



COPY

Our Ref: MT:ssh:1291035

20 April 2009

The Hon. Robert McClelland MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney,

**Re: Australia's Obligations under the Convention Against Torture**

I am writing to you on behalf of the Law Society's Human Rights Committee ("Committee") in regards to several recent reports containing allegations concerning certain acts committed in overseas jurisdictions by Australian nationals against other Australians.

These reports call into question the fulfilment by Australia of its international obligations arising under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

I enclose a copy of the Committee's submission for your information. The submission outlines the source and nature of the Committee's concerns, identifies specific features of the relevant legislative framework warranting amendment, and suggests several practical and feasible courses of action amenable to immediate adoption and intended to affirm Australia's obligations under the Convention.

The Committee believes that if action is not seen to be taken, Australia's reputation as an international citizen will continue to corrode. Australia will be derided by an increasing proliferation of international bodies for having violated its international human rights obligations, its law enforcement and intelligence personnel could be prosecuted in a well-publicised fashion by the International Criminal Court and the incumbent government will appear to have tolerated the failings of its predecessor.

The Committee would appreciate any updated information on the issues raised and urges sincere consideration of the enclosed proposals.

Yours sincerely

**Michael Tidball**  
Chief Executive Officer





The Law Society  
of New South Wales

170 Phillip Street  
Sydney NSW 2000  
DX 362 Sydney  
Tel (02) 9926 0333  
Fax (02) 9231 5809  
[www.lawsociety.com.au](http://www.lawsociety.com.au)

ACN 000 000 699

# **AUSTRALIA'S OBLIGATIONS UNDER THE CONVENTION AGAINST TORTURE**

**HUMAN RIGHTS COMMITTEE**

Contact: Sarah Sherborne-Higgins  
Executive Officer  
Human Rights Committee  
Phone: 02 9926 0354 or Email: [ssh@lawsocnsw.asn.au](mailto:ssh@lawsocnsw.asn.au)

## Introduction

1. The Committee acknowledges that Australia has been a Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for nearly two decades.<sup>1</sup> It also appreciates at the outset that 'Australia takes its obligations under the Convention seriously and continues to progressively implement, monitor and enforce mechanisms to proscribe and prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in all Australian jurisdictions. Australia strongly supports international action against torture and deplores such behaviour wherever and whenever it occurs.'<sup>2</sup>
2. The Committee is accordingly concerned by allegations from several Australian nationals in respect of certain conduct committed against them, including by Australian law enforcement and intelligence personnel, in overseas jurisdictions. This is in addition to longstanding concerns that an Australian has alleged ill-treatment during solitary confinement in Guantanamo Bay.<sup>3</sup> More particularly, an Australian has asserted that, during his detention in Pakistan during 2001 and Guantanamo Bay in 2002, he informed the Australian Federal Police and the Australian Security Intelligence Organisation that he had been kidnapped and tortured and that such claims were not investigated.<sup>4</sup> In relation to a third Australian citizen, involuntary admissions made to Australian law enforcement and intelligence personnel in circumstances involving indefinite detention, inducements and threats have been declared inadmissible, although the Committee notes that the specific question of torture or cruel, inhuman or degrading treatment did not arise for determination.<sup>5</sup>
3. The Committee is also concerned that these matters are being reported with increasing frequency and prominence within international fora. Most recently, the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights of the International Commission of Jurists 'heard allegations that intelligence personnel from Australia, UK and the US interviewed detainees held in secret detention by the Pakistani ISI [Intelligence Services], and that some countries sent intelligence personnel to interview detainees who were held in US custody in Guantánamo Bay'.<sup>6</sup> Indeed, one United Nations (UN) Special Rapporteur has gone so far as to conclude that the '[e]vidence proves that Australian, British and United States intelligence personnel have themselves interviewed detainees who were held incommunicado by the Pakistani ISI in so-called safe houses, where they were being tortured'.<sup>7</sup> The Committee notes that relevant proceedings remain on foot and that the plaintiff has been found not to have met Australian officers at the Australian High Commission in

---

<sup>1</sup> 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1989] ATS 21, reproduced in *Crimes (Torture) Act 1988* (Cth), Sch. Australia ratified the Convention on 8 August 1989 and it came into force for Australia on 7 September 1989.

<sup>2</sup> Committee against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention: Australia, UN Doc CAT/C/67/Add.7 (2005), para 2.

<sup>3</sup> *R (Hicks) v Secretary of State for the Home Department* [2005] EWHC 2818 (High Court of Justice, Queen's Bench Division, Administrative Court), para 9.

