



Australian
Human Rights
Commission

Information for List of Issues Prior to Reporting - Australia

**SUBMISSION BY THE AUSTRALIAN HUMAN
RIGHTS COMMISSION**

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1. Introduction

1. This submission is made by the Australian Human Rights Commission. The Commission is an 'A status' national human rights institution established and operating in full compliance with the Paris Principles. Information about the Commission can be found at: www.humanrights.gov.au.
2. The submission provides information to the Committee Against Torture (CAT Committee) that is relevant to Australia's implementation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).¹
3. The submission is based on work that has been undertaken by the Commission in accordance with our mandate and functions. The material provided here has been publicly reported in Australia and has been brought to the attention of the Australian government.
4. In particular, the submission draws upon material contained in the following documents:
 - Commission submission to the CAT Committee prior to Australia's constructive dialogue in November 2014 (2014 CAT Submission)²
 - Commission submission to Australia's 2nd cycle Universal Periodic Review (UPR) (UPR Submission)³
 - Commission UPR Fact Sheets⁴
 - Report of the Working Group on the UPR, Australia (UPR Working Group Report)⁵
 - Addendum 1 to the UPR Working Group Report.⁶
5. The Commission thanks the CAT Committee for the opportunity to provide a written contribution prior to its adoption of the List of Issues Prior to Reporting (LOIPR) on Australia.
6. The submission has been presented according to the thematic issues identified in the Committee's *Concluding observations on the combined fourth and fifth periodic reports of Australia* (UN Doc: CAT/C/AUS/CO/4-5). The Commission has also included information considered relevant to the development of the LOIPR.
7. The recommended issues for consideration in the LOIPR are compiled in **Attachment 1** of this submission.

2. National Human Rights Institution

Concluding Observations, para 8

8. The Commission has a statutory power to promote and protect human rights under the *Australian Human Rights Commission Act 1986* (Cth) Act (AHRC

Act). Human rights are defined as the international instruments scheduled to or declared under the AHRC Act. The Commission's legislation does not include the CAT within the definition of 'human rights'.

9. The *International Covenant on Civil and Political Rights* (ICCPR),⁷ and the *Convention on the Rights of the Child* (CRC),⁸ are included in the definition of human rights under the AHRC Act. As such, the Commission can investigate allegations of torture, cruel, inhuman and degrading treatment through the ICCPR and the CRC.
10. The definition of human rights in the *Australian Human Rights Commission Act 1986* (Cth) is not consistent with that of the Joint Parliamentary Committee on Human Rights under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). This Act defines human rights as the seven instruments to which Australia is a party, including the CAT.
11. **Issue for consideration in the LOIPR: Ensuring that the Commission is guided by a comprehensive definition of human rights, including by CAT being a scheduled instrument.**

3. Ratification of OPCAT

Concluding Observations, para 22

Relevant provisions of the CAT: Article 2(1)

12. The Commission notes that Australia signed the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in 2009, but has yet to ratify the treaty.
13. During Australia's UPR appearance and response, the Government noted that ratification was under active consideration.⁹ At this stage, there have not been detailed discussions about the model for the national preventive mechanism under the OPCAT.
14. **Issue for consideration in the LOIPR: Information on the timing of ratification of OPCAT and the nature of the National Preventive Mechanism to be established for places of detention.**

4. Scrutiny of human rights and role of the Parliamentary Joint Committee on Human Rights

Concluding Observations, para 21

Relevant provisions of the CAT: Article 2(1)

15. The Parliamentary Joint Committee on Human Rights (PJCHR), analyses bills and legislative instruments before the federal Parliament for compliance with human rights. The definition of human rights is the seven international instruments to which Australia is a party, including CAT.

16. Since its establishment, the PJCHR has produced 56 reports to Parliament assessing over 850 bills and the statement of compatibility with human rights accompanying each bill.¹⁰ Through these reports (and also through the provision of two Practice Notes),¹¹ the PJCHR provides guidance to government departments on their expectations about the level of human rights analysis that statements of compatibility should contain.
17. As a matter of practice, ministers and government departments respond to concerns raised by the PJCHR regarding proposed legislation.¹² The PJCHR raises concerns when they believe that legislation places an unjustifiable limitation on human rights. However, legislators are under no obligation to amend bills to reflect these concerns. Furthermore, there have been cases where bills have passed into law before the PJCHR has reported on the bill.¹³
18. The Commission notes that the findings of the PJCHR are often not taken into account by legislators when they are deliberating on proposed legislation.
19. The processes of the PJCHR stand in isolation as there is no national human rights act or charter of rights to otherwise incorporate the obligations in CAT into Australian law. However, the Commission notes that the *Criminal Code Act 1995* (Cth), includes a reference to the CAT and the definition of torture.¹⁴
20. **Issue for consideration in the LOIPR: Incorporation of human rights into Australian law including procedures for considering the concerns raised by the PJCHR.**

