, with individuals receiving sentences that are disproportionate to the circumstances of their offending.<sup>13</sup>

## **Disproportionate incarceration of Indigenous Australians**

- 29. In 2001 the Committee recommended that Australia ‘address the socio-economic disadvantage that, inter alia, leads to a disproportionate number of indigenous Australians coming into contact with the contact with the criminal justice system’.<sup>14</sup>
- 30. HREOC notes that Indigenous Australians are still incarcerated at a disproportionate rate when compared to non-Indigenous Australians. The Australian Bureau of Statistics report, *Prisoners in Australia 2006*, states that Indigenous prisoners represented 24% of the total prisoner population at 30 June 2006, the highest proportion at 30 June since 1996.
- 31. One of the clear messages of Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was that a reduction in the unacceptable rate at which Aboriginal people were dying in custody required a reduction in the rates of arrest, detention and imprisonment of Aboriginal people. Many of the 339 recommendations contained in the RCIADIC are yet to be implemented.

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11 *Sentencing Act 1995* (NT) s 78BA; s 78BB .

12 *Criminal Code* (WA), s282.

13 HREOC, Submission to the UNHRC, available at

[http://www.hreoc.gov.au/pdf/social\\_justice/submissions\\_un\\_hr\\_committee/5\\_mandatory\\_sentencing.pdf](http://www.hreoc.gov.au/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf).

14 *Concluding Observations of the Committee Against Torture: Australia*, 25<sup>th</sup> session, 13-24 November 2000, CAT A/56/44/2001.



## Case study: Mulrunji's Death

32. The death of a man living on Palm Island in Northern Queensland, in a police cell on 19 November 2004, highlighted many systemic problems with policing in Aboriginal communities which could have been avoided by implementation of the recommendations of RCIADIC. An inquest into the death of Mulrunji was conducted by the Queensland Deputy State Coroner in 2006.
33. Mulrunji was arrested for disorderly behaviour as he walked along a street on Palm Island after he said certain words to a police officer and a Police Liaison Officer. Upon being removed from the police wagon at the police station, Mulrunji struck the arresting officer, Senior Sergeant Hurley, and a scuffle ensued which resulted in the two men falling to the floor of the police station.
34. The Deputy State Coroner found that Senior Sergeant Hurley hit Mulrunji while he was on the floor. This broke four of Mulrunji's ribs and caused his liver to rupture. The bleeding from this injury resulted in his death.
35. HREOC intervened in the Coroner's inquest. HREOC's submissions included 40 suggested recommendations aimed at protecting human rights and preventing future deaths<sup>15</sup> all of which were adopted by the Coroner.
36. Despite the Coroner's findings, the Queensland Director of Public Prosecutions recommended that no charges be laid against Senior Sergeant Hurley. A subsequent independent report by former New South Wales Chief Justice Sir Lawrence Street found that there was sufficient evidence to charge Senior Sergeant Hurley. Senior Sergeant Hurley has now been formally charged with manslaughter.

## Issue 4: refoulement and extradition

### Complementary protection

37. In 2001 the Committee recommended that Australia consider the 'desirability of providing a mechanism for independent review of ministerial decisions in respect of cases coming under article 3 of CAT'.<sup>16</sup> There is currently no such review mechanism in Australia.
38. In 2004, HREOC made a submission to the 2004 Senate Select Committee on Ministerial Discretion in Migration. HREOC's submission stated:
  - (a) the exercise of ministerial discretion (under s 417 of the *Migration Act 1958* (Cth)) provides inadequate protection against non-refoulement of

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<sup>15</sup> HREOC, Submission to the Coroner's Inquest into the Death of Mulrunji, available at: <http://www.humanrights.gov.au/legal/intervention/mulrunji.html>. The Coroner's decision can be found at <http://www.justice.qld.gov.au/courts/coroner/findings/mulrunji270906.doc>.

<sup>16</sup> *Concluding Observations of the Committee Against Torture: Australia*, 25<sup>th</sup> session, 13-24 November 2000, CAT A/56/44/2001.

asylum seekers who may be eligible for protection under CAT, the ICCPR, or the CRC.

