# AUSTRALIAN government RESPONSE

## Call for submissions FROM THE Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Australia thanks the Special Rapporteur for their invitation to provide a submission to inform the report on the duty to investigate crimes of torture in national law and practice.

**(i)** **Challenges, impediments and obstacles to effective national investigations and prosecutions of acts of torture:** What are the main impediments preventing full and prompt investigations into allegations of torture – consider matters such as gaps in legal and regulatory frameworks, political-cultural-leadership, institutional, practical and other challenges?

Nil.

**(ii) Regulatory frameworks:** How is torture (and other forms of cruel, inhuman or degrading treatment or punishment, as applicable) criminalized in your national legislation? Please provide examples (and copies) of national laws that criminalize torture (and other forms of cruel, inhuman or degrading treatment or punishment, as applicable), and approaches to questions such as immunities, amnesties, statutes of limitations, defences of superior orders, and sentencing.

Division 274 of the Commonwealth Criminal Code (at **Attachment A**) criminalises acts of torture, in similar terms to the definition in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The offence applies to the conduct of any person, regardless of nationality, and to acts committed anywhere in the world. The penalty for the offence of torture is 20 years imprisonment. Importantly, the offence applies where the perpetrator is a public official, acts in an official capacity or at the instigation, or with the consent or acquiescence, of a public official or a person acting in an official capacity. Division 268 of the Criminal Code also criminalises acts of torture and the severe infliction of pain.

**(iii)** **Elements of human rights-compliant investigations and prosecutions:** Please provide concrete examples of laws, regulations or practices that ensure that torture investigations and prosecutions are:

* a. independent and impartial,
* b. prompt,
* c. adequate and effective,
* d. accessible and safe,
* e. open to public scrutiny and transparent, and
* f. secure rights and remedies for victims and survivors.

Torture is a criminal offence under Australian law and is prosecuted according to standard prosecutorial policies. Criminal prosecution would be the preferred avenue to address allegations of torture.

**Legal protections**

Australia has a common law legal system, meaning that the recognition and protection of many basic rights and freedoms, such as rights for those in custody, relies on the enunciation of those rights over the centuries by judges in common law. An extensive discussion of common law rights, freedoms and privileges can be found in the Australian Law Reform Commission’s (ALRC) 2016 report into traditional rights and freedoms, available at [www.alrc.gov.au/publications](http://www.alrc.gov.au/publications). This review includes sections that consider in detail the right to a fair trial (which includes the right to a lawyer), rights that relate to the burden of proof, rights that relate to client legal privilege.

There are a wide range of laws that set out legal safeguards for individuals in both criminal and civil law contexts, including both before, during, and after the court process (such as rights of detainees to complaints mechanisms).

**Victims of crime compensation schemes**

Each State and Territory jurisdiction have victims’ compensation schemes which provides for counselling and financial assistance for compensable violent acts, as well as financial assistance for financial loss and compensable injuries that arise from a violent act. Victims of torture and cruel, inhuman or degrading treatment or punishment (CIDTP) have access to victims’ compensation schemes within their relevant jurisdiction.

**Assistance for survivors of torture and trauma**

At a Commonwealth level, the Department of Home Affairs administers the Program of Assistance for Survivors of Torture and Trauma (PASTT). (PASTT) delivers counselling and other support to people who experienced trauma or torture before arriving in Australia on humanitarian grounds.

Eligible clients come from the Department of Home Affairs Humanitarian Settlement Program – new arrivals or permanently resettled entrants – or those on temporary substantive visas. PASTT is delivered in each state and Territory by member agencies of the Forum of Australian Services for Survivors of Torture and Trauma.

Support under PASST includes:

* counselling
* advocacy and referrals to health and other services
* education and training of health and service providers
* activities that build capacity and help communities grow stronger
* rural and regional outreach services to ensure access to services outside metropolitan locations
* resources to assist specialist counselling and support services deliver effective assistance.

**(iv)** **Mechanisms/institutions/entities involved in complaints, investigations and prosecution:** What are the institutional arrangements in place to secure independent and effective investigations and prosecutions of allegations of torture (and other forms of cruel, inhuman or degrading treatment or punishment, as applicable)? How are complaints initiated? Please elaborate on competence, composition and expertise, working methods, legal and regulatory framework, etc.

For criminal investigations, see the answer to the above question.

For general complaints, there are a number of bodies that can investigate allegations including the Commonwealth Ombudsman or the Australian Human Rights Commission.

**Complaints against Australian Government agencies**

Complaints about the administrative actions of Australian Government agencies may be made to the Commonwealth Ombudsman. For the Commonwealth Ombudsman’s complaints process, see [here](https://www.ombudsman.gov.au/what-we-do/Can-we-help-you).

**Complaints against the Australian Federal Police**

Complaints about the Australian Federal Police may be made under the *Complaints (Australian Federal Police) Amendment Act 1994*. The Australian Federal Police’s Professional Standards is responsible for the oversight and investigation of complaints about the conduct of AFP employees.

The Commonwealth Ombudsman and the Australian Commission for Law Enforcement Integrity may also investigate complaints about the conduct of AFP employees.

Australian Federal Police’s internal governance framework sets out procedures for preventing and reporting suspected torture or cruel, inhuman or degrading treatment during interviews conducted offshore by foreign authorities. AFP’s authority to investigate such complaints is provided by Part V of the *Australian Federal Police ACT 1979*.

**Complaints against security and intelligence agencies and counter-terrorism**

Consistent with Australia’s laws, Australia’s security and intelligence agencies all have internal policies and operational guidelines which prohibit the use of or involvement with torture or other cruel, inhuman or degrading treatment or punishment.

The Inspector-General of Intelligence and Security is an independent statutory officer responsible for overseeing and reviewing the activities of Australian intelligence agencies. One of the statutory functions of the Inspector-General of Intelligence and Security is to ensure that the activities of intelligence agencies are consistent with human rights, including the prohibition against torture or other cruel, inhuman or degrading treatment or punishment.

The Inspector-General can investigate complaints, including complaints by members of the public or staff of an intelligence agency, about an action taken by an intelligence agency. The Inspector-General regularly liaises with the Australian Human Rights Commission (AHRC). The AHRC is required to refer to the Inspector General human rights and discrimination matters, including use or involvement of torture, relating to an act or practice of the intelligence and security agencies.

**Complaints about military personnel**

Complaints about military personnel may be made through internal military channels, the Commonwealth Ombudsman and the Australian Human Rights Commission.

**Complaint about places of detention**

The [*Guiding Principles for Corrections in Australia*](https://www.corrections.vic.gov.au/guiding-principles-for-corrections-in-australia) (‘the Principles’) represent a national intent around which each Australian state and territory develops its practices, policies, and performance standards. These include a commitment to effective systems that provide prisoners/offenders with opportunities to make requests or complaints and access appropriate information. The Principles also articulate a commitment to ensure external review and oversight is supported through engagement with Official Visitors, including providing Official Visitors with free and unfettered access to all prisoners, staff and all areas of the prison. All jurisdictions are committed to ensuring complaints are promptly actioned and governed by a review framework that is fair, transparent and equitable.

Each jurisdiction has policies and procedures to ensure those in custody are aware of their rights and have access to complaint mechanisms. For example, in the ACT, detainees are informed of how to make a complaint upon admission, including to relevant oversight agencies, such as the ACT Ombudsman, Human Rights Commission, the ACT Inspector of Correctional Services and the Integrity Commissioner. Detainees may make complaints verbally or in writing (including via email) to ACT Corrective Services directly or to relevant oversight agencies. Phone numbers for these oversight agencies are on the free call list, and their email addresses are whitelisted for all detainees.

In Victoria, all prisoners may make complaints, both internally within Corrections Victoria or to the Department of Justice and Community Safety, and externally to various Victorian oversight bodies. A range of material and posters including the ‘Complaints Poster’, identifying the general complaints process, are accessible across prisons, including in Easy English versions, for prisoners with limited English reading skills.

**(v)** **Victim participation and protection:** What measures are in place to secure victim participation in proceedings involving allegations of torture, and how are their rights and safety secured? Are there special arrangements and protections available for victims of sexual and gender-based violence? Please give consideration also to witness protection schemes, as well as whistleblower legislation and protection and other measures taken to ensure protection of complainants against reprisals.

At a Commonwealth level, the *Crimes Act 1914* (Cth) provides a range of protections for vulnerable witnesses giving evidence in federal criminal proceedings, including victims of human trafficking and slavery.

These protective measures are intended to ensure that vulnerable witnesses are able to give effective evidence to the court, including by minimising intimidation, additional trauma, fear for their personal safety and undue public embarrassment.

Protections afforded to vulnerable witnesses include disallowing inappropriate cross-examination, allowing evidence be given by means of closed-circuit television, video-link or video-recording, have their contact with the defendant or members of the public limited, and have a support person with them while they give evidence.

The *Crimes Act* also makes it an offence to publish public material identifying a trafficked person, and allows trafficked people to make victim impact statements to the court outlining the harm they have experienced.

**Confidentiality of complaints regarding torture, and protection of complainants**

Confidentiality is an integral part of complaints systems around Australia. For example, in the Northern Territory, all prisoners may make a complaint under confidential access. These complaints under confidential access are sent to the Corrections Commissioner.

South Australia’s only youth justice custodial facility, Adelaide Youth Training Centre, ensures the confidentiality of complainants by providing secure boxes in each unit to deposit feedback and complaint forms. Once received, all complaints are dealt with confidentially. The South Australian Independent Office for Public Integrity is responsible for the assessment and investigation of complaints.

**Responses to complaints regarding torture and ill-treatment**

Australia has a range of measures, including complaint handling procedures, reporting mechanisms and appropriate escalation points, to ensure that all complaints are responded to, investigated and managed appropriately.

In Queensland for example, in the event of a formal complaint at a corrective facility, Queensland Corrective Services (QCS) will investigate and aim to resolve and respond to the complainant within 30 days. In instances where a human rights element, such as torture or ill-treatment, is identified, it is flagged as such within the QCS complaints management system for governance and reporting purposes, and the agency has 45 days to respond. Depending on the nature and severity of the alleged misconduct, QCS may refer the matter to the Crime and Corruption Commission for investigation and consideration of criminal proceedings. Prisoners also have a right of review through the Queensland Human Rights Commission or Queensland Civil and Administrative Tribunal for these matters.

In the Northern Territory, the Northern Territory Ombudsman accepts complaints against police, the Independent Commissioner Against Corruption has the power to investigate corrupt conduct, as well as reprisals against witnesses and whistleblowers, and the Judicial Commission may take action against judicial malfeasance.

**Special arrangements and protections for victims of sexual and gender-based violence**

The Australian Government’s *National Plan to End Violence against Women and Children 2022 – 2032* provides the strategic framework for the Government’s response to the pervasive problem of domestic and gender-based violence in Australia. To this end, the Government has committed to an investment of $1.7 billion to end violence against women and children, which includes at least $1.3 billion in measures which support the National Plan.

The National Plan supports a renewed national approach to ending violence against women and children. This includes setting the national policy agenda to guide the work of states and territories, women’s safety experts and front-line services, and engaging with victim-survivors, to deliver meaningful change. The National Plan will be underpinned by two five-year action plans and a dedicated Aboriginal and Torres Strait Islander Action Plan.

Commonwealth and State and Territory Governments also provide significant legal and service supports for victim-survivors of family violence through a range of programs. Legal supports are provided through services including legal aid commissions, Family Violence Prevention Legal Services, women’s and community legal centres, and Aboriginal and Torres Strait Islander Legal Services. Support services are provided through a number of different channels including family violence services, crisis services, domestic violence support lines, women’s refuges and crisis accommodation and therapeutic supports.