5. Violence against women and children

Concluding Observations, para 9

Relevant provisions of the CAT: Articles 2, 12, 13, 14 and 16

21. Violence against women remains a significant issue in Australia. As stated in the 2014 CAT Submission, 41% of women aged 18 and over have experienced violence in their lifetime.¹⁵ Further, violence is a leading cause of ill-health and death among women aged between 15 and 44 years.¹⁶
22. Aboriginal and Torres Strait Islander women are five times more likely than non-Indigenous women to be homicide victims¹⁷ and 45 times more likely to be victims of domestic and family violence.¹⁸ Women with disability, women who are of culturally and linguistically diverse backgrounds, and women who are of diverse sexual orientation, gender identity or intersex are also particularly susceptible to violence.
23. Sexual harassment, another form of violence against women, is prevalent in Australian university settings and in Australian workplaces. Just over one in five (21%) people aged 15 years and older has experienced sexual harassment in the workplace in the past five years.¹⁹
24. The unique needs and experiences of children in this context also needs to be considered. An estimated 935,600 adult women first experienced physical abuse, and an estimated 1,092,200 first experienced sexual abuse, as a child

aged between 0 to 14 years.²⁰ It also estimated that family and domestic violence is present in 55% of physical abuses and 40% of sexual abuses against children.²¹

25. The Commission notes that Australia has responded to the Committee's Concluding Observations regarding violence against women.²² The Commission commends the significant efforts made by Australia to address violence against women under the *National Plan to Reduce Violence against Women and their Children 2010-22* (National Plan).
26. In 2015, the Australian Government announced \$100 million in funding to respond to family and domestic violence by enhancing women's safety. \$21 million of the package is targeted towards specific measures to help Indigenous women.²³ In 2016, the Australian Government allocated a further \$100 million over three years to fund the implementation of the third Action Plan of the National Plan.²⁴
27. However, as raised in the UPR Submission, a number of support services remain under-resourced.²⁵ Cuts to community legal centres and Aboriginal legal services can impact on access to services for women affected by violence.
28. The Commission also acknowledges the \$5.1 million dedicated by the Australian Government to the implementation of the Third Action Plan of the *National Framework for Protecting Australia's Children 2009-2020*, which will help support early intervention and child safe approaches.²⁶ However, the Commission is concerned that this funding is inadequate to achieve the objectives of the Plan.
29. **Issues for consideration in the LOIPR:**
 - **Information on how the National Plan addresses gender inequality, focuses on prevention measures, and ensures robust, independent monitoring and evaluation.**
 - **Information on the funding for specialist family violence services including legal services (community legal centres and Family Violence Prevention Legal Services), funding for appropriate support for crisis and transitional accommodation, and adequacy of funding for the Third Action Plan of the *National Framework for Protecting Australia's Children 2009-2020*.**
 - **Information on how the National Plan addresses the specific needs and rights of children and young people recognising that discrimination, harassment, violence, and a lack of safety are all abuses of children's human rights.** To this end the Commission refers the Committee to the National Children's Commissioner's *Children's Rights Report 2015*.²⁷

30. Australia lacks a coherent national system of death reviews to consider cross-jurisdictional issues and ensure accurate monitoring to address systemic issues from deaths associated with domestic violence. The Commission is conducting an inquiry into *Enhancing domestic and family violence death review processes*.
31. The Commission notes that the Australian and New Zealand Child Death Review and Prevention Group (ANZCDR&PG) has continued its valuable work to establish a national child death and injury data base as per the recommendation of the National Children's Commissioner in her 2014 Children's Rights Report.²⁸
32. **Issues for consideration in the LOIPR:**
 - **Information on the monitoring of the implementation of Coronial Inquest findings, to address systemic failures to protect women from domestic violence.**
 - **Information on the progress to establish a national child death and injury data base.**

6. Trafficking in persons

Concluding Observations, para 10

Relevant provisions of the CAT: Articles 2, 12, 13, 14 and 16

33. The Commission commends Australia for developing a *National Action Plan to Combat Human Trafficking and Slavery 2015-2019*, which adopts a human rights-based approach, includes measures to standardise data collection on human trafficking and slavery, and includes measures to raise community awareness among vulnerable groups.²⁹ The Commission notes that adequate funding is needed for the full implementation of the National Action Plan.
34. The Commission also notes a strengthening of criminal offences against forced marriage. In 2015, legislation was enacted that increases the protection of children from forced marriage along with other persons who do not have the capacity to provide free and full consent to marriage.³⁰
35. The Commission notes that the Australian Government is undertaking a national consultation on the implementation of the UN Guiding Principles on Business and Human Rights.³¹ The Commission considers that the subsequent National Action Plan on Business and Human Rights should have clear links with the *National Action Plan to Combat Human Trafficking and Slavery 2015-2019*.
36. The Commission further notes the recent inquiry and report of the House of Representatives Standing Committee on Social Policy and Legal Affairs into the regulatory and legislative aspects of international and domestic surrogacy arrangements *Surrogacy Matters*.³² The Commission submission considered that unregulated surrogacy arrangements raise real concerns about the potential for the trafficking of women and children.³³

37. The Committee's 10 recommendations concern improving access to well-regulated and lawful domestic surrogacy arrangements so that there is less need for Australians to travel overseas to engage in surrogacy (Recommendations 1-6), and to promote better protection of the human rights of birth mothers and the children they carry on behalf of Australian citizens involved in international surrogacy arrangements (Recommendations 7-10). If the recommendations in this report are adopted, it will be a significant step towards more uniform domestic laws that provide increased access to well-regulated surrogacy arrangements in Australia, and increased scrutiny of the practices in other countries which should lead to better human rights outcomes.
38. **Issues for consideration in the LOIPR:**
- **Information about mechanisms for providing compensation to victims of human trafficking and slavery and the adequacy of support services for victims.**³⁴
 - **Information about responses to human trafficking, slavery and slavery-like situations, including measures in place to address forced labour in value chains.**
 - **Information about how current consideration of a National Action Plan on Business and Human Rights will incorporate the approach to people trafficking and Australia's obligations under CAT.**
 - **Information on the adoption of the recommendations contained in the report *Surrogacy Matters* to ensure the prevention of trafficking of birth mothers and the children they carry.**

7. Criminal Justice System

7.1 *Aboriginal and Torres Strait Islander Peoples*

Concluding Observations, para 12

Relevant provisions of the CAT: Articles 2, 11 and 16

39. The overrepresentation of Aboriginal and Torres Strait Islander peoples as both victims and offenders in the criminal justice system remains one of the most glaring disparities between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians.³⁵
40. The Commission welcomes the Australian Government decision to reverse previously announced funding cuts to National Aboriginal and Torres Strait Islander Legal Services.³⁶ The Commission remains concerned that the funding is insufficient to meet the needs of Aboriginal and Torres Strait Islander communities.
41. The Commission welcomes the Australian Government UPR voluntary commitment to improve the way the criminal justice system treats people with

cognitive disability who are unfit to plead or found not guilty by reason of mental impairment.³⁷ As part of this commitment, the Government committed to a national effort to analyse existing data and develop best practice resources in Australia.

42. Nevertheless, the Commission continues to be concerned about the indefinite detention of people with a cognitive impairment. The Commission has previously reported on several cases where Aboriginal and Torres Strait Islander people have been detained for a period longer than the maximum sentence if they had been found guilty.³⁸ The Commission and NGOs have advocated that justice targets be set to halve the gap in rates of incarceration for Aboriginal and Torres Strait Islander peoples. The justice targets could be included in the existing Close the Gap framework.³⁹ Further, justice reinvestment strategies have also been recommended by the Senate Legal and Constitutional Affairs Committee and successive Social Justice Commissioners.⁴⁰
43. The Commission is concerned regarding amendments to the *Police Administration Act* (NT) which provide for 'paperless arrests'. These amendments provide the police with the power to detain a person and hold them in custody for up to four hours (or longer if the person is intoxicated) if they suspect that the person has committed or is about to commit an 'infringement notice offence'. These amendments have a disproportionate impact on Aboriginal and Torres Strait Islander peoples.
44. **Issues for consideration in the LOIPR:**
 - **Information about approaches to address the rates of incarceration for Aboriginal and Torres Strait Islander peoples, including benchmarks and targets.**
 - **Information about the adequacy of funding to meet needs of Aboriginal and Torres Strait Islander communities.**
 - **Information on the intended analysis of existing data and development of best practice to address the treatment of people with cognitive disability in contact with the criminal justice system.**
 - **Information on the application and impact of the 'paperless arrests' powers in the Northern Territory.**

7.2 *Juvenile justice*

Concluding Observations, n/a

Relevant provisions of the CAT: Article 2, 11 and 16

45. The Commission continues to express concern about the number of children being detained in youth justice centres, those under 18 years being detained in adult facilities, and the lack of action on raising the minimum age of criminal responsibility to an internationally accepted level.⁴¹

46. The Commission notes recent amendments to the *Youth Justice Act 1992* (Qld) that will stop the transfer to 17-year-olds with six months remaining of their sentence from a youth justice centre to an adult facility in Queensland.⁴² However, the Commission is concerned that young people aged 17 years continue to be treated as adults by the Queensland criminal justice system and may still serve a sentence of imprisonment in an adult facility.⁴³
47. The Commission is also concerned about proposed amendments to the *Youth Justice Act* (NT) that will expand the circumstances in which restraints, including restraint chairs, can be used against young people in youth justice centres in the Northern Territory.⁴⁴
48. The National Children's Commissioner is currently examining how the special needs and interests of children and young people under the age of 18 in youth justice centres can be considered and monitored under the OPCAT. Young people under 18 years detained in adult detention facilities have also been included.
49. The project involves a stock-take of current oversight, complaints and reporting arrangements across the jurisdictions, an analysis of their adequacy in meeting OPCAT requirements, and the identification of opportunities for national improvements.
50. The project also includes consideration of the minimum age of criminal responsibility and the need to keep detained children in facilities separate from adults.
51. The National Children's Commissioner wants to make sure that the unique experiences and needs of children are a critical focus. This will contribute to greater transparency and consistency in the treatment of children in closed environments across Australia.
52. The results of this project will be included in the 2016 statutory Children's Rights Report. The report will be publically available in December 2016.
53. **Issues for consideration in the LOIPR:**
 - **Information on persons under 18 years being detained in adult facilities.**
 - **Information on the use of restraints against young people in custody.**

7.3 Deprivation of liberty - People with disability

Concluding Observations, para 11

Relevant provisions of the CAT: Article 2, 11 and 16

54. The Commission notes the Senate Community Affairs References Committee inquiry into *Violence, abuse and neglect against people with disability in institutional and residential settings*.⁴⁵ The Commission draws the CAT

