

*Human Rights and
Equal Opportunity
Commission*



THE ASIA PACIFIC FORUM
OF NATIONAL HUMAN RIGHTS INSTITUTIONS

... a partnership for human rights in our region

ABN 98 099 972 997

**ADVISORY COUNCIL OF JURISTS & ASIA PACIFIC
FORUM OF NATIONAL HUMAN RIGHTS
INSTITUTIONS**

**QUESTIONNAIRE FOR BACKGROUND PAPER ON
TORTURE**

**RESPONSE OF THE AUSTRALIAN HUMAN RIGHTS
AND EQUAL OPPORTUNITY COMMISSION**

6 October 2005

Activities of National Human Rights Institutions

1. ***Has your Commission received complaints from individuals or groups claiming torture? If so, how many complaints and please describe some of the most important cases and the role of your Commission in resolving the complaints.***

Yes.

Under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (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 of Australia (the Commonwealth).¹ The term ‘human rights’ is defined in the HREOC Act as rights and freedoms contained in any relevant instrument which is scheduled to or declared under the HREOC Act.² They are:

- the *International Covenant on Civil and Political Rights* (ICCPR);
- the *Declaration on the Rights of the Child*;
- the *Declaration on the Rights of Mentally Retarded Persons*;
- the *Declaration on the Rights of Disabled Persons*;
- the *Convention on the Rights of the Child* (CRC); and
- the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief*.

If a complaint to HREOC is neither conciliated³ nor declined,⁴ the President can undertake further inquiry.⁵ If the President is satisfied that the subject matter of the complaint constitutes a breach of a human rights, the President must report the findings to the Commonwealth Attorney-General for tabling in the Commonwealth Parliament.⁶

Under the HREOC Act, HREOC’s jurisdiction is limited to inquiring into acts by, or on behalf of, the Commonwealth government. It does not have jurisdiction to directly scrutinise the activities of state governments (or the governments of the Australian Capital Territory and the Northern Territory) which are responsible for the administration of Australia’s prisons in which prisoners, both state and federal, are kept. However, it can inquire into the detention of federal prisoners on the basis that they are detained ‘on behalf of’ the Commonwealth.⁷ Further, HREOC does not have jurisdiction to investigate an act or practice of an Australian intelligence agency. Any

¹ See HREOC Act, section 11(1)(f).

² See HREOC Act, sections 3 (‘Covenant’, ‘Declarations’ and ‘human rights’) & 47.

³ See HREOC Act, section 11(1)(f)(i).

⁴ See HREOC Act, section 20(2).

⁵ See HREOC Act, sections 11(1)(f), 14(1), 20(1).

⁶ See HREOC Act, section 11(1)(f)(ii).

⁷ See HREOC Act, section 3(10).

complaints about intelligence agencies must be referred to the Inspector-General of Intelligence and Security.⁸

Relevantly, the *Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment*⁹ ('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. They also proscribe cruel, inhuman and degrading treatment (which is the subject of article 16(1) of CAT). Thus 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.

Article 10(1) of the ICCPR and Article 37(c) of the CRC are also relevant. Those articles impose positive obligations towards persons who are particularly vulnerable because of their status as persons deprived of their liberty and have been said to 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.¹⁰ Similar concerns for those vulnerable persons are reflected in articles 10 and 11 of CAT and in the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.¹¹ We have therefore included complaints and findings regarding those articles in our response to this question (and, where relevant, in responding to the questions below).¹²

Appendix A contains a table setting out the number and nature of the complaints made to HREOC pursuant to articles 7 and 10 of the ICCPR and article 37 of the CRC.¹³ Those complaints relate mainly to the treatment and conditions in immigration detention centres and Federal prisons.

The majority of those complaints have been declined under section 20(2) of the HREOC Act. However, HREOC has issued reports that find a breach of one or more of those provisions in the following eight matters:

- 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*¹⁴ (breach of ICCPR, Article 10(1); no breach of ICCPR, Article 7);

⁸ See HREOC Act, section 11(3).

⁹ Coming into force for Australia on 8 August 1989, [1989] ATS 21.

¹⁰ See Human Rights Committee, General Comment 21, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994).

¹¹ Opened for signature on 4 February 2003, 42 ILM 26 (2003).

¹² We note, in that regard, that it is generally considered that "inhuman treatment" within the meaning of article 10(1) of the ICCPR involves a lower "intensity" of disregard for human dignity than that within the meaning of article 7 (see M Nowak *UN Covenant on Civil and Political Rights ICCPR Commentary* 1993 at p186).

¹³ We have limited that information to statistics for the period 1 July 2000 to 4 March 2004.

¹⁴ See http://www.humanrights.gov.au/human_rights/asylum_seekers/index.html#Perth

- 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*¹⁵ (breach of ICCPR, Articles 9(1) and 10(1));
 - 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));
 - Report No.21: *Report of 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));
 - 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*¹⁶ (breach of ICCPR, Articles 10(1) and 10(2)(a));
 - 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*¹⁷ (breach of ICCPR, Articles 9(1) and 10(1));
 - 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)*¹⁸ (breach of CRC, Articles 3(1), 9(1), 19(1), 37(b) and 37(c));
 - 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*¹⁹ (breach of ICCPR, Articles 7 (cruel, inhuman and degrading treatment) and 10(1); and CRC, Articles 37(a) and 37(c)).
2. ***Has your Commission conducted research on the issue of torture? If so, please provide the results of this research.***

Yes – we have set out some recent examples below.

HREOC recently conducted a self initiated National Inquiry regarding children in immigration detention. The findings and recommendations of that inquiry are set out in *A last resort? The Report of the National Inquiry into Children in Immigration Detention*.²⁰ The Commission inquired into whether the practice of detaining children asylum seekers and their families contravened Article 37(a) of the CRC. That Article

¹⁵ See http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_report_12_april.html

¹⁶ See http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_23.html

¹⁷ See http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_24.html

¹⁸ See http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_25.html

¹⁹ See http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_report_27.htm

²⁰ See HREOC website at:

http://www.humanrights.gov.au/human_rights/children_detention/index.html

relevantly provides that '[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment', reflecting, in part, Article 16(1) of CAT.

The Report was the result of two years of careful consideration of evidence and submissions. The Inquiry visited all detention centres in Australia and took evidence from a vast range of individuals and organisations - detainee children and parents, human rights advocacy groups, medical and legal experts, State governments, Australasian Correctional Management (ACM) and the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) amongst others.