<sup>4</sup> NSW Council for Civil Liberties, 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 International Covenant on Civil and Political Rights, 28 November 2008, paras 70, 71 and 84.

<sup>5</sup> *R v Thomas* [2006] VSCA 165, para 128.

<sup>6</sup> International Commission of Jurists, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Assessing Damage, Urging Action, Geneva, 2009, 82.

<sup>7</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc A/HRC/10/3 (2009), footnote 63.

Pakistan or at any other place under Commonwealth control as alleged.<sup>8</sup> Concerns have also been articulated in relation to the exercise of investigative and preventative detention by Australian law enforcement authorities within Australian jurisdiction.<sup>9</sup>

4. Following consideration of Australia's most recent report, the Committee against Torture, the UN body entrusted with monitoring compliance with and implementation of the Convention, expressed concern that:
  - Australia lacks an offence of torture at the Federal level notwithstanding an intention to enact under Commonwealth law a specific offence of torture having an extraterritorial application;
  - Australia 'might have failed to establish its jurisdiction in some cases where Australian nationals have been victims of acts of torture abroad';
  - there have been 'allegations against law enforcement personnel in respect of acts of torture and other cruel, inhuman or degrading treatment or punishment'.<sup>10</sup>
5. The Committee against Torture recommended that Australia should:
  - consider establishing jurisdiction over the offences referred to in Articles 4 and 5 of the Convention Against Torture;
  - ensure that all allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement officials are investigated promptly, independently and impartially and, if necessary, prosecuted and sanctioned.
6. These recommendations are premised upon the view that, where there is an immediate risk that an individual will be tortured or ill-treated and agents of a State Party are present but fail to prevent a violation of the Convention against Torture, then any violations are committed with the acquiescence of that State Party and constitute a violation of the Convention by that State.<sup>11</sup>
7. It has moreover been suggested that the active or passive participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture or other prohibited treatment, including arbitrary detention.<sup>12</sup> On that view, the mere presence of intelligence or law enforcement personnel during the interrogation of an individual whose rights are violated can be reasonably understood as implicitly condoning such practices and can in certain cases constitute a form of encouragement or support.
8. Whatever weight or status such opinions warrant, the Human Rights Committee considers that the views outlined above impugn the law enforcement and intelligence-gathering activities undertaken by Australia in overseas jurisdictions. The Committee acknowledges that Australian law enforcement and intelligence personnel can perform a legitimate and crucial role in protecting Australia's national interests both domestically and overseas.

---

<sup>8</sup> *Habib v Commonwealth of Australia* [2008] FCA 1494; *Habib v Commonwealth of Australia* [2008] FCA 489.

<sup>9</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Australia: Study on Human Rights Compliance while Countering Terrorism, UN Doc A/HRC/4/26/Add.3 (2006), paras 41-45.

<sup>10</sup> Committee against Torture, Concluding observations for Australia, UN Doc CAT/C/AUS/CO/3 (2008), paras 8, 19 and 27.

<sup>11</sup> UN Committee against Torture, *Dzemajl v Yugoslavia*, UN Doc CAT/C/29/D/161/2000 (2002), para 9.2.

<sup>12</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc A/HRC/10/3 (2009), para 54.

## Proposals for National Legal Reform

9. Australia has previously indicated that it has fully implemented its obligations under Article 5 of the Convention against Torture such that '[a]ny Australian national, including Australian Defence Force personnel and police officers, who commits an act of torture anywhere in the world can be prosecuted under Australian law.'<sup>13</sup> In relation to persons within their custody, the conduct of Australian Defence Force personnel or police officers stationed abroad are covered by one or more of the *Crimes (Torture) Act*, the *Crimes (Overseas) Act*, the *Defence Force Discipline Act* and the *Criminal Code Act*.
10. The Committee considers that this legislative framework constitutes an imperfect basis for proceeding against individuals where allegations of acts of torture or cruel, inhuman or degrading treatment or punishment have been raised. The Committee believes that legal reform is warranted in the circumstances and takes the opportunity to offer several constructive suggestions.
11. First, the *Crimes (Torture) Act 1988 (Cth)* criminalises the offence of torture far too narrowly, applies outside Australia in only a limited range of circumstances and does not prohibit other cruel, inhuman or degrading treatment or punishment consistent with the Convention. The Act is intended to give effect to 'certain provisions' of the Convention against Torture. However, the Committee notes that the definition of an 'act of torture' in s.3 of the Act does not precisely correspond with the definition of 'torture' under Article 1 of the Convention. Second, the Act is stated to have an extraterritorial operation 'according to its tenor', whatever that may be (s.4). However, the offence of torture for persons acting in an official capacity who commit such an act outside Australia requires that the act, 'if done by the person at that time in a part of Australia, would constitute an offence against the law then in force in that part of Australia' (s.6). Regard shall also be had to any defence available under that law (s.6(2)). Only Australian citizens or persons present in Australia may be prosecuted (s.7) provided that you as Attorney-General have consented in writing to proceedings under the Act (s.8). The Committee notes that Australia has indicated a willingness to consider enacting under Commonwealth law a specific offence of torture, as defined by Article 1 of the Convention, and intended to have extraterritorial application.<sup>14</sup>
12. Second, s.71.13 of the *Criminal Code Act 1995 (Cth)* defines 'torture' as 'the deliberate and systematic infliction of severe pain over a period of time'. Torture is identified in the *Code* as an offence in the context of a crime against humanity where a perpetrator inflicts severe physical or mental pain or suffering (which does not arise from, or is inherent or incidental to, lawful sanctions) upon a person in their custody or control when accompanied by intent or knowingly as part of a widespread or systematic attack directed against a civilian population (s.268.13). Torture is also identified as an offence in the context of a war crime where a perpetrator knowingly or recklessly inflicts severe physical or mental pain or suffering upon a protected person to obtain information or a confession, to punish, intimidate or coerce or for a discriminatory reason during an international armed conflict (s.268.25). Finally, torture is identified as an offence in the context of a war crime when committed against individuals (including civilians) not taking an active part in hostilities during a