Committee's attention to the Report of the Senate inquiry, in particular the recommendation to the Australian Government to work with state and territory governments on the implementation of initiatives to improve access to justice for people with disability contained in reports from the Australian Law Reform Commission, the Productivity Commission and the Commission's report *Equal Before the Law*.⁴⁶

55. The Commission's report, *Equal Before the Law*,⁴⁷ concluded that people with disabilities have higher rates of interaction with the criminal justice system than other Australians. The report cited 2012 statistics, which indicate that 38% of prison entrants reported they have ever been told by a doctor, psychiatrist, psychologist or nurse that they have a mental health disorder and 46% of prison discharges reported that they have ever been told they have a health condition – mental health, including drug and alcohol abuse. The report found that necessary supports and adjustments for people with disabilities were frequently not provided in the criminal justice system.
56. **Issues for consideration in the LOIPR:**
- **Information on the Australian Government response to the Senate Inquiry report into *Violence, abuse and neglect against people with disability in institutional and residential settings*.**
 - **Information on the mental health care services provided within the criminal justice system.**

7.4 Deprivation of liberty – overcrowding

Concluding Observations, para 11

Relevant provisions of the CAT: Articles 2, 11 and 16

57. The Commission raised the issue of overcrowding in prisons in the 2014 CAT Submission⁴⁸ and the UPR submission.⁴⁹ The Commission is concerned that there has been little improvement on this issue.
58. **Issue for consideration in the LOIPR: Information on the current conditions and capacity of prisons within Australia.**

7.5 Use of conducted energy weapons - Tasers

Concluding Observations, para 13

Relevant provision of the CAT: Articles 2, 12, 13, 14 and 16

59. The Commission raises the issue of inappropriate use of Tasers generally and the disproportionate use of Tasers against Aboriginal and Torres Strait Islander peoples in the 2014 CAT Submission.⁵⁰
60. **Issue for consideration in the LOIPR: Information on whether uniform national rules governing the use of Tasers has been adopted and whether the use is prohibited on children and pregnant women.**

8. Counter-terrorism legislation

Concluding Observations, para 14

Relevant provision of the CAT: Article 2

61. The 2015 CAT submission⁵¹ and the UPR submission,⁵² identified that Australia's counter-terrorism laws restrict human rights and that recent legislation has not been shown to be legitimate and proportionate responses to potential harms.
62. Since November 2014, new national security laws have been introduced to Parliament:
- *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth) – passed 2 December 2014
 - *Australian Citizenship and Other Legislation Amendment Act 2014* (Cth) – passed 3 December 2014
 - *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth) – passed 26 March 2015.
63. The Commission provided submissions to each of these bills when referred to the Parliamentary Joint Committee on Intelligence and Security for inquiry and report.⁵³ In particular, the Commission is concerned that the following bill amendments were incorporated into the Acts unchanged:
- *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth): increases the availability of control orders in light of the previous Independent National Security Legislation Monitor's (INSLM) criticisms of the current control order regime and without introducing any of the additional safeguards recommended by the Council of Australian Government's (COAG) Review of Counter-Terrorism Legislation.
 - *Australian Citizenship and Other Legislation Amendment Act 2014* (Cth): the application of the Act to children aged 10 – 14 years (section 35A); the ten year retrospectivity of the Act regarding prior convictions; the lack of entitlement of the person affected to make submissions on the revocation of their citizenship; the lack of a requirement for a criminal conviction prior to revocation of citizenship for some offences.
 - *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth): introduction of a mandatory data retention scheme that requires service providers to retain communications data for two years. The Act does require that any interference with the data be justified on reasonable grounds and interference with privacy must be justifiable and proportionate. The Commission has expressed concern that the regime unjustifiably limits individual rights to privacy and freedom of expression.

64. The Commission welcomes the appointment of the Independent National Security Legislation Monitor (INSLM), the Hon Roger Gyles AO QC on an acting basis on 11 December 2014 by the then Prime Minister. The Governor-General appointed Mr Gyles as the INSLM, for a period of two years on 20 August 2015.⁵⁴
65. The INSLM has produced several reports,⁵⁵ including:
- Report on the impact on journalists of section 35P of the ASIO Act
 - Control Order Safeguards (INSLM) Report Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015
 - Control Order Safeguards Part 2.
66. The INSLM has raised concerns regarding control orders and other issues. It is unclear, at this time, whether the INSLM's recommendations to moderate counter-terrorism laws will be implemented.
- 67. Issue for consideration in the LOIPR: Information on the implementation of the recommendations of the Independent National Security Legislation Monitor.**

9. Immigration detention and asylum seeker policy

9.1 *Non-refoulement*

Concluding Observations, para 15

Relevant provisions of the CAT: Articles 1, 2, 3, 4, 10, 11 and 16

68. The Commission notes the continuation of Operation Sovereign Borders, a military-led border security operation which aims to counter people smuggling, including through preventing the entry to Australia of boats carrying asylum seekers. As part of Operation Sovereign Borders, boats have been intercepted and returned to their point of departure 'where it is safe to do so'. At least 20 boats carrying over 600 people have been returned in this manner since Operation Sovereign Borders commenced.⁵⁶
69. Prior to being returned under Operation Sovereign Borders, asylum seekers undergo a screening process to determine whether Australia has protection obligations towards them. This process takes place at sea, via teleconference, and while the person is effectively being detained on board an Australian vessel.
70. The Commission is concerned that the process does not constitute a fair or thorough assessment of protection claims for the following reasons:
- Interviews may be brief and insufficiently detailed or probing to ensure that all relevant protection claims are raised.