- (b) the s 417 ministerial discretion is non-compellable, non-reviewable and lacks the basic features of accountable and transparent decision making.<sup>17</sup>
- (c) a specific ‘complementary protection’ visa class must be introduced to ensure Australia complies with its non-refoulement obligations under the CAT, the ICCPR and the CRC. The decision to grant or decline the visa application should be:
  - based on the application of clear criteria; and
  - subject to independent merits review and judicial review.

39. The report of the 2004 Senate Select Committee on Ministerial Discretion in Migration recommended:

the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR.<sup>18</sup>

## **Procedural safeguards**

- 40. HREOC notes that litigants in immigration matters are more likely than other litigants to be unfamiliar with the Australian legal system and speak English as a second language. They may also have a history of torture and/or trauma which may significantly impair their ability to manage their legal affairs.
- 41. HREOC is concerned that the imposition of onerous procedural requirements may place migration litigants at a particular disadvantage. The consequences of such disadvantage are potentially very serious. The failure of a person's application for protection for procedural, rather than substantive, inadequacies may expose them to 'refoulement' (returning a person to a country where they face persecution) and so breach their human rights
- 42. This is why HREOC has consistently emphasised the need to have proper procedural safeguards in immigration matters to ensure Australia's non-refoulement obligations under the Refugee Convention and the CAT, the ICCPR and the CRC are fulfilled. Recent submissions on this subject include:

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17 For further information see HREOC, submission to the 2004 Senate Select Committee on Ministerial Discretion in Migration, available at:

[http://www.humanrights.gov.au/human\\_rights/migration\\_matters.html](http://www.humanrights.gov.au/human_rights/migration_matters.html)

18 *Report of Senate Select Committee on Ministerial Discretion in Migration*, 2004, [8.82]. HREOC notes that an earlier report in 2000 by the Senate Legal and Constitutional References Committee recommended that the Attorney-General's Department, in conjunction with the then Department of Immigration and Multicultural Affairs (DIMA), consider amending Australia's laws to explicitly incorporate the non-refoulement obligations of CAT and the CRC into domestic law.

- (a) In 2007 HREOC made a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry on the *Migration Amendment (Review Provisions) Bill 2006*. HREOC expressed concern that the Bill creates an unfair process for determining refugee and migration cases. This may lead to incorrect decisions and increase the risk of refoulement.<sup>19</sup>
- (b) In April 2004, HREOC made a submission to the Senate Legal and Constitutional Legislation Committee in relation to a proposed amendment to the *Migration Act 1958 (Cth)*. HREOC expressed concern that certain of the proposed amendments would weaken the protections under Australian law to prevent refoulement in potential breach of Article 3 of the CAT.<sup>20</sup>

### **Asylum seekers returned to their country or origin**

- 43. HREOC believes there is insufficient monitoring of the fate of asylum seekers who are refused refugee status and returned to their country of origin. HREOC notes with concern the recent report of the Edmund Rice Centre for Justice & Community Education which reported deported asylum seekers were in serious danger as a result of being denied protection in Australia.<sup>21</sup>

### **Extradition**

- 44. HREOC's submissions to the Attorney-General's Department's review of Australia's extradition and mutual assistance arrangements, recommends that these arrangements contain stronger safeguards to against the risk of torture and inhuman and degrading treatment.<sup>22</sup>

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19 HREOC, Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry on the *Migration Amendment (Review Provisions) Bill 2006*, available at [http://www.humanrights.gov.au/legal/submissions/migration\\_amendment\\_bill\\_06.htm](http://www.humanrights.gov.au/legal/submissions/migration_amendment_bill_06.htm). While the Report of the Senate Legal and Constitutional Affairs Committee did not adopt HREOC's recommendation that the Bill should not be passed. However, the Committee did however acknowledge that the Bill's proposal to only provide adverse information to applicants in refugee and migration cases verbally created an unacceptable risk of unfairness. The Committee adopted HREOC's suggestion (made in oral submissions at the Inquiry), that applicants should be able to elect whether to have adverse information provided orally or in writing. See further: Report of the Standing Committee on Legal and Constitutional Affairs, *Migration Amendment (Review Provisions) Bill 2006*, February 2007 available at

[http://www.aph.gov.au/senate/committee/legcon\\_ctte/mig\\_review\\_provisions/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/mig_review_provisions/report/report.pdf)

20 HREOC, Submission to the Senate Legal and Constitutional Committee on the Migration Amendment (Judicial Review) Bill 2004 available at

[http://www.hreoc.gov.au/legal/submissions/migration\\_amendment.html](http://www.hreoc.gov.au/legal/submissions/migration_amendment.html). See also Legal and Constitutional Committee, Australian Senate, *Provisions of the Migration Amendment (Judicial Review) Bill 2004* (June 2004). The Committee Report did not adopt HREOC's recommendations.

21 Edmund Rice Centre for Justice & Community Education, *No Liability – Tragic Results from Australia's Deportations: Interim Report* (2006)

[http://www.erc.org.au/index.php?module=documents&JAS\\_DocumentManager\\_op=downloadFile&JAS\\_File\\_id=2](http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=2) at 21 February 2007.

22 See HREOC's submission in response to the Attorney General's Department (AGD) Discussion Paper: *A new extradition system – a review of Australia's extradition law and practice* (<http://www.humanrights.gov.au/legal/submissions/extradition200604.html>) and submission in

45. Currently under the *Mutual Assistance in Criminal Matters Act 1987*(Cth) and the *Extradition Act 1988* (Cth) it is not mandatory to refuse a request for extradition or mutual assistance in circumstances where there are substantial grounds for believing granting the request may result a breach of a person's rights under CAT.

***Issue 5: the prohibition on the use of evidence obtained by torture and cruel inhuman and degrading treatment.***

46. *The Law and Justice Legislation Amendment (Video Evidence and Other Measures) Act 2005* (the Act) adds part 1AE to the *Crimes Act 1914* (Cth). Part 1AE sets up a new regime for the taking of video evidence in criminal proceedings for federal terrorism offences and related offences and proceedings under the *Proceeds of Crime Act 2002* (Cth).<sup>23</sup>
47. It is now notorious that some states have tortured people who have been detained in connection with actual or suspected terrorist activities.<sup>24</sup> This is of concern in the context of the Act, because the Act provides for the witness to be giving evidence at locations outside the control of any Australian government.
48. Under Article 15 of CAT, Australia must make sure that any statement found to have been made as a result of torture is not invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. Article 7 of the ICCPR also prohibits the use of evidence obtained by torture or cruel, inhuman and degrading treatment
49. In *PE v France*,<sup>25</sup> the Committee held that article 15 requires State parties to 'ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.' The Committee indicated that this obligation applies to evidence obtained from witnesses in other states.
50. However, the Act raises the issue of how the court can determine whether any such treatment has taken place where the witness is located outside Australia. The Act tries to deal with this by giving the court the discretion (under s15YW) to make the giving of video evidence conditional on a specified

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response to the Attorney General's Department (AGD) Discussion Paper: *A better mutual assistance system – a review of the Australia's mutual assistance law and practice*

[http://www.humanrights.gov.au/legal/submissions/mutual\\_assistance\\_review.html](http://www.humanrights.gov.au/legal/submissions/mutual_assistance_review.html)

23 The Law and Justice Legislation Amendment (Video Evidence and Other Measures) Act also amends the Foreign Evidence Act. See HREOC, submission to the Senate Legal and Constitutional Committee Inquiry into the *Law and Justice Legislation Amendment (Video Evidence and Other measures) Bill 2005*, available at

[http://www.hreoc.gov.au/legal/submissions/video\\_evidence\\_and\\_other\\_measures.html](http://www.hreoc.gov.au/legal/submissions/video_evidence_and_other_measures.html) .

24 See discussion in Dr Ben Saul, *Torture Degrades Us All*, International Day in Support of Victims of Torture, Amnesty International & the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors Powerhouse Museum, Sydney, 26 June 2005, See also generally A & Ors v Secretary of State for the Home Department [2004] EWCA Civ 1123.