---

<sup>13</sup> Committee against Torture, Consolidated Written Replies by the Government of Australia to the List of Issues to be taken up in connection with the consideration of the Fourth Periodic Report of Australia, Fortieth session, Geneva, 28 April – 16 May 2008, paras 366, 368 and 371.

<sup>14</sup> Committee against Torture, Consolidated Written Replies by the Government of Australia to the List of Issues to be taken up in connection with the consideration of the Fourth Periodic Report of Australia, Fortieth session, Geneva, 28 April – 16 May 2008, para 369A.

non-international armed conflict (s.268.73). 'Inhumane treatment' is defined as an offence in the context of a war crime where a perpetrator knowingly or recklessly inflicts severe physical or mental pain or suffering upon a protected person during an international armed conflict. (s.268.26). The *Criminal Code* also addresses 'complicity' in s.11.2 such that a person who in fact aids, abets, counsels or procures an offence by another person, with intent or recklessness as to the commission of that offence, is taken to have committed that offence. Individuals may be found guilty even if the principal offender has not been prosecuted or found guilty. However, individuals cannot be found guilty if, before the offence was committed, the person terminated their involvement and took all reasonable steps to prevent the commission of the offence.

13. In sum, the offence of torture under the *Criminal Code* does not conform squarely to the definition of torture under the Convention, only arises in several specific legal contexts and, in relation to complicity, envisages defences not contemplated under that instrument. Amendments to the legislative framework are desirable, as are several concrete steps Australia should take in the interim.

### **Suggested Initiatives consistent with the Convention against Torture**

14. The Committee has identified several options consistent with Australia's existing obligations under the Convention against Torture. It welcomes Australia's statement that 'a person present in Australia who has committed a crime of torture outside Australia would be liable to prosecution under the *Crimes (Torture) Act 1988*'.<sup>15</sup> However, the Committee notes that the Commonwealth Director of Public Prosecutions (CDPP) has never prosecuted such a matter. Nor has the CDPP conducted any prosecutions in respect of offences against ss. 268.13 or 268.25 of the *Criminal Code* (that is, in respect of torture as a crime against humanity or torture as a war crime).<sup>16</sup>
15. The Committee foresees a prospect that, if Australia does not itself investigate and prosecute individuals within its jurisdiction or control and suspected of having committed torture or other cruel, inhuman or degrading treatment or punishment, it may be required to take custody and surrender such persons for trial before the International Criminal Court as a result of obligations arising as a State Party to the Rome Statute.<sup>17</sup> Torture, when committed within the context of a war crime or crime against humanity, is an offence falling within the jurisdiction of the Court (Articles 7(1)(f) and 8(2)(a)(ii)).<sup>18</sup> Australia is obliged to cooperate fully with the Court to investigate and prosecute such a crime (Article 86). This includes, under Article 89, complying with requests for the arrest and surrender of particular persons in accordance with Australian law.<sup>19</sup> Furthermore, when a request for provisional arrest

---

<sup>15</sup> Committee against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention: Australia, UN Doc CAT/C/67/Add.7 (2005), para 19.