- There is an absence of the normal safeguards, which would apply under Australia's statutory refugee status determination processes including access to merits review.
 - There is not typically access to legal advice.
71. The Commission notes that the screening process creates a risk that asylum seekers who have legitimate needs for protection, may be returned to situations where they could be in danger of being torture or subjected to other forms of cruel, inhuman or degrading treatment.
72. The Commission remains concerned about the changes introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* and the *Migration Amendment (Protection and Other Measures) Act 2015*, which similarly heighten the risk that some asylum seekers will be wrongly denied refugee status and removed from Australia.
73. The Commission is also concerned that most asylum seekers currently in Australia no longer have access to free government-funded legal advice to assist them in presenting their asylum claims.
74. **Issues for consideration in the LOIPR:**
- **Information on the measures taken under Operation Sovereign Borders to ensure non-refoulement.**
 - **Information on how the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* and the *Migration Amendment (Protection and Other Measures) Act 2015* ensure non-refoulement.**
 - **Information on the provision of government-funded legal services for asylum seekers.**

9.2 ***Mandatory immigration detention, including of children***

Concluding Observations, para 16

Relevant provisions of the CAT: Articles 1, 2, 4, 10, 11 and 16

75. Under the *Migration Act 1958* (the Migration Act), indefinite immigration detention remains mandatory for all unlawful non-citizens.⁵⁷ People who are detained cannot seek judicial review of whether or not their detention is necessary. There are no minimum standards for conditions of detention codified in Australian law.
76. There have been a number of positive developments relating to immigration detention in recent years:
- The overall number of people in detention has reduced from 2,757 in December 2014 to 1,679 in March 2016.⁵⁸

- The vast majority of children have been released from closed detention facilities in Australia into alternative community arrangements.⁵⁹
- Several detention facilities, including a number in remote areas of Australia, have either been closed or are due to close in the near future.⁶⁰
- A number of refugees who were previously held in indefinite detention due to having received an adverse security assessment have been released from closed detention.

77. However, there have been several developments, which are contrary to Australia's obligations under the CAT:

- Since 2014, there has been a significant increase in cases of long-term detention. As at March 2016, 804 people had been held in closed detention for more than one year (including 434 people who had been held for more than two years).⁶¹ The overall average length of detention in closed facilities has remained in excess of one year since August 2014.⁶²
- There has been a significant increase in the number of people detained as a result of having a visa refused or cancelled on character grounds. The number of people in detention as a result of visa cancellation increased from 140 in December 2014 to 589 in March 2016.⁶³ While these figures include people who have had visas cancelled on grounds unrelated to character, the increase followed changes to the Migration Act which broadened the criteria for visa cancellation on character grounds.⁶⁴
- A number of refugees continue to be held in indefinite detention due to having received an adverse security assessment. In April 2016, the UN Human Rights Committee reaffirmed that the prolonged indefinite detention of refugees in these circumstances violates the prohibition of cruel, inhuman and degrading treatment under Article 7 of the International Covenant on Civil and Political Rights.⁶⁵

78. The Commission also remains concerned about the impact of prolonged indefinite detention on the mental health of those detained. Numerous studies have documented high rates of mental health problems amongst people in immigration detention in Australia,⁶⁶ with the negative impacts of detention tending to worsen as detention becomes more prolonged.⁶⁷

79. **Issues for consideration in the LOIPR:**

- **Information on the use of mandatory and prolonged detention in light of the impacts that long-term indefinite detention has on the mental health of those detained.**
- **Information on the availability of regular judicial oversight of detention and the minimum standards for conditions of detention.**

9.3 Offshore processing of asylum claims

Concluding Observations, para 17

Relevant provisions of the CAT: Articles 1, 2, 4, 10, 11 and 16

80. The Commission remains concerned about several aspects of third country processing arrangements in Nauru and Papua New Guinea, which engage Australia's obligations under the CAT.
81. The Commission is concerned that the pre-transfer assessment process conducted before a person is transferred to Nauru or Papua New Guinea (either immediately after arrival or after being temporarily brought to Australia for medical treatment) does not allow for an adequate assessment of issues. For example:
- The Commission is aware of several cases in which same-sex attracted people have been removed to Nauru and Papua New Guinea, despite the fact that both countries criminalised same-sex sexual activity at the time.⁶⁸
 - The pre-transfer assessment process does not take into account whether a person is suffering from a mental illness or is a survivor of torture and trauma, creating a risk that they could be transferred to an environment which would further compromise their health and wellbeing.
82. The Commission welcomes the introduction of 'open centre' arrangements for asylum seekers in both countries. However, numerous reports and inquiries as well as the Commission's own research have repeatedly documented serious shortcomings in living conditions for people subject to third country processing.⁶⁹ Available evidence suggests that there has been limited improvement in these conditions over time.⁷⁰ The Commission is particularly concerned by reports of physical and sexual assault and other forms of abuse and exploitation involving people subject to third country processing.
83. The combination of (until recently) prolonged indefinite detention, delays in the processing of asylum claims, difficult living conditions, concerns about physical safety, and uncertainty about the future has reportedly had a profoundly negative impact on the mental health outcomes of people subject to third country processing. For example, interviews and assessments conducted by the Commission in November 2015 with children and families who had been subject to third country processing in Nauru revealed high levels of trauma and developmental risk amongst these children.⁷¹
84. The Commission again notes with concern that there is still no monitoring body for third country processing arrangements with all of the key features necessary to be fully effective: independence from the governments involved; adequate funding to fulfil the role; the capacity to maintain an ongoing or regular presence at immigration detention facilities; a specific statutory power to enter immigration detention facilities; comprehensive public reporting for transparency; and the capacity to require a public response from government.