HREOC found a breach of Article 37(a) of the CRC²¹ for the following reasons:

*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.*²²

HREOC made a number of recommendations, including recommendations for steps to be taken by the Commonwealth and for legislative amendment.²³

The Commission has also used its own motion inquiry functions and/or other functions to prepare the following reports or publications dealing with the treatment of persons in Australia's immigration detention centres:

- *A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001*, October 2002 (see further details in Question 4 below);²⁴
- *Immigration Detention: Human Rights Commissioner's 1998-99 Review* (see further details in Question 4 below);²⁵ and
- *Those who've come across the seas: detention of unauthorised arrivals*, May 1998.²⁶

Again, those activities involved factual and legal research regarding Australia's obligations under Articles 7 and 10 of the ICCPR and Article 37 of the CRC.

The Commission also conducts relevant factual and legal research in the course of preparing the reports on individual complaints referred to in response to Question 1 and the submissions referred to in response to Questions 7 and 10. Careful and

²¹ *A last resort?* was tabled in the Commonwealth Parliament on 13 May 2004 and is available on HREOC's website at:

http://www.humanrights.gov.au/human_rights/children_detention/index.html

²² See HREOC, *A last resort?* (April 2004), p. 431, 850, 855.

²³ *Ibid*, pp 5-6.

²⁴ See HREOC website at:

http://www.humanrights.gov.au/human_rights/idc/index.html

²⁵ See the HREOC website at

http://www.humanrights.gov.au/human_rights/asylum_seekers/index.html#idc_review.

²⁶ See HREOC website at

http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf

extensive research is necessary to ensure that that material meets the Commission's very high standards and is effective in achieving the Commission's aims.

3. ***Has your Commission undertaken awareness and education campaigns relating to torture? If so, please provide details of these campaigns, identify the individuals or groups who have been trained and estimate how many people have been trained.***

Yes.

HREOC's functions include:

- promoting an understanding and acceptance of human rights in Australia;²⁷ and
- undertaking research and educational programs to promote human rights;²⁸

A recent example of a HREOC education initiative in relation to torture and cruel, inhuman or degrading treatment or punishment is the education package designed around *A last resort? Report on the National Inquiry into Children in Immigration Detention* (see above). That material was provided to teachers and school students by way of workshops and online web materials and activities. An interactive CD-rom was also produced and over 496 copies have been distributed.

4. ***Has your Commission monitored the conditions in and visited centres of detention to assess the conditions in which detainees are kept and the treatment they receive? If so, please provide details of any findings.***

Yes.

The Human Rights Commissioner has conducted prison visits in the exercise of his functions between 1995 - 2000. Further, the Social Justice Commissioner conducted a review of deaths in custody between 1991 and 1996 and visited prisons as part of his review. The Social Justice Unit has subsequently visited prison facilities in connection with its work. However, there is no regular program of prison visits by HREOC.

HREOC's Human Rights Commissioner has undertaken to inspect periodically immigration detention facilities and in State prisons holding immigration detainees to evaluate the condition and treatment of detainees. This builds on HREOC's work on immigration detention over many years. The experience of the Human Rights Commissioner, in respect of this work, is that it usually results in a range of human rights concerns ranging from specific issues such as the physical conditions of detention, to more systemic issues such as the deterioration in mental health due to the prolonged nature of detention. It is the practice of the Human Rights Commissioner, following on from the visits, to raise particular issues concerning each facility directly with the responsible government department (Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)) and in some cases to correspond directly with the Minister. That material is obviously sensitive and we are therefore unable to provide it to you.

²⁷ See HREOC Act, section 11(1)(g).

²⁸ See HREOC Act, section 11(1)(h).

On occasion, pursuant to sub-sections 11(1)(j) and (k) of the HREOC Act, the Human Rights Commissioner has transmitted a report on these visits to the Attorney-General for tabling in the Commonwealth Parliament.²⁹

5. ***Has your Commission intervened in court proceedings on the issue of torture? If so, please provide details of the cases, the role of the Commission and the outcome of the cases. Please provide copies of any submissions and court decisions.***

The HREOC Act confers upon HREOC the function of intervening in proceedings before a Court involving ‘human rights issues’.³⁰ We have set out below some relatively recent examples of the exercise of that power in court proceedings raising the issue of torture.

In 2002, HREOC was granted leave to intervene in the matter of *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*³¹

That case concerned provisions inserted into the *Migration Act* 1958 (Cth) limiting the rights of judicial review of asylum seekers (‘privative clause’). It was heard in the Full Federal Court.

HREOC submitted to the Court that the provisions in question raised issues under Article 7 of the ICCPR because restricting asylum seekers’ ability to seek judicial review increased the risk that such persons would be returned to situations of torture. HREOC also submitted that this would violate Australia’s refoulement obligations under Article 3 of CAT and Article 33(1) of the Refugee Convention.

HREOC’s full submission in *NAAV* can be found on its website at

http://www.humanrights.gov.au/legal/guidelines/submission_naav.html.

In 2003, HREOC was granted leave to intervene before the High Court in *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*³² (heard with *SHDB v Godwin & Ors (Al Kateb v Godwin)*,³³ and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*).³⁴

In all three matters, HREOC focused its submissions on the limits of lawful detention of ‘unlawful non-citizens’ by the Commonwealth under section 196 of the *Migration Act* 1958 (Cth). HREOC contended that in determining those limits, the Court should have regard to relevant international standards including the proscription against torture and cruel, inhuman or degrading treatment (ICCPR, Article 7) and the

²⁹ See http://www.humanrights.gov.au/human_rights/idc/index.html.

³⁰ HREOC Act, section 11(1)(o).

³¹ (2002) 123 FCR 298, available at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2002/391.html>.

³² [2004] HCA 36.

³³ [2004] HCA 37.

³⁴ [2004] HCA 38.

requirement that people deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person (ICCPR, Article 10).³⁵

Copies of HREOC's submissions and supplementary submissions are available on its website at:

<http://www.humanrights.gov.au/legal/intervention/khafaji.htm>

http://www.humanrights.gov.au/legal/intervention/khafaji_supp.htm.

6. ***Has your Commission addressed the issue of torture in its annual report? If so, please provide a copy of the relevant sections.***

In its annual reports for the period 2000-2004, HREOC has reported on:

- the submissions made by HREOC to Parliamentary committees impacting on issues of torture and cruel, inhuman and degrading treatment and punishment, including those referred to in Questions 10 and 11, below;³⁶
- the matters in which HREOC has intervened in before the courts impacting on issues of torture and cruel, inhuman and degrading treatment and punishment, including those matters referred to in Question 5, above;³⁷ and
- the reports issued by HREOC following its investigation into complaints made to it under the HREOC Act referred to in Question 1, above.³⁸

7. ***If your government has ratified the International Covenant on Civil and Political Rights, Convention Against Torture and/or Convention on the***

³⁵ No reference was made to CAT. We refer you to the explanation provided in our response to question 1.

³⁶ See HREOC, *Annual Report 2003-2004*, pp 44-46 for summaries of submissions made to Parliamentary Committees in relation to the Migration Litigation Review, Migration Amendment (Judicial Review) Bill 2004, Ministerial Discretion in Migration Matters and the Optional Protocol against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The full text of the *Annual Report 2003-04* is available on HREOC's website at

<http://www.humanrights.gov.au/annrep04/index.html>

³⁷ See HREOC, *Annual Report 2002-2003*, pp 94-95, 96-97, 99-100 for summaries of HREOC's intervention in *NAAV v MIMA*; HREOC, *Annual Report 2003-2004*, pp 93-94 for summaries of HREOC's intervention in *Al Kateb v DIMIA*; *MIMIA v Al Khafaji* and *Behrooz v DIMIA*. The full text of the *Annual Report 2002-03* is available on HREOC's website at

http://www.humanrights.gov.au/annrep02_03/index.html. The full text of the *Annual Report 2003-04* is available on HREOC's website at <http://www.humanrights.gov.au/annrep04/index.html>.

³⁸ See HREOC, *Annual Report 2000-2001*, pp 88, 89-90 for summaries of Report No. 10 and Report No. 12, respectively; HREOC, *Annual Report 2001-02*, pp 85 for a summary of Report No.18; HREOC, *Annual Report 2002-2003*, pp 88-89, 90-93 for summaries of Report No.21, Report No. 23, Report No. 24 and Report No. 25; HREOC, *Annual Report 2003-2004*, pp 91-91 for a summary of Report No.27. The full text of the *Annual Report 2000-01* is available on HREOC's website at http://www.humanrights.gov.au/annrep00_01/index.html. The full text of the *Annual Report 2001-02* is available at http://www.humanrights.gov.au/annrep01_02/index.html. The full text of the *Annual Report 2002-03* is available on HREOC's website at

http://www.humanrights.gov.au/annrep02_03/chap3.html. The full text of the *Annual Report 2003-04* is available on HREOC's website at <http://www.humanrights.gov.au/annrep04/index.html>

Rights of the Child, has your Commission been approached by the government to contribute to the periodic reports to the relevant Committees, or has your Commission provided a shadow report to the relevant Committees? If so, please provide copies of the sections relevant to torture.

Yes.

HREOC has been consulted in the drafting by Government of its periodic reports to treaty bodies and the International Labour Organisation. This includes the Committee against Torture. HREOC's submissions to Government are not publicly available and we are unable to provide them to you.

8. ***Does your Commission have regional offices and are these offices involved in torture issues? If so, in what way?***

While HREOC does not maintain regional offices it aims to facilitate broad community access to its information and services (including information and services relevant to issues of torture or cruel, inhuman and degrading treatment) by:

- maintaining a complaints information line which can be accessed by anyone in Australia for the cost of a local telephone call;
- maintaining a website which provides the general public and potential complainants with information about HREOC's complaint handling role and complaint process in 14 different languages. HREOC's website also includes an on-line complaint form, which allows complaints to be lodged electronically;
- conciliation circuits whereby HREOC Conciliation Officers travel around Australia to conduct face-to-face conciliations and community education and training.

HREOC notes that its Complaints Handling Section also maintains an access working group which provides training to HREOC staff and staff of other anti-discrimination Commissions on service provision for complainants with intellectual disabilities.

Further information about the services referred to above is contained in HREOC's *Annual Report 2003-2004*, the full text of which is available at

<http://www.humanrights.gov.au/annrep04/index.html>.

9. ***Does your Commission work in collaboration with civil society including the private sector, government or UN agencies or multilateral donors such as the World Bank on issues of torture? If so, in what way?***

Yes.

HREOC seeks to engage with and work constructively with the Australian Government and the Commonwealth Parliament, including in the activities identified in response to Questions 1, 2, 4, 7, 10 and 11. We would of course observe that, in

those activities, HREOC maintains its independence consistent with the Paris Principles.³⁹

HREOC has a collaborative and consultative working relationship with civil society actors, such as non-government organisations, community groups, and individuals. For example, in the recent National Inquiry into Children in Immigration Detention (which dealt with, inter alia, issues regarding cruel, inhuman or degrading treatment) the Commission invited written submissions from any interested party. Over 340 written submissions were received. Additionally, almost thirty focus groups were convened with children, parents and other former detainees. The Inquiry also held over 60 public hearings in capital cities to allow community, State, government agencies, non-government agencies and other interested parties to provide further information to the Inquiry.

HREOC maintains a good relationship with various UN agencies and bodies. For instance and in relation to issues of cruel, inhuman or degrading treatment or punishment in Australia, in 2002, HREOC met with and provided information to both Justice PN Bhagwati, Personal Envoy and Asia Pacific Regional Adviser of the United Nations High Commissioner for Human Rights and Louis Joinet, Head of the United Nations Working Group on Arbitrary Detention.

10. ***Has your Commission identified laws/policies/practices in your country that impact on torture?***

Yes.

As noted above, HREOC considered and made recommendations regarding Commonwealth immigration detention laws, practices and policies found to permit cruel, inhuman or degrading treatment in *A last resort? Report on the National Inquiry into Children in Immigration Detention* (see response to Question 2 above).

Recently, HREOC has made a number of public submissions that impact on issues of torture and cruel, inhuman or degrading treatment, which we briefly summarise below.

On 29 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.⁴⁰

In February 2004, HREOC made written and oral submissions 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. In those

³⁹ Principles relating to the status and functioning of national institutions for the protection and promotion of human rights, UN Doc. A/RES/48/134 (20 December 1993).

⁴⁰ The full text of the submission is available on HREOC's website at http://www.humanrights.gov.au/legal/submissions/migration_amendment.htm.

submissions the Commission urged the Government to ratify and implement the Optional Protocol to CAT.⁴¹

On 21 November 2003, HREOC made a submission to the Migration Litigation Review being conducted by Ms Hilary Penfold QC, First Parliamentary Counsel. In that submission HREOC submitted that efficient management and disposition of immigration cases should not come at the expense of the fundamental rights of people involved in immigration litigation.⁴²

11. ***Has your Commission proposed legislation relating to torture, or helped develop a national policy?***

Yes.

As outlined in Question 10 above, HREOC has made submissions to Parliamentary Committees on legislation proposed by the Government which raise issues of torture or cruel, inhuman or degrading treatment. In some of those submissions, HREOC has provided draft legislative provisions that could be adopted by the Federal Parliament to overcome or alleviate a human rights issue identified by HREOC. For example, in a supplementary submission to the Senate Legal and Constitutional Legislation Committee's inquiry into amendments to the Migration Amendment (Judicial Review) Bill 2004, HREOC provided draft legislative amendments to the Committee that could be adopted by the Federal Parliament.⁴³

HREOC has also proposed relevant legislative amendments and national policies in other areas of its work (for example, in the recommendations in *A last resort? Report on the National Inquiry into Children in Immigration Detention* – see response to Question 2 above).

⁴¹ The full text of the Commission's written submission to the Committee can be found at <http://www.humanrights.gov.au/legal/submissions/jscot.html>.

⁴² The full text of the submission is available on HREOC's website at <http://www.humanrights.gov.au/legal/submissions/migration.html>.

⁴³ The full text of HREOC's supplementary submission is available on the Committee's website at http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/mig_judicial_04/submissions/sub5a.pdf.

Documentation

We enclose the following documentation in accordance with your request:

Constitutional provisions relating to:

- torture, including references to other ill-treatment and refoulement or extradition; and
- relevance of international law in the domestic jurisdiction.

There are no Constitutional provisions relating to torture, or the relevance of international law in the domestic jurisdiction.

Relevant legislation referring to:

- torture and other forms of ill-treatment;
- the treatment of individuals in all forms of detention; and
- legal and other safeguards aimed at the prevention of torture.

We attach a copy of:

- *War Crimes Act 1945* (Cth);
- *Human Rights and Equal Opportunity Commission Act 1986* (Cth);
- *Crimes (Torture) Act 1988* (Cth);
- *International Criminal Court Act 2002* (Cth);
- *Criminal Code 1995* (Cth);
- *Crimes Act 1914* (Cth).

NGO Reports

- Reports by local, national or regional non-governmental organisations on torture within your country.

HREOC is not aware of any significant reports by NGOs on torture within Australia but encourages the APF to contact local and national NGOs for further information.

For instance, the Edmund Rice Centre has published a study on refoulement which raises issues of Australia's compliance with CAT, Article 3 and the Refugee Convention, Article 33(1).⁴⁴

⁴⁴ 'Deported to Danger', see Edmund Rice Centre's website at <http://www.erc.org.au/research/1096416029.shtml>.

Issues raised in the Terms of Reference

1. *Do the police and other disciplinary forces in your country currently follow set minimum standards of interrogation?*

If so, are you able to provide a copy of these minimum standards?

If not, please provide any information you have about these minimum standards including:

- *who developed them?*
- *on the basis of what documentation?*
- *when were they developed?*
- *when were they last revised?*
- *do the staff of the disciplinary services receive specific training in interrogation methods?*
- *if so, how often and who conducts the training?*

Please provide any information about complaints received by individuals or groups about the methods of interrogation used by the disciplinary forces in your country.

Yes – the Australian Federal Police, their State and Territory counterparts and any intelligence agents such as Australian Security and Intelligence Organisation (ASIO) officers, are bound by various common law and statutory requirements when conducting any interrogation.

We cannot supply any minimum standards as no such comprehensive document exists to our knowledge.

We outline some of the relevant legal restrictions below:

The *Crimes Act* 1914 (Cth) imposes requirements in relation to:

- the period of detention of accused persons before they are charged with an offence;
- treatment of accused persons while in detention;
- cautioning of accused persons upon apprehension and during interrogation;
- communications with a ‘friend’, relative or legal practitioner while detained;
- access to a legal practitioner and if appropriate, an interpreter, during questioning;
- special protections for Aboriginal and Torres Strait Islanders and person under 18 years old; and
- the tape-recording of interviews.⁴⁵

In the wake of September 11, 2001, the *Australian Security and Intelligence Organisation* 1979 (Cth) (ASIO Act) was amended to permit additional questioning powers by ASIO officers in relation to persons detained for terrorism offences (see

⁴⁵ See part IC of the *Crimes Act* 1914 (Cth).

Question 4 for further discussion of the detention regime established by the ASIO Act).

The *Evidence Act* 1995 (Cth) also imposes limitations on interrogation techniques. Relevantly, section 84 of that Evidence Act provides that, evidence of an admission is not admissible unless the admission and the making of the admission were not influenced by ‘violent, oppressive, inhuman or degrading conduct’, whether towards the person who made the admission or towards another person, or a threat of such conduct. This reflects the common law rules relating to self-incrimination, voluntariness and the admissibility of evidence.

Each State and Territory has its own legal regime in this regard.

2. Do your national courts recognise customary international law as a source of law to be complied with? Include any cases that refer to the rule of customary international law prohibiting torture.

The relationship between municipal law and international customary law in Australia remains unclear. The weight of authority suggests that the rules of customary international law are not to be considered as part of domestic law unless they have been adopted and made part of the domestic law by decision of the court or by legislative act of the Parliament.⁴⁶

Customary international law may therefore be one *source* of Australian law, but it will not form part of that law until it is incorporated by judicial or legislative act. The extent to which customary international law shapes Australian law is discussed below, first, in relation to the circumstances in which international legal principles will be used by the courts as a guide to the development of the common law, and, second, in relation to the manner in which courts use international law in interpreting and applying Acts of Parliament.

Customary international law as a guide to the development of the common law

In *Mabo and Others v Queensland (No 2)*⁴⁷ Brennan J held that ‘international law is a legitimate influence on the development of the common law, especially when international law declares the existence of universal human rights’.⁴⁸ However his Honour qualified that broad statement of principle by suggesting that courts in Australia are not ‘free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency’.⁴⁹ In *Dietrich v R*⁵⁰ the majority of the High Court expressed a narrower view: that customary international law could only be used to address ambiguities or uncertainties in the common law.⁵¹

⁴⁶ See *Chow Hung Ching v The King* (1948) 77 CLR 449, 477 (Dixon J); *Mabo (No 2)* (1992) 175 CLR 1, 42 (Brennan J, Mason CJ and McHugh J agreeing); *Nulyarimma v Thompson* (1999) [18]-[31] (Wilcox J); [49]-[58] (Whitlam J). See also *Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 501, 562-63 (Brennan J).

⁴⁷ (1992) 175 CLR 1.

⁴⁸ *Mabo (No 2)* (1992) 175 CLR 1, 42 (Brennan J, Mason CJ and McHugh J agreeing)

⁴⁹ *Mabo (No 2)* (1992) 175 CLR 1, 43 (Brennan J); *Dietrich v R*, 320 (Brennan J).

⁵⁰ (1992) 177 CLR 292.

⁵¹ *Ibid* 306 (Mason CJ and McHugh J), 348-49 (Dawson J).

However, in *Minister for Immigration and Ethnic Affairs v Teoh*,⁵² Mason CJ and Deane J moved away from that narrow statement of principle saying that in cases involving human rights, the concept of ambiguity should be broadly construed, and international conventions declaring ‘universal fundamental rights’ were legitimate guides in developing the common law as long as it was not used as a ‘backdoor means of importing an unincorporated convention into the common law’.⁵³

The Full Court of the Federal Court has since considered these principles in *Nulyarimma v Thompson*,⁵⁴ and, in particular, whether genocide was a punishable crime in Australia. Although Australia has ratified the *Genocide Convention 1949*, it had not at that time been legislatively incorporated into domestic law. The question for the Court was therefore whether genocide was recognised as a crime under the Australian common law on the basis of its status as a peremptory norm in customary international law. The majority of the Court held that genocide did not form part of the Australian common law and hence was not a punishable crime in Australia, though they differed in their reasons; and one member of the Court dissented. The difference in the approaches of their Honours in relation to the relationship between the common law and customary international law continues to be reflected in current case law.⁵⁵

Statutory Interpretation

One principle of statutory construction is that, where a statute is unclear or ambiguous on its face, it is to be interpreted and applied, so as far as its language permits, consistently with Australia’s international obligations.⁵⁶ This is based on the presumption in common law that the Parliament does not intend to violate obligations by which it is bound under international law. A ‘non-narrow’ conception of statutory ambiguity is required when applying the principle.⁵⁷

The question of the nature of the international obligations to which courts are permitted to refer is unresolved. While the High Court has not clearly spoken on this point, most judicial statements in relation to this principle are broad enough to encompass reference to customary international law and Australia’s treaty obligations.⁵⁸

⁵² *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

⁵³ *Ibid*, 287-88 (Mason CJ and Deane J).

⁵⁴ (1999) 96 FCR 153.

⁵⁵ See H Charlesworth, M Chiam, D Hovell, G Williams, ‘Deep Anxieties: Australia and the International Order’, (2003) 25 *Sydney Law Review* 423, 461. See for instance, *Western Australia v Ward* (2002) 194 ALR 1, [958] in which Callinan J stated that ‘there is no requirement for the common law to develop in accordance with international law’. Cf *Dow Jones v Gutnick* (2002) 194 ALR 433, [116] in which Kirby J held that the development of the common law to address legal issues arising out of the ‘digital millennium’ should be consistent with the relevant principles of the ICCPR

⁵⁶ *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 363 (O’Connor J).

⁵⁷ See for example, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, 362 (Mason CJ and Deane J).

⁵⁸ See *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 30; *Zachariassen v Commonwealth* (1917) 24 C:R 166; *Polites v Commonwealth* (1945) 70 CLR 60; *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 and *Kruger v Commonwealth of Australia* (1997) 190 CLR 1.

Presumption against the abrogation of fundamental rights and freedoms

A related presumption of the common law is that courts will not impute to the legislature an intention to abrogate or curtail fundamental freedoms unless such an intention is clearly manifested by the legislature. A number of recent cases have extended the presumption to the protection of fundamental human rights, as well as common law rights and freedoms.⁵⁹ Commentators have suggested that it is likely that courts will have regard to international human rights norms when applying this presumption in the future.⁶⁰

3. Does your constitution or national law allow for any derogation from the prohibition on torture and other forms of ill-treatment? If so, please provide the relevant sections.

Derogation

HREOC notes that some human rights treaties allow States Parties to ‘derogate’ or suspend its obligations under that treaty in limited circumstances, to the extent ‘strictly required’ to meet those circumstances.⁶¹ HREOC therefore uses the term ‘derogation’ to refer to an act done by a State Party subsequent to ratification which detracts from, partially repeals or abolishes rights previously granted, so having the consequence of limiting the scope or impairing the utility of those rights.⁶²

Notwithstanding the above, HREOC notes that the prohibition against torture cannot be derogated from by States as it is a peremptory norm (*‘jus cogens’*) under international customary law.⁶³

Constitution

The Australian Constitution makes limited mention of fundamental individual freedoms. It is silent on torture. It expressly guarantees only a limited number of individual rights, including:

- the right to vote (s 41);
- protection against acquisition of property on unjust terms (s 51(xxxi));
- the right to a trial by jury (s 80);
- freedom of religion (s 116); and
- the prohibition of discrimination on the basis of State of residency (s 117).

National law

⁵⁹ See *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 (Einfeld J); *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337 (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24, 34 (Gleeson CJ); *Minister for Immigration and Multicultural Affairs v Al Masri* (2003) 197 ALR 241, [86] (Black CJ, Sundberg and Weinberg JJ).

⁶⁰ H Charlesworth, M Chiam, D Hovell, G Williams, ‘Deep Anxieties: Australia and the International Order’, (2003) 25 *Sydney Law Review* 423, 461.

⁶¹ See S Joseph et al., *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (2nd Ed, 2003), [25.49]. See also I Brownlie, *Principles of International Law*, (6th Ed, 2003), p 598.

⁶² See Butterworths, *Australian Legal Dictionary*, 1997, p 350 and the cases cited therein.

⁶³ See, I Brownlie, *Principles of International Law*, (6th Ed, 2003), p 537.

Under the *Criminal Code 1995* (Cth) torture is prohibited where such conduct is committed as a War Crime⁶⁴ or a Crime Against Humanity,⁶⁵ within Australia or extraterritorially.⁶⁶ In addition, the Code provides that torture will be an ‘aggravating factor’ under the Code for certain crimes committed against the UN or Associated Personnel.⁶⁷ HREOC notes that proceedings for any of those offences cannot be brought without the consent of the Attorney-General.⁶⁸

As stated above, under international law Australia cannot effect any derogations to the prohibition against torture in Federal law. However, HREOC notes that s 268.116(3) of the *Criminal Code 1995* (Cth) provides a defence to persons alleged to have committed torture as a War Crime. That provision mirrors Article 33 of the *Rome Statute of the International Criminal Court*⁶⁹ and was enacted to meet Australia’s obligations under the Rome Statute. HREOC notes that s 268.116(3) of the *Criminal Code 1995* (Cth) could potentially put Australia in breach of its obligation under Article 2(3) of CAT to ensure that in any prosecution for torture, ‘an order from a superior officer or a public authority may not be invoked as a justification of torture’. HREOC stresses that whether that provision would constitute a breach of Australia’s obligations under Article 2(3) of CAT is by no means clear given that s 268.116(3) was enacted to fulfil Australia’s obligations under the Rome Statute.

An Australian citizen or person in Australia alleged to have committed an act of torture *extraterritorially* could also be liable to prosecution under the *Crimes (Torture) Act 1988* (Cth).⁷⁰ That legislation is discussed further in response to Question 7 below. HREOC notes that under the Act the definition of ‘act of torture’ excludes:

...any act arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the [ICCPR].⁷¹

⁶⁴ See *Criminal Code 1995* (Cth), ss 268.25 (as a grave breach of Protocol I to the Geneva Conventions) and 268.73 (as a serious violation of common Article 3 to the Geneva Conventions).

⁶⁵ See *Criminal Code 1995* (Cth), s 268.13.

⁶⁶ See *Criminal Code 1995* (Cth), ss 268.117 and 15.4. This extended jurisdiction relevantly only applies to Genocide, War Crimes and Crimes against Humanity.

⁶⁷ See *Criminal Code 1995* (Cth), s 71.13 (as an aggravating factor in any offence committed against the UN or Associated Personnel pursuant to ss 71.4 – 71.10, inclusive).

⁶⁸ See *Criminal Code 1995* (Cth), s 268.121(2).

⁶⁹ That provision provides that, ‘it is a defence to a War Crime that:

- a) the War Crime was committed by a person pursuant to an order of a Government or of a superior, whether military or civilian;
- b) the person was under a legal obligation to obey the order;
- c) the person did not know the order was unlawful; and
- d) the order was not manifestly unlawful’.

While it is unclear to HREOC why Article 33 was included in the Rome Statute, it appears that it may have been inserted to ensure that the Statute reflected military necessity principles embodied in International Humanitarian Law: see UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Rome, 15 June – 17 July 1998, UN Doc A/CONF.183/2/Add.1, p 59. HREOC notes that this is an example of the sometime disjunction between the rules of International Human Rights Law and those of International Humanitarian Law. See *Criminal Code 1995* (Cth), s 268.116(3).

⁷⁰ See *Crimes (Torture) Act 1988* (Cth) and *War Crimes Act 1945* (Cth).

⁷¹ See s 3(1) of the *Crimes (Torture) Act 1988* (Cth).

Of course, other acts committed within Australia amounting to torture or cruel, inhuman or degrading treatment or punishment would be subject to Commonwealth and/or State or Territory criminal law (eg: assault, murder, rape etc). As with other criminal offences, certain defences would potentially apply in any prosecution.

4. *Set out any legislation, rules or practices of courts in admitting or rejecting any statement that is made by an accused as a result of torture or any other form of ill-treatment.*

Section 84 of the *Evidence Act* 1995 (Cth) provides that evidence of an admission is not admissible unless the admission and the making of the admission were not influenced by:

- violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
- a threat of any such conduct.

However that exclusion only applies if the party against whom evidence of the admission is adduced raises an issue in the proceedings about whether the admission, or the making of the admission, were influenced by violent, oppressive, inhuman or degrading conduct.

Counter-terrorism legislation

Section 84 of the *Evidence Act* 1995 (Cth) applies in all proceedings, including terrorism proceedings to the extent that it has not been abrogated by the ASIO Act.

A person detained pursuant to the ASIO Act has no automatic right to contact family members,⁷² though they are permitted to contact a lawyer⁷³ and persons under 18 years of age may request the presence of a parent or legal guardian during questioning.⁷⁴ Furthermore, a person may be detained under the ASIO Act without charge for a continuous period of more than 168 hours.⁷⁵ Further, the ASIO Act abrogates the right to silence of the person the detained under the Act as it requires the detained person:

- to give any information requested by the prescribed authority in accordance with the warrant;⁷⁶
- make a statement that is to the person's knowledge, false or misleading;⁷⁷ or
- fail to produce any record or thing that the person is requested to produce in accordance with the warrant,⁷⁸

⁷² See s 34D(4) of the ASIO Act.

⁷³ See 34C(3B) of the ASIO Act.

⁷⁴ See s 34NA(4) of the ASIO Act.

⁷⁵ See s 34HC of the ASIO Act.

⁷⁶ See s 34G(3) of the ASIO Act. Though note that this does not apply if the defendant can establish that he or she does not have the information requested: s 34G(4).

⁷⁷ See s 34G(5) of the ASIO Act.

⁷⁸ See s 34G(6) of the ASIO Act.

even if the doing of any of those acts will tend to incriminate the person, or make the person liable to a penalty.⁷⁹

To date, there have been no cases involving these provisions. Consequently, it is unclear whether admissions made under such conditions would be considered as ‘violent, oppressive, inhuman or degrading conduct’ and inadmissible in a court pursuant to s 84 of the *Evidence Act 1995* (Cth).

5. Describe the remedies available and provided in practice to victims of torture and other forms of ill-treatment, including complaints systems, compensation mechanisms and medical rehabilitation.

Complaints about a Commonwealth act or practice

We refer to the HREOC Act complaints process outlined in the first section of this questionnaire. If the President of HREOC finds any breach of human rights pursuant to an investigation under the HREOC Act (section 11(1)(f)), including torture, there is no power to enforce any recommended remedies.

HREOC notes that there is no other Australian independent review body that has the specific jurisdiction to scrutinise Australia’s compliance with its obligations under CAT.

Commonwealth Ombudsman

The Commonwealth Ombudsman is empowered to investigate matters or where a complaint is made, to investigate complaints, in relation to the decisions and actions of Australian Government departments and authorities (including police and security personnel) to see if they are wrong, unjust, unlawful or unfair (*Ombudsman Act 1976* (Cth), section 5).

For example, during 2002–03, Ombudsman staff conducted a review of conditions in IDFs and of how complaints were being investigated in those facilities. The review identified a range of concerns about how detention facilities were being managed by the detention service provider, and how the provider's performance was being monitored by the Department against the agreed Immigration Detention Standards.

Upon investigation, the Ombudsman can make recommendations in a report, which are not enforceable (*Ombudsman Act 1976* (Cth), sections 15 – 17).

Similarly, State and Territory Ombudsmen (or equivalent office holder) may investigate complaints about the actions or decisions of State or Territory governments.

Criminal law

As discussed in Question 3 in this section, there are specific prohibitions against torture in the *Criminal Code 1995* (Cth) and the *Crimes (Torture) Act 1988* (Cth) in relation to acts of torture committed by Australian citizens or persons within Australia or extraterritorially. As noted in Question 3 in this section, such conduct would also be prohibited under Commonwealth and State and Territory criminal laws (eg: as rape, assault or murder).

⁷⁹ See s 34G(8) of the ASIO Act.

Civil law

Tortious compensation for wrongful imprisonment and trespass to the person is available at common law throughout Australia.

Specialised legislation

We set out in question 3 above the extent of legislation that deals specifically with torture. As already stated, there is no provision for the offence of torture for acts committed within Australia.

Victims' compensation

Some States and Territories operate victims' compensation schemes for victims of crime, however, this would be awarded in relation to offences other than torture as no such offence exists.

Government funded rehabilitation services for torture and trauma survivors

HREOC is aware of initiatives, partially funded by the Commonwealth, to assist in rehabilitation and medical services provided to survivors of torture and other trauma, particularly amongst recognised refugees but has no specific information to provide.

For further information, you may wish to contact the Australian Department of Immigration and Multicultural and Indigenous Affairs.

6. Provide information about the protections afforded to persons being forcibly returned to a country in which they may face torture or other forms of ill-treatment.

As far as HREOC is aware, the Australian Government does not monitor the safety of persons who are deported back to their country of origin or some other third country after being denied refugee protection in Australia.

For an NGO analysis of this issue, we refer you to a recent report by the Edmund Rice Centre, *Deported to Safety?*.⁸⁰

7. Have the national courts been asked to consider any cases of alleged torture that have taken place outside the territory of your country and not involving citizens of your country? If so, please describe the position of national courts in exercising their jurisdiction in such cases. For example, General X was a Balkan military officer accused of torturing civilians during the regional conflict. He is currently holidaying in your country. What would the position of your national courts be if they were asked to try him for torture?

Yes.

In *Polyukhovich v Commonwealth*⁸¹ the High Court was asked to consider the constitutional validity of the *War Crimes Act 1945* (Cth) (as amended by the *War*

⁸⁰ 'Deported to Danger', see Edmund Rice Centre's website at <http://www.erc.org.au/research/1096416029.shtml>.

⁸¹ (1991) 172 CLR 501.

Crimes Amendment Act 1988 (Cth)) which allowed persons to be tried in Australia for war crimes committed extra-territorially.⁸² The majority of the Court upheld the legislation as being constitutionally valid.

A person may be liable for acts of torture committed extraterritorially under the *Criminal Code 1995* (Cth) and the *Crimes (Torture) Act 1988* (Cth), each of which are discussed separately below.

Criminal Code 1995 (Cth)

The *Criminal Code 1995* (Cth) prohibits torture committed as a War Crime⁸³ or a Crime Against Humanity,⁸⁴ whether such crimes are committed within or outside Australia.⁸⁵ In addition, the Code provides that torture will be an ‘aggravating factor’ under the Code for certain crimes committed against the UN or Associated Personnel. Like the *Crimes (Torture) Act 1988* (Cth), persons can only be prosecuted under the War Crimes and Crimes Against Humanity provisions in the Code with the consent of the Attorney-General. Furthermore, under the Code, a person is not be liable to be tried by a Federal or State or Territory court if the person ‘has already been convicted or acquitted by the International Criminal Court for an offence constituted by substantially the same conduct as constituted’ the alleged offence under the Code. (See Question 3 in this section for further discussion of the relevant Criminal Code provisions).

Crimes (Torture) Act 1988 (Cth)

The *Crimes (Torture) Act 1988* (Cth) (the Torture Act) provides that a person may be held liable for ‘an act of torture’ committed outside Australia, if:

- the person committed the act in his or her capacity as a public office or while acting in an official capacity; or
- the person committed the act at the instigation, or with the consent or acquiescence of a public official or person acting in an official capacity; and
- at the time it was committed, it would have been an offence under Australian law.⁸⁶

‘Act of torture’ under the Torture Act is defined as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

a) for such purposes as:

- (i) obtaining from the person or from a third person information or a confession;
- (ii) punishing the person for an act which that person or third person has committed or is suspected of having committed; or

⁸² *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

⁸³ See *Criminal Code 1995* (Cth), ss 268.25 (as a grave breach of Protocol I to the Geneva Conventions) and 268.73 (as a serious violation of common Article 3 to the Geneva Conventions).

⁸⁴ See *Criminal Code 1995* (Cth), s 268.13.

⁸⁵ See *Criminal Code 1995* (Cth), ss 268.117 and 15.4. This extended jurisdiction relevantly only applies to Genocide, War Crimes and Crimes against Humanity.

⁸⁶ See s 6 of the *Crimes (Torture) Act 1988* (Cth).

(iii) intimidating or coercing the person or a third person; or

b) for any reason based on discrimination of any kind;

but does not include any act arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the [ICCPR].⁸⁷

The Torture Act gives the court jurisdiction in relation to ‘acts of torture’ committed by ‘Australian citizens’ or ‘persons present in Australia’.⁸⁸ Hence, a territorial nexus between Australia and conduct of the accused is not required to enliven the court’s jurisdiction under the Act. The courts jurisdiction is enlivened if the accused is ‘an Australian citizen’ or ‘present in Australia’.

However, HREOC notes that a prosecution can only be brought under the *Crimes (Torture) Act* 1988 with the consent of the Attorney-General.

Under the Act it is not a defence that:

- the act constituting the defence was done out of necessity arising from the existence of a state of war, a threat of war, internal political instability, a public emergency or any other exceptional circumstance;⁸⁹ or
- in doing the act the accused was acting under orders or a superior officer or public authority.⁹⁰

To date there have been no prosecutions brought under the *Crimes (Torture) Act* 1988.

While the constitutional validity of the *Crimes (Torture) Act* 1988 has not been tested, as noted above, the High Court has held legislation allowing persons to be tried in Australia for war crimes committed extra-territorially is constitutionally valid.⁹¹

Example of General X

General X could be prosecuted under the *Crimes (Torture) Act* 1988 (Cth) as he is ‘present in Australia’, if it could be established that:

- he committed an ‘act of torture’ as that term is defined under the Act;
- his conduct was unlawful in Australia at the time he committed the alleged acts of torture; and
- he committed the act in his official capacity as a General in the Balkan Army, or at the instigation or with the consent of any other public official or a person acting in an official capacity.

However, General X could only be prosecuted with the consent of the Attorney-General.

⁸⁷ See s 3(1) of the *Crimes (Torture) Act* 1988 (Cth).

⁸⁸ See s 7 of the *Crimes (Torture) Act* 1988 (Cth).

⁸⁹ See s 11(a) of the *Crimes (Torture) Act* 1988 (Cth).

⁹⁰ See s 11(b) of the *Crimes (Torture) Act* 1988 (Cth).