<sup>16</sup> Committee against Torture, Consolidated Written Replies by the Government of Australia to the List of Issues to be taken up in connection with the consideration of the Fourth Periodic Report of Australia, Fortieth session, Geneva, 28 April – 16 May 2008, para 736.

<sup>17</sup> Rome Statute for an International Criminal Court [2002] ATS 15, ratified by Australia on 29 June 2002 and entering into force for Australia on 1 September 2002.

<sup>18</sup> The Committee does not at this time express a view on the permissibility of Australia's declaration that it understands these offences to be interpreted and applied in a way that accords with their implementation under Australian law.

<sup>19</sup> See further Parts 2-4, *International Criminal Court Act 2002* (Cth), stated to be an Act 'to facilitate compliance by Australia with obligations under the Rome Statute of the International Criminal Court'. Schedule 1 of the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) introduced the amendments to Division 268 of the *Criminal Code Act 1995* (Cth) outlined in para 12.

or for arrest and surrender is received from the Court, Australia is obliged under Article 59 to immediately take steps to arrest the persons in question when located within its territory and to deliver them to the Court as soon as possible. When lodging its instrument of ratification to the Rome Statute, Australia made a 'declaration' that 'no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes'. The 'Declaration' added that under Australian law no person can be arrested or surrendered unless you as Attorney-General have issued the necessary certificate. However, the Committee notes that the operation of the Court's Statute is such that Australian nationals located overseas may be detained and delivered to the Court by other State Parties. Such circumstances are self-evidently to be avoided.

16. Whether or not there is any evidentiary basis to support a determination of torture or other cruel, inhuman or degrading treatment, the reports of UN Committees, UN Special Rapporteurs, expert legal bodies and others taken collectively could suggest the desirability of initiating further inquiry. The Committee believes that allegations of this magnitude warrant scrutiny by an appropriate means. More importantly, allegations made by Australian 'victims' concerning the conduct overseas of Australian 'perpetrators' are most appropriately addressed in and by Australia. Put simply, Australia risks condemnation by documentation.
17. The Committee takes the view that a proactive stance by Australia will preserve its good reputation, demonstrate good faith adherence to the Convention against Torture, signal respect for the rules of international human rights law and alleviate any concerns raised. A principled position including enhanced transparency would be conducive to those ends.
18. The Committee accordingly wishes to draw attention to several provisions of the Convention against Torture which identify measures which Australia would be obliged to adopt as a State Party to that instrument.
  - First, Article 4 obliges Australia to ensure that 'all acts of torture', as well as 'an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture', are offences under Australian law;
  - Second, under Article 5, Australia is obliged to take such measures as may be necessary to establish jurisdiction over these offences when the alleged offender is an Australian national and, where Australia considers it appropriate, when the victim is an Australian national;
  - Third, where Australia is satisfied, after an examination of the information available to it, that the circumstances so warrant, it is obliged to take into custody persons within Australian territory alleged to have committed such offences, or adopting other legal measures to ensure their presence, Article 6 also requires a preliminary inquiry into the facts to be immediately made by Australia.
19. The Committee appreciates that most of the circumstances the subject of its concerns arose during the tenure of a previous government. As you will be aware, as a matter of international law Australia as a State remains responsible for compliance with its international obligations irrespective of any political transition at the national level. In certain circumstances, an incumbent government may be obliged to punish individuals for the commission of criminal offences where a predecessor government failed to discharge its obligation to prevent those acts. While a change of government may be a superficially attractive means of drawing such issues to a close, the references cited above suggest that the question of Australia's compliance with the Convention against Torture is increasingly acquiring its own international momentum. The Committee notes that a similar predicament confronting Australia's principal

allies is becoming less manageable for them in both international and national arenas.

20. There are practical steps which Australia could voluntarily undertake which offer the benefits of responding to increasing international concerns, alleviating domestic pressures and demonstrating a clear contrast in the local political arena:
- First, Australia could provide updated information on the measures adopted and considered appropriate by it with a view to implementing the recommendations of the Committee against Torture as outlined above.
  - Second, the Government could issue an assurance that, in its view, the conduct of Australian personnel, including law enforcement and intelligence officers, in overseas jurisdictions has at all times been consistent with Australia's obligations under the Convention against Torture.
  - Third, Australia could make a commitment that credible, relevant and significant allegations to the effect that such personnel are reasonably suspected of involvement in circumstances which may constitute acts of torture or complicity or participation in acts of torture will be promptly, independently and impartially investigated.

### **Conclusion**

21. The Committee unreservedly deplores all acts of torture and other cruel, inhuman or degrading treatment, particularly when committed against Australian citizens. The Committee would strongly support Commonwealth initiatives to eradicate this practice wherever, whenever and by whomever it occurs.