85. Issues for consideration in the LOIPR:

- **Information on the continuation of third country processing of asylum claims in Nauru and Papua New Guinea and steps taken ensure that the human rights of people subject to third country processing are adequately protected.**
- **Information on independent monitoring of third country processing facilities including funding, reporting and access.**

10. Rights of the Child

10.1 *Royal Commission into Institutional Responses to Child Sexual Abuse*

Concluding Observations, para 19

Relevant provisions of the CAT: Articles 2, 9, 12, 14, and 16

86. The Commission notes that on 13 September 2014, the Letters Patent provided to the Royal Commission were amended. The time frame for the Royal Commission to report to the Governor-General has been extended until 15 December 2017.⁷² The Royal Commission report, recommendations and government response will be available prior to the CAT Committee constructive dialogue with Australia in 2018.
87. The Commission also notes that the Royal Commission has released a report on redress, *Redress and civil litigation report*.⁷³ The Report provides information relevant to the recommendations and concerns contained in paragraph 19(c) of the Concluding Observations on Australia.
- 88. Issue for consideration in the LOIPR: Information about redress mechanisms for victims of child sexual assault in institutional settings and the response of the Government to the findings and recommendations of the Royal Commission (once known).**

11. Sterilization of persons with disabilities

Concluding Observations, para 20

Relevant provisions of the CAT: Articles 2 and 16

89. The Commission draws the Committee's attention to the 2014 CAT Submission,⁷⁴ and the UPR Submission.⁷⁵
90. The Commission notes the Australian delegation to the UPR stated that a sterilization procedure required a person's consent or, if unable to give consent, with the authorization of a court or guardianship tribunal. Accordingly, the Delegation advised that UPR recommendations concerning sterilization would not be considered further at this time.⁷⁶

91. The Commission remains concerned that sterilisation of people with disabilities, including children, continues to take place in Australia without consent.
92. **Issue for consideration in the LOIPR: Information on the support provided to people with disabilities to exercise their legal capacity and to free and informed consent.**

12. Other issues

12.1 ***Sexual Orientation, Gender Identity and Intersex issues (SOGII)***

Concluding Observations: n/a

Relevant provisions of the CAT: Article 16

93. The Commission remains concerned that children born with intersex variations are still subject to medically unnecessary normalising medical interventions before they are able to provide full and informed consent.⁷⁷ Such interventions can have significant and ongoing physical and psychological consequences.⁷⁸ The Commission notes that the Senate Community Affairs Committee conducted an inquiry into the involuntary or coerced sterilisation of intersex people in Australia in 2013.⁷⁹ The Government responded to the recommendations of that inquiry in 2015.⁸⁰ The Commission remains concerned that many of the recommendations have not been implemented; particularly at the state and territory level.
94. The Commission also remains concerned that in all Australian states and territories, with the exception of the Australian Capital Territory (ACT), people must undergo surgical or medical treatment to change the legal record of their sex. They must also be unmarried.⁸¹ In the ACT people must provide a declaration from a psychologist or doctor that they have received 'appropriate clinical treatment for the alteration'.⁸²
95. **Issues for consideration in the LOIPR:**
- **Information on the implementation of the recommendations of the Senate Inquiry Report Community Affairs Committee's 2013 *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia* by federal, state and territory governments.**
 - **Information on steps taken by state and territory governments to remove the surgery and marital status requirements in births, deaths and marriages registration legislation.**

12.2 ***Older persons – elder abuse***

Concluding Observations: n/a

Relevant provisions of the CAT: Articles 2 and 16

96. The Commission notes that the Australian Government UPR voluntary commitment to include a dedicated section on the rights of older Australians in all relevant human rights treaty reports and UPR reports.⁸³
97. The Commission is of the view that all Australians have the basic human right to feel safe, respected and free from violence in their relationships, families and in their homes. Elder abuse, in many various forms, is a fundamental human rights issue faced by many older people and is presenting a range of complex challenges for the Australian community.
98. At present the evidence about the prevalence of elder abuse in Australia is limited. There is no national prevalence data, but it is almost certain that elder abuse will increase as Australia's population lives longer, and older people form a greater proportion of the population. There is growing community awareness of elder abuse and the need for coordinated action. In recent years elder abuse has been the subject of investigation by the Queensland⁸⁴ and New South Wales⁸⁵ state parliaments and a Victorian Royal Commission into Family Violence.⁸⁶
99. The Commission notes that in February 2016, the Australian Government, released an Australian Institute of Families Studies (AIFS) report on elder abuse, providing a valuable insight into the nature of abuse in Australia. Building on the AIFS study, the Attorney-General asked the Australian Law Reform Commission to conduct an inquiry into safeguards for older Australians, with the report due by May 2017.⁸⁷ The Commission is of the view that these initiatives are a first step towards a coordinated national strategy on elder abuse.
- 100. Issue for consideration in the LOIPR: Information on the prevalence of elder abuse and strategies to combat this abuse.**

Attachment 1: Compilation of issues for consideration in the LOIPR

- **National Human Rights Institution**

Ensuring that the Commission is guided by a comprehensive definition of human rights, including by CAT being a scheduled instrument.

- **Ratification of OPCAT**

Information on the timing of ratification of OPCAT and the nature of the National Preventive Mechanism to be established for places of detention.

- **Scrutiny of human rights and role of the Parliamentary Joint Committee on Human Rights**

Information on the incorporation of human rights into Australian law including procedures for considering the concerns raised by the PJCHR.

- **Violence against women and children**

Information on how the National Plan addresses gender inequality, focuses on prevention measures, and ensures robust, independent monitoring and evaluation.

Information on the funding for specialist family violence services including legal services (community legal centres and Family Violence Prevention Legal Services), funding for appropriate support for crisis and transitional accommodation, and adequacy of funding for the Third Action Plan of the National Framework for Protecting Australia's Children 2009-2020.

Information on how the National Plan addresses the specific needs and rights of children and young people recognising that discrimination, harassment, violence, and a lack of safety are all abuses of children's human rights. To this end the Commission refers the Committee to the National Children's Commissioner's Children's Rights Report 2015.

Information on the monitoring of the implementation of Coronial Inquest findings, to address systemic failures to protect women from domestic violence.

Information on the progress to establish a national child death and injury data base.

- **Trafficking in persons**

Information about mechanisms for providing compensation to victims of human trafficking and slavery and the adequacy of support services for victims.

Information about responses to human trafficking, slavery and slavery-like situations, including measures in place to address forced labour in value chains.

Information about how current consideration of a National Action Plan on Business and Human Rights will incorporate the approach to people trafficking and Australia's obligations under CAT.

Information on the adoption of the recommendations contained in the report *Surrogacy Matters* to ensure the prevention of trafficking of birth mothers and the children they carry.

- **Criminal Justice System**

Aboriginal and Torres Strait Islander Peoples

Information about approaches to address the rates of incarceration for Aboriginal and Torres Strait Islander peoples, including benchmarks and targets.

Information about the adequacy of funding to meet needs of Aboriginal and Torres Strait Islander communities.

Information on the intended analysis of existing data and development of best practice to address the treatment of people with cognitive disability in contact with the criminal justice system.

Information on the application and impact of the 'paperless arrests' powers in the Northern Territory.

Juvenile justice

Information on persons under 18 years being detained in adult facilities.

Information on the use of restraints against young people in custody.

Deprivation of liberty - People with disability

Information on the Australian Government response to the Senate Inquiry report into *Violence, abuse and neglect against people with disability in institutional and residential settings*.

Information on the mental health care services provided within the criminal justice system.

Deprivation of liberty – overcrowding

Information on the current conditions and capacity of prisons within Australia.

Use of conducted energy weapons – Tasers

Information on whether uniform national rules governing the use of Tasers has been adopted and whether the use is prohibited on children and pregnant women.

- **Counter-terrorism legislation**

Information on the implementation of the recommendations of the Independent National Security Legislation Monitor.

- **Immigration detention and asylum seeker policy**

Non-refoulement

Information on the measures taken under Operation Sovereign Borders to ensure non-refoulement.

Information on how the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* and the *Migration Amendment (Protection and Other Measures) Act 2015* ensure non-refoulement.

Information on the provision of government-funded legal services for asylum seekers.

Mandatory immigration detention, including of children

Information on the use of mandatory and prolonged detention in light of the impacts that long-term indefinite detention has on the mental health of those detained.

Information on the availability of regular judicial oversight of detention and the minimum standards for conditions of detention.

Offshore processing of asylum claims

Information on the continuation of third country processing of asylum claims in Nauru and Papua New Guinea and steps taken ensure that the human rights of people subject to third country processing are adequately protected.

Information on independent monitoring of third country processing facilities including funding, reporting and access.

- **Rights of the Child**

Information about redress mechanisms for victims of child sexual assault in institutional settings and the response of the Government to the findings and recommendations of the Royal Commission (once known).

- **Sterilization of persons with disabilities**

Information on the support provided to people with disabilities to exercise their legal capacity and to free and informed consent.

- **Other issues**

Sexual Orientation, Gender Identity and Intersex issues (SOGII)

Information on the implementation of the recommendations of the Senate Inquiry Report Community Affairs Committee's 2013 Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia by federal, state and territory governments.

Information on steps taken by state and territory governments to remove the surgery and marital status requirements in births, deaths and marriages registration legislation.

Older persons – elder abuse

Information on the prevalence of elder abuse and strategies to combat this abuse.

Endnotes

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⁶⁷ For example, a 2004 study of asylum seeker families in immigration detention found that this incidence of psychiatric disorders amongst both adults and children in detention increased over time. See Zachary Steel et al, 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia' (2004) 28 2 *Australian and New Zealand Journal of Public Health* 23.

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⁶⁹ See United Nations High Commissioner for Refugees, *UNHCR Mission to the Republic of Nauru, 3-5 December 2012* (2012). At <http://reliefweb.int/sites/reliefweb.int/files/resources/2012-12-14%2Bnauru%2Bmonitoring%2Breport%2Bfinal.pdf> (viewed 30 March 2016); United Nations High Commissioner for Refugees, *UNHCR Mission to Manus Island, Papua New Guinea, 15-17 January 2013* (2013). At http://unhcr.org.au/wp-content/uploads/2015/05/15Jan2013_ManusMission.pdf (viewed 29 March 2016); United Nations High Commissioner for Refugees, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 11-13 June 2013* (2013). At http://unhcr.org.au/wp-content/uploads/2015/05/11June2013_ManusMonitoringVisit.pdf (viewed 29 March 2016); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of the Migration (Regional Processing) package of legislation* (19 June 2013). At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/92013/index (viewed 30 March 2016); United Nations High Commissioner for Refugees, *UNHCR monitoring visit to the Republic of Nauru, 7 to 9 October 2013* (2013). At <http://unhcr.org.au/wp-content/uploads/2015/05/2013-12-06-Report-of-UNHCR-Visit-to-Nauru-of-7-9-October-2013.pdf> (viewed 29 March 2016); United Nations High Commissioner for Refugees, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013* (2013). At http://unhcr.org.au/wp-content/uploads/2015/05/23Oct2013_ManusMonitoringVisit.pdf (viewed 29 March 2016); Robert Cornall, *Review into the events of 16-18 February 2014 at the Manus Regional Processing Centre* (Department of Immigration and Border Protection, 23 May 2014). At <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-robert-cornall.pdf> (viewed 30 March 2016); United Nations Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014), 6. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/AUS/CO/4-5&Lang=En (viewed 30 March 2016); Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* (Department of Immigration and Border Protection, 6 February 2015). At

<https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf> (viewed 30 March 2016); Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Observations on*

- communications transmitted to Governments and replies received, United Nations Human Rights Council, 28th sess, Agenda Item 3, UN Doc A/HRC/28/68/Add.1 (5 March 2015). At http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_68_Ad_d.1_en.doc (viewed 29 March 2016); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (December 2014) 37–54. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/~media/Committees/Senate/committee/legcon_ctte/Manus_Island/Report/report.pdf (viewed 31 May 2016); Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking responsibility: Conditions and circumstances at Australia's Regional Processing Centre in Nauru* (August 2015) 59–86. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/~media/Committees/nauru_ctte/Final_Report/report.pdf (viewed 6 May 2016); Elizabeth Elliott and Hasantha Gunasekera, *The health and well-being of children in immigration detention: Report to the Australian Human Rights Commission – Monitoring Visit to Wickham Point Detention Centre, Darwin, NT* (Australian Human Rights Commission, 2016) 12. At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration> (viewed 30 March 2016).
- ⁷⁰ As indicated by a comparison of the issues raised in the documents referred to above.
- ⁷¹ Elizabeth Elliott and Hasantha Gunasekera, *The health and well-being of children in immigration detention: Report to the Australian Human Rights Commission – Monitoring Visit to Wickham Point Detention Centre, Darwin, NT* (Australian Human Rights Commission, 2016). At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration> (viewed 30 March 2016).
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- ⁷³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and civil litigation report* (14 September 2015). At <https://www.childabuseroyalcommission.gov.au/about-us/our-reports> (viewed 8 June 2016).
- ⁷⁴ Australian Human Rights Commission, 'Submission to the UN Committee Against Torture under the *Convention Against Torture*, 17 October 2014, [223-226]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fNGO%2fAUS%2f18690&Lang=en (viewed 8 June 2016); Australian Human Rights Commission, 'Submission by the Australian Human Rights Commission under the *Universal Periodic Review Process*, April 2015, [26]. At <https://www.humanrights.gov.au/submissions/australia-s-second-universal-periodic-review> (viewed 9 June 2016).
- ⁷⁵ Australian Human Rights Commission, 'Submission by the Australian Human Rights Commission under the *Universal Periodic Review Process*, April 2015, [26]. At <https://www.humanrights.gov.au/submissions/australia-s-second-universal-periodic-review> (viewed 9 June 2016).
- ⁷⁶ *Report of the Working Group on the Universal Periodic Review Australia*, HRC, 31st sess, Agenda Item 6, Addendum 1, UN Doc A/HRC/31/14 (31 January 2016) [38-39]. At <http://www.ohchr.org/EN/HRBodies/UPR/Pages/AUSession23.aspx> (viewed 9 June 2016).
- ⁷⁷ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights 2015*, 57. At <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual> (viewed 17 June 2016).
- ⁷⁸ Tiffany Jones et al, *Intersex: Stories and Statistics from Australia* (OpenBook Publishers, 2016) 109-113.
- ⁷⁹ Senate Standing Committee on Community Affairs, *Involuntary or coerced sterilisation of intersex people in Australia* (2013). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index (viewed 20 June 2016).
- ⁸⁰ Commonwealth, *Parliamentary Debates*, Senate, 17 June 2015, 3755-3769 (Senator Fifield). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2Fb72114df-d068-4aeb-8fd0-833d5a01f955%2F0164%22;src1=sm1> (viewed 20 June 2016).
- ⁸¹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights 2015*, 50. At <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual> (viewed 17 June 2016).

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