⁹¹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

Further, if General X had been acquitted in a country outside Australia of an offence against the law of that country in respect of the alleged torture, he would not be liable to be convicted of an offence under the Torture Act in respect of that conduct.⁹²

Alternatively, General X could be subject to prosecution under the *Criminal Code* 1995 (Cth) if it could be established that his conduct amounted to a War Crime or a Crime Against Humanity within the meaning of the *Criminal Code* 1995 (Cth).⁹³ In particular, HREOC notes that it would have to be established that the impugned conduct took place in the context of, or was associated with, an ‘international armed conflict’, (which depending on the circumstances, may include a ‘regional conflict’). In that regard, see International War Crimes Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v Dusko Tadic a/k/a “Dule”* (IT-94-1), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995). However, as noted above, General X could only be prosecuted with the consent of the Attorney-General. Furthermore, he would not be liable to be tried in an Australian court if he had already been convicted or acquitted by the International Criminal Court for an offence constituted by substantially the same conduct as constituted the alleged offence under the Code.

The Commission notes that General X would also be liable to be arrested in Australia pursuant to the *International Criminal Court Act 2002* (ICC Act) if the ICC had issued a warrant for the arrest of General X, and such a request for assistance had been made to Australia by the ICC in accordance with the ICC Act.⁹⁴

8. *Have the national courts considered the extent of their jurisdiction over international intervention forces? If so, please provide details of the cases and copies of the judgments if possible.*

No.

However, we note that the President of HREOC wrote an opinion editorial contribution that was published in the metropolitan press on 21 June 2004. He highlighted the human rights obligations of Australian troops when deployed overseas, whether on active combat duty or as part of a peacekeeping or international intervention force.⁹⁵

9. *Describe the nature and extent of procedures and safeguards, both legal and practical, in place to protect against torture by non-state actors.*

As set out in Questions 3 and 7 in this section, the *Criminal Code* 1995 (Cth) prohibits torture committed as a War Crime, Crime Against Humanity and is an aggravating factor under the Code for certain crimes committed against the UN or Associated Personnel. HREOC notes that the Code does not differentiate between

⁹² See s 5(3) of the *Crimes (Torture) Act* 1988 (Cth).

⁹³ See *Criminal Code* 1995 (Cth), s 268.25 (War Crimes as a grave breach of Protocol I to the Geneva Conventions), s 268.73 (War Crime as a serious violation of common Article 3 to the Geneva Conventions) and s 268.13 (Crime Against Humanity).

⁹⁴ See s 7(1)(a)(i) and Part 3, Divisions 2 and 3 of the *International Criminal Court Act* 2002 (Cth).

⁹⁵ See HREOC website at http://www.hreoc.gov.au/media_releases/op_ed/coalition.html.

State and non-State actors and as such those provisions could equally apply to the conduct of non-State actors. In addition, the *Crimes Act 1914* (Cth) and State and Territory criminal laws operate to prohibit torture and cruel, inhuman and degrading treatment or punishment perpetrated by State and non-State actors.

Insofar as ‘practical’ procedures and safeguards are concerned, as discussed in Questions 3 and 8 in section 1, HREOC has undertaken various complaint handling, educational and inquiry activities relating to torture. Those activities are aimed at promoting awareness and assisting in the protection against torture by non-State actors.

**Appendix A: Schedule of HREOC Act complaints
within jurisdiction under ICCPR/CRC of relevance to CAT**

Year	Complaints re breach of the ICCPR	Complaints re arts 7/10 ICCPR	Complaints re breach of CRC	Complaints re art 37(a)/(c) CRC	Main allegations made in complaints*
2000/2001	63	15 - article 7 2 - article 10	17	7	<ul style="list-style-type: none"> • immigration detainees alleging physical assault by custodial officers during security incidents (9) • federal prisoners shackled while being transferred to court and held in a metal cage during the hearing • a federal prisoner tied up, blind folded and knocked unconscious • claims of persecution/torture if returned by Australia to country of origin • use of handcuffs during transfer of immigration detainees (4) • use of tear gas in relation to immigration detainees • immigration detainees alleging restriction on ability to see visitors or contact legal representatives (2 complaints – art 10) • alleged physical assault of children in immigration detention by custodial officers during a disturbance (2) • claims of persecution of a child if returned to country of origin • harsh treatment of a child immigration detainee during a hunger strike, including an attempt to leg cuff the child • harassment of child immigration detainee by other detainees • holding a child with adult detainees who were a security risk in the context of a major disturbance in a

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Year	Complaints re breach of the ICCPR	Complaints re arts 7/10 ICCPR	Complaints re breach of CRC	Complaints re art 37(a)/(c) CRC	Main allegations made in complaints*
					centre
2001/2002	84	8 – article 7 29 – article 10	9	3	<ul style="list-style-type: none"> • immigration detainees alleging physical assault/harsh treatment by custodial officers (6 complaints) • claims of persecution/torture if returned by Australia to country of origin • use of tear gas on immigration detainees in security incidents (3) • inadequate care of immigration detainee contributed to death • immigration detainees alleging use of handcuffs in the context of security incidents and transferring people to hospitals or medical appointments (6 complaints – art 10) • immigration detainees alleging assault by custodial officers (9 complaints – art 10) • immigration detainees unable to contact their families for several months during the initial period of detention (17 complaints – art 10) • alleged child immigration detainees roughly handled by custodial officers • continuing immigration detention of a child in a detention centre despite medical assessments that detention was detrimental to his health
2002/2003	52	7 – article 7 12 – article 10	15	8	<ul style="list-style-type: none"> • immigration detainees alleging physical assault by custodial officers (6) • claims of persecution/torture if returned by Australia to country of origin (3) • use of tear gas on immigration detainees (3)

ACJ/APF Questionnaire on Torture – HREOC response

Year	Complaints re breach of the ICCPR	Complaints re arts 7/10 ICCPR	Complaints re breach of CRC	Complaints re art 37(a)/(c) CRC	Main allegations made in complaints*
					<ul style="list-style-type: none"> • immigration detainees alleging assault by custodial officers (8 complaints – art 10) • immigration detainees alleging use of handcuffs in relation to transfers or in the context of security incidents and a strip search (5 complaints – art 10) • child immigration detainees were hit with batons and tear gassed during a security incident (2) • concerns about the quality of education provided to children in immigration detention (2) • child immigration detainee bullied by other detainees • child removed from mother immigration detainee following security incident • three child siblings alleging physical assault by custodial officers while in immigration detention • children not sufficiently protected during fires in an immigration detention centre
2003 to 4/3/2004	24	2 – article 7 11 – article 10	3	1	<ul style="list-style-type: none"> • immigration detainee alleging assault by custodial office; handcuffs injured his hands • federal prisoner alleging torture by custodial officers and humiliation during a strip search • immigration detainees alleging assault by custodial officers (9 complaints – art 10) • immigration detainees alleging use of handcuffs following a security incident or handcuffing during medical treatment (4 complaints – art 10) • quality of food provided to a child in immigration detention