25 Committee Against Torture, Communication No 193/2001, UN Doc CAT/C/29/D/193/2001.

observer being present while the evidence is being given (the observer provision). However, HREOC is still concerned that:

- Section 15YW does not specify the matters a court must take into account in deciding whether to make the presence of an observer a condition of receiving video evidence, making a decision not exercise the discretion hard to challenge.
- the observer provisions do not facilitate scrutiny of the treatment of the witness away from the location where evidence is being given.

51. HREOC believes in circumstances where it is not possible to determine how the evidence was obtained, the evidence should not be received. Australia is otherwise putting itself in a position where it cannot meet its obligations under article 7 of the ICCPR and article 15 of CAT.

### ***Issue 6: medical and psychological rehabilitation for victims of torture or other cruel, inhuman or degrading treatment or punishment***

#### **Rehabilitation for Trafficking Victims**

52. In October 2003, the Australian Government launched the Commonwealth Action Plan to Eradicate Trafficking in Persons (the Action Plan). The Action Plan introduced, among other initiatives, a new visa framework for potential trafficking victims willing and able to assist in police investigations, and a victim support program. The Action Plan also heralded the introduction of new federal offences to ‘comprehensively criminalise trafficking’.
53. While these initiatives are commendable, HREOC is concerned that the primary criteria for the granting of visas to suspected trafficking victims is that the victim is a person of interest in relation to an offence or an alleged offence involving people trafficking, sexual servitude or deceptive recruiting.
54. Restricting access to recovery and support programs to those women who undertake to assist the investigation or prosecution of trafficking offences and to those women whose evidence is considered to be of value, means that many victims of trafficking are not eligible for victim support despite suffering significant human rights abuses, including cruel, inhuman and degrading treatment and, in some cases, torture. From a human rights perspective, access to these programs should be on the basis of need.<sup>26</sup>

#### **Rehabilitation for Refugees**

53. Some refugees or people who have entered Australia on humanitarian grounds are the victims of torture and trauma. There are a range of state based specialised services to assist survivors of torture and other human

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<sup>26</sup>HREOC, submission to Senate Legal and Constitutional Committee Inquiry into Inquiry into the *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004*, available at [http://www.hreoc.gov.au/legal/submissions/criminal\\_code\\_trafficking\\_bill.html](http://www.hreoc.gov.au/legal/submissions/criminal_code_trafficking_bill.html)

rights abuse. HREOC does not monitor the operation of these services and notes the Committee may wish to seek further information about the operation of these services from other sources.

## Appendix A – Relevant HREOCA Reports

1. Report No. 10: Report of an inquiry into a complaint of acts or practices inconsistent with or contrary to human rights in an immigration Detention centre (breach of ICCPR, Article 10(1); no breach of ICCPR, Article 7);
2. Report No. 12: Report of an inquiry into a complaint of acts or practices inconsistent with or contrary to human rights in an immigration detention centre (breach of ICCPR, Articles 9(1) and 10(1));
3. Report No.18: report of an inquiry into a complaint by Mr Duc Anh Ha of acts or practices inconsistent with or contrary to human rights arising from immigration detention (breach of ICCPR, Articles 9(1) and 10(1));
4. Report No.21: Report of an inquiry into a complaint by six asylum seekers concerning their transfer from immigration detention centres to state prisons and their detention in those prisons (breach of ICCPR, Articles 9(1) and 10(1));
5. Report No. 23: Report of an inquiry into a complaint by Mr Hassan Ghomwari concerning his immigration detention and the adequacy of the medical treatment he received while detained (breach of ICCPR, Articles 10(1) and 10(2)(a));
6. Report No. 24: Report of an inquiry into complaints by five asylum seekers concerning their detention in the separation and management block at the Port Hedland Immigration Reception and Processing Centre (breach of ICCPR, Articles 9(1) and 10(1));
7. Report No. 25: Report of an inquiry into a complaint by Mr Mohammed Badraie on behalf of his son Shayan regarding acts or practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs) (breach of CRC, Articles 3(1), 9(1), 19(1), 37(b) and 37(c));
8. Report No. 27: Report of an inquiry into a complaint by Ms KJ concerning events at Woomera Immigration Reception and Processing Centre between 29-30 March 2002 (breach of ICCPR, Articles 7 and 10(1); and CRC, Articles 37(a) and 37(c));
9. Report No. 28: Report of an inquiry into complaints by immigration detainees concerning their detention at the Curtin Immigration Reception and Processing Centre (breach of ICCPR, Article 10(1));
10. Report no.31. Report of an inquiry into a complaint by Mr Zacharias Manongga Consul for the Northern Territory, Consul of the Republic of Indonesia that the human rights of Indonesian Fishers detained on vessels in Darwin Harbour were breached by the Commonwealth of Australia (breach of ICCPR, Article 10(1));

11. Report no. 35. Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention (breach of ICCPR, Article 10(1), Article 7);
12. Report no. 36. Breach of Ms CD's human rights at the Curtin Immigration Reception and Processing Centre (breach of ICCPR, Article 10(1))

These reports can all be located at

[http://www.hreoc.gov.au/human\\_rights/human\\_rights\\_reports/hrc\\_report\\_35.html](http://www.hreoc.gov.au/human_rights/human_rights_reports/hrc_report_35.html)

## **Appendix B – Relevant United Nations Human Rights Committee Decisions**

### **1. *Brough v Australia, UN Doc CCPR/C/86/D/1184/2003, (2006)***

In 1999 the author of the communication, Corey Brough, an Aboriginal youth with a mild mental disability, was transferred from a juvenile detention centre to the Parklea Adult Correctional Centre. At Parklea, the author was segregated from the other inmates and held in a 'safe cell' in a segregation area. The author experienced difficulty coping with the long periods of being locked in the safe cell and began to self harm. On 7 April 1999 the author was allegedly stripped to his underwear and confined to a dry cell for 72 hours, with lights on day and night. On 15 April 1999 the author was confined to his cell for 48 hours. The author also alleged he was administered an anti-psychotic medication without his consent.

The author claimed that the conditions of his segregation and confinement were in violation of article 7 and article 10(1) of the ICCPR. The author also claimed his transfer to an adult institution violated Art 10(3). The UNHRC held that the author's treatment violated Art 10(1), 10(3) and Art 24(1) of the ICCPR. The UNHRC rejected the author's claims that the non-consensual administration of anti-psychotic medication was a breach of article 7, noting that the medication was prescribed following medical advice with the intention to control the author's self-destructive behaviour.

### **2. *Madaffrei v Australia, UN Doc CCPR/C/81/D/1011/2001, (2004)***

Mr Madafferi, an Italian tourist in Australia, overstayed his visa, which expired in April 1990. This made him an unlawful non-citizen. In August 1990, he met and married an Australian citizen. By 1996 they had four children. Mr Madafferi's application for permanent residency as the spouse of an Australian citizen was rejected on character grounds (his residency application disclosed he had been in prison in Italy and that the Italian government had cancelled an outstanding warrant for his arrest).

While he appealed this decision, Mr Madafferi was sent to an immigration detention centre where his mental health deteriorated. At the request of the United Nations, Mr Madafferi was transferred to home detention. When Mr Madafferi's court appeals failed, he was taken back to the immigration detention centre. Three months later he was committed to a psychiatric hospital.



The UNHCR found that the decision to send Mr Madafferi to the detention centre the second time, when it was known Mr Madafferi had mental health problems, violated article 10(1). The Australian Government rejected the findings of the Human Rights Committee.

**3. *Cabal and Pasini v Australia, U.N. Doc. CCPR/C/78/D/1020/2001, (2003)***

The authors were detained in a high security unit of Port Philip Prison, Victoria awaiting extradition to Mexico. In addition to an unsuccessful claim of a breach of article 10(2)(a) the authors, claimed violations of articles 7 and 10(1) for the treatment received including shackling, being stripped and subjected to cavity searches and being placed in a holding cell referred to as a 'cage'. The UNHCR found a violation of article 10(1), with respect to the authors' detention for one hour in the triangular 'cage' but found that Australia had sufficiently provided explanations of the authors' flight risk to warrant the other treatment.