**(vi)** **Complex investigations:** Please share concrete examples of handling complex investigations and prosecutions, including those where the crime was committed outside the territory of the prosecuting state (extradite or prosecute), during ongoing armed conflict or occupation or ongoing public emergency. Do you have experience of mutual legal assistance in torture cases, or universal jurisdiction? Also please share information about handling situations where both domestic and international investigations and prosecutions are occurring simultaneously.

**The Brereton Report – example of a complex investigation**

The Inspector-General of the Australian Defence Force (IGADF) Afghanistan Inquiry was commissioned by the Department of Defence in 2016. The scope of the Inquiry was ‘whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning, Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2005 to 2016’.

The report made a broad range of findings and 143 recommendations. The findings and recommendations fall into two categories: potential breaches of the Law of Armed Conflict or systemic cultural issues in some areas of the ADF.

Australia, particularly the Department of Defence and the ADF, has made significant progress in developing and implementing effective, efficient and fulsome responses to the findings and recommendations in the report.

At this time, Defence has implemented the required action to close 102 of the 143 Inquiry recommendations. Comprehensive oversight and governance arrangements have been put in place to support Defence’s response to the Afghanistan Inquiry. This includes the independent Afghanistan Inquiry Implementation Oversight Panel, established by the Australian Government to provide oversight and assurance of Defence’s response to the Inquiry.

*Potential Breaches of the Law of Armed Conflict*

The Inquiry identified potential breaches of the Law of Armed Conflict. The Law of Armed Conflict is the appropriate legal framework for responding to the findings and recommendations, which relate to the conduct of ADF personal during armed conflict in Afghanistan.

Where the response to a recommendation may involve Afghanistan, Australia is responding to the recommendation in a manner that respects Afghanistan’s sovereignty.

In respect of potential breaches of the Law of Armed Conflict, the Office of the Special Investigator (OSI) has been established to investigate potential breaches of Australia’s criminal law. Australia’s domestic criminal law implements Australia’s obligations under the Law of Armed Conflict and the Rome Statute.

The OSI is working with the Australian Federal Police to investigate allegations of criminal offences arising from or related to breaches of the Law of Armed Conflict by ADF members in Afghanistan between 2005 and 2016. Where appropriate the OSI will develop briefs of evidence to refer to the Commonwealth Director of Public Prosecutions for consideration.

To help protect the integrity of investigations and any future prosecutions (should they arise), the OSI has established a dedicated, separate Special Counsel team to advise the OSI on its access to, and the use and management of, information obtained by the Inquiry.

All Inquiry recommendations for criminal investigation have been referred to the OSI through the provision of the Afghanistan Inquiry report to the OSI Special Counsel. The activities of the OSI are ongoing and, therefore, it would be inappropriate to comments on the specific activities of the OSI at this time.

Where the actions of an ADF member do not rise to a breach of criminal law, but are below the high professional standard expected by the ADF, there are established ADF administrative and disciplinary mechanisms that can be used to address the member’s behaviour.

Australia is aware that human rights mechanisms have been used by other states, on some occasions, to address potential breaches of international law during armed conflict. Australia’s domestic legal system and its support for the international rules-based order provide effective platforms for responding to matters related to the Law of Armed Conflict identified in the IGADF Afghanistan Inquiry report. Should a specific matter be raised in the context of international human rights, Australia will engage and respond constructively.

*Cultural Reforms*

As stated at the outset the findings and recommendations also identified what has been broadly described as systemic cultural issues.

A substantial body of work has been undertaken through the Afghanistan Inquiry Reform Program to address the findings and recommendations and embed sustainable, enduring reform across the organisation.

The Reform Program has two objectives:

* Address the past – consider and take appropriate action to address organisational, collective and individual responsibility for past failures and wrongdoing
* Prevent recurrence – build the best possible organisation for the future, comprehensively understanding and addressing the root causes of the failures and wrongdoings; and developing the systems, cultures and accountability that will prevent, and promptly detect and respond to, departures from required standards.

**Extradition matters**

Between 1 November 2014 and 30 June 2022, Australia did not formally reject any extradition request from a foreign country concerning an individual suspected of having committed a torture-based offence, so as to prosecute the individual in lieu.

**(vii)** **Evidence collection and innovation:** Please provide examples of innovative practices to secure evidence collection and any associated challenges around use of new technologies, open source documentation, application of the Istanbul Protocol, or other innovative practices and developments.

Nil.

## ATTACHMENT A

***Criminal Code Act 1995 (Cth)***

**Division 274—Torture**

**274.1  Definitions**

             (1)  In this Division:

***Convention*** means the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations at New York on 10 December 1984.

Note:          The text of the Convention is set out in Australian Treaty Series 1989 No. 21 ([1989] ATS 21). In 2010, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

             (2)  An expression that is used both in this Division and in the Convention (whether or not a particular meaning is given to it by the Convention) has, in this Division, the same meaning as it has in the Convention.

**274.2  Torture**

             (1)  A person (the ***perpetrator***) commits an offence if the perpetrator:

                     (a)  engages in conduct that inflicts severe physical or mental pain or suffering on a person (the ***victim***); and

                     (b)  the conduct is engaged in:

                              (i)  for the purpose of obtaining from the victim or from a third person information or a confession; or

                             (ii)  for the purpose of punishing the victim for an act which the victim or a third person has committed or is suspected of having committed; or

                            (iii)  for the purpose of intimidating or coercing the victim or a third person; or

                            (iv)  for a purpose related to a purpose mentioned in subparagraph (i), (ii) or (iii); and

                     (c)  the perpetrator engages in the conduct:

                              (i)  in the capacity of a public official; or

                             (ii)  acting in an official capacity; or

                            (iii)  acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

Penalty:  Imprisonment for 20 years.

             (2)  A person (the ***perpetrator***) commits an offence if the perpetrator:

                     (a)  engages in conduct that inflicts severe physical or mental pain or suffering on a person; and

                     (b)  the conduct is engaged in for any reason based on discrimination of any kind; and

                     (c)  the perpetrator engages in the conduct:

                              (i)  in the capacity of a public official; or

                             (ii)  acting in an official capacity; or

                            (iii)  acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

Penalty:  Imprisonment for 20 years.

             (3)  Absolute liability applies to paragraphs (1)(c) and (2)(c).

Note:          For absolute liability, see section 6.2.

             (4)  Subsections (1) and (2) do not apply to conduct arising only from, inherent in or incidental to lawful sanctions that are not inconsistent with the Articles of the International Covenant on Civil and Political Rights (a copy of the English text of which is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*).

             (5)  Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1) or (2).

**274.3  Prosecutions**

             (1)  Proceedings for an offence against this Division, where the conduct constituting the alleged offence occurs wholly outside Australia, must not take place except with the consent in writing of the Attorney‑General.

             (2)  Even though a consent in accordance with subsection (1) has not been given in relation to an offence against this Division:

                     (a)  a person may be arrested for the offence, and a warrant for the arrest of a person for the offence may be issued and executed; and

                     (b)  a person may be charged with the offence; and

                     (c)  a person so charged may be remanded in custody or on bail;

but no further step in proceedings referred to in subsection (1) is to be taken until such a consent has been given.

             (3)  Subsection (2) does not prevent the discharge of the accused if proceedings are not continued within a reasonable time.

**274.4  No defence of exceptional circumstances or superior orders**

                   It is not a defence in a proceeding for an offence under this Division that:

                     (a)  the conduct constituting the offence 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; or

                     (b)  in engaging in the conduct constituting the offence the accused acted under orders of a superior officer or public authority;

but the circumstances referred to in paragraphs (a) and (b) may, if the accused is convicted of the offence, be taken into account in determining the proper sentence.

**274.5  Jurisdiction of State/Territory courts preserved**

                   For the purposes of section 38 of the *Judiciary Act 1903*, a matter arising under this Division, including a question of interpretation of the Convention, is taken not to be a matter arising directly under a treaty.

**274.6  Concurrent operation intended**

                   This Division is not intended to exclude or limit the concurrent operation of any other law of the Commonwealth or any law of a State or Territory.

**274.7  Double jeopardy**

                   If a person has been convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence under this Division in respect of that conduct.