**Submission of the Australian Government - draft General Comment on the implementation of article 3 of the Convention in the context of article 22**

1. The Australian Government presents its compliments to the United Nations Committee Against Torture (the Committee) and has the honour to refer to the Committee’s invitation for written comments on draft General Comment No. 1 (2017).[[1]](#footnote-1) The Australian Government thanks the Committee for the opportunity to provide a written submission.
2. Australia is a longstanding party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) and is firmly committed to upholding its obligations. The Australian Government takes the view that *non-refoulement* is a norm of customary international law. It accepts that *non-refoulement* obligations are central to several treaties, to which Australia is a State Party, including the Convention in relation to torture, the International Covenant on Civil and Political Rights (ICCPR) in relation to the death penalty[[2]](#footnote-2) and torture and cruel, inhuman and degrading treatment and punishment (CIDTP),[[3]](#footnote-3) and the 1951 Convention on the Status of Refugees as amended by the 1967 Protocol.[[4]](#footnote-4) Australia’s *non-refoulement* obligations are reflected in relevant domestic legislation.[[5]](#footnote-5)

States Parties’ obligations under article 3 of the Convention

1. The Australian Government considers, and the Committee has long accepted, that article 3 of the Convention obliges States Parties not to return a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[[6]](#footnote-6) The Committee’s Views in *G.R.B. v Sweden* confirm that this obligation must be interpreted by reference to the definition of ‘torture’ in article 1.[[7]](#footnote-7) Article 1 requires that three elements be satisfied for an act to constitute torture: (a) that the act must *cause* a person *severe pain or suffering*, which may be physical or mental, (b) that the act must be *intentionally inflicted* on the person for such *purposes* as obtaining information or a confession, punishment for an act he (or she) or a third person has or is suspected of having committed, intimidation or coercion, or for any reason based on discrimination of any kind, and (c) that the act must be *inflicted by* or at the *instigation of* or with the consent or acquiescence of *a public official* or other person acting in an official capacity.[[8]](#footnote-8)
2. Each case must be assessed on its own facts. Whether conduct amounts to torture will depend on the nature of the acts and the circumstances underlying the complaint. The *non‑refoulement* obligation under the Convention is confined to torture and does not extend to CIDTP.[[9]](#footnote-9) The Committee’s own Views demonstrate this distinction.[[10]](#footnote-10)
3. Under article 3(1), the author bears the onus of proof[[11]](#footnote-11) to demonstrate that there are *substantial grounds for believing* that he or she would be in danger of being subjected to torture.[[12]](#footnote-12) The author must show a ‘foreseeable, real and *personal* risk of being subjected to torture’.[[13]](#footnote-13) This risk must be ‘assessed on grounds that go beyond mere theory and suspicion’.[[14]](#footnote-14)
4. The Australian Government acknowledges that article 3(2) of the Convention requires all relevant considerations to be taken into account when determining whether article 3(1) is engaged, including the existence in the State concerned of a ‘consistent pattern of gross, flagrant or mass violations of human rights’. However, the Committee has acknowledged that the existence of a general risk of violence does not substantiate an individual’s personal risk of being subjected to torture:

It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist that indicate that the individual concerned would be personally at risk.[[15]](#footnote-15)

The (re)interpretation of States Parties’ obligations in article 3

1. The Australian Government is concerned that the draft General Comment reflects an interpretation of article 3 inconsistent with the widely accepted and long-standing interpretation of article 3. In particular, the draft General Comment’s interpretation of article 3 appears to be overly broad and inconsistent with the Committee’s own Views, those of the UN Human Rights Committee and States Parties’ practice. Australia accordingly invites the Committee to clarify the scope of States Parties’ legal obligations on the following:

*Distinction between torture and CIDTP*

1. The draft General Comment refers to the obligation in article 16 of the Convention that States Parties should prevent acts constituting CIDTP that do not amount to torture. However, the Committee does not acknowledge that article 16 does not impose a *non-refoulement* obligation and that it applies only in relation to any territory under a State Party’s jurisdiction.[[16]](#footnote-16)
2. Australia notes the Committee’s comments that ‘the obligation to prevent ill-treatment … overlaps with and is largely congruent with the obligation to prevent torture’.[[17]](#footnote-17) It also notes the Committee’s view that States Parties should, in assessing *non-refoulement* risk, determine whether a person may risk experiencing forms of CIDTP that could likely change so as to constitute torture.[[18]](#footnote-18) Australia’s view, consistent with the ordinary meaning of the text, is that for conduct to amount to torture, it must fall within the definition of ‘torture’ in article 1, including that it be ‘intentionally inflicted’ for a particular purpose. The *non-refoulement* obligation in article 3 does not extend to CIDTP[[19]](#footnote-19) and this should be clarified in the draft General Comment.

*‘Substantial grounds for believing’*

1. Australia welcomes the draft General Comment’s statement that substantial grounds will exist when the risk of torture is ‘personal, present, foreseeable and real’.[[20]](#footnote-20) It suggests that the Committee emphasise that the personal nature of the risk is the key factor to be considered under article 3 and that it explicitly refer to its Views in *G.R.B v Sweden* in paragraph 11 of the draft General Comment.[[21]](#footnote-21)
2. In Australia’s view, the draft General Comment mischaracterises the purpose of article 3(2).[[22]](#footnote-22) Article 3(2) must be interpreted in light of Article 3(1), which contains the primary *non-refoulement* obligation. The draft General Comment lists circumstances to which States Parties ‘should give consideration in their decisions for removal of a person from their territory’ because the Committee considers that they indicate a risk of torture.[[23]](#footnote-23) Some of these circumstances relate to rights under the ICCPR that do not enliven *non‑refoulement* obligations,[[24]](#footnote-24) or raise generalised rather than personalised risks of torture or CIDTP-type conduct.[[25]](#footnote-25) Australia notes that human rights violations considered under Article 3(2) must be of a grave nature (‘gross, flagrant or mass’). In Australia’s view, the draft General Comment should explicitly state that, for there to be ‘substantial grounds’, a person must be personally at risk of torture in light of the circumstances in the relevant country taking into account all relevant considerations.
3. The draft General Comment states that an indication of a person being in danger of being subjected to torture is whether the individual or his or her family has or would be exposed to CIDTP, ‘whether amounting to torture or not’.[[26]](#footnote-26) While Australia observes that article 16 of the Convention refers to ‘other acts’ of CIDTP ‘which do not amount to torture’, Australia is concerned that the Committee appears to have conflated ‘torture’ with the lesser treatment of CIDTP[[27]](#footnote-27) and understated the requirement for an individual bringing a complaint to demonstrate that he or she is at a ‘foreseeable, real and personal risk of being subjected to torture’.

*Access to specialised rehabilitation does not found a claim for non-refoulement*

1. The draft General Comment appears to extend the scope of the *non‑refoulement* obligation in article 3 to victims of torture who require ‘sustained specialized rehabilitation treatment’, whose ‘need for treatment has been medically certified’ and in circumstances where ‘adequate medical services for their rehabilitation linked to their torture-related trauma are not available or not guaranteed’ in the State to which they would be removed.[[28]](#footnote-28) Australia respectfully submits that this assertion is not consistent with, and goes far beyond, States’ *non-refoulement* obligations under international law. This statement should be removed from the draft General Comment.
2. Australia notes further that the way paragraph 22 of the draft General Comment is framed suggests that a States Party to the Convention is required to provide financial and legal assistance to persons who have been removed from the relevant State Party’s territory where they have subsequently faced a substantial risk of being tortured or they have been tortured in the receiving State. In Australia’s view the draft General Comment should clarify that a State Party who has removed an individual in good faith consistently with Article 3 does not owe further obligations to that individual. Australia reiterates its view that human rights obligations are primarily territorial.

*Severe pain or suffering*

1. Australia’s view is that an assessment of the severity of pain or suffering in accordance with the definition of ‘torture’ in article 1 will depend on the relevant circumstances of the individual case. Conduct must meet a high threshold commensurate with the inclusion of the word ‘severe’ in article 1.[[29]](#footnote-29) In Australia’s view, the draft General Comment should clarify this threshold.[[30]](#footnote-30)

*In any territory under its jurisdiction*

1. In respect of the Committee’s comments on the extraterritorial application of human rights obligations,[[31]](#footnote-31) Australia’s position is that a high degree of control over territory is required and that human rights obligations are primarily territorial.

*Non-state actors*

1. The draft General Comment suggests that States Parties should refrain from deporting individuals to another State where they would be in danger of torture and CIDTP at the hands of non‑State actors over which the State of deportation has no or only partial de facto control.[[32]](#footnote-32) Australia asks the Committee to clarify how such an approach is consistent with the definition of ‘torture’, which requires that the act must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It reiterates that the *non-refoulement* obligation in the Convention does not cover CIDTP.

Article 22 requirements

*Admissibility*

1. The draft General Comment would provide more useful guidance to complainants and their representatives[[33]](#footnote-33) if it referred to the requirements of Rule 113 of the Committee’s Rules of Procedure (‘Rules’).[[34]](#footnote-34) In Australia’s view the draft General Comment should clarify that claims may be inadmissible *ratione materiae* where they do not fall within the definition of torture in article 1[[35]](#footnote-35) or where they are manifestly unfounded. [[36]](#footnote-36) The draft General Comment should reflect the Committee’s view that a specific claim will not have been sufficiently substantiated for the purposes of admissibility where the author provides no evidence or manifestly inadequate evidence in substantiation[[37]](#footnote-37) and acknowledge that the Committee has a duty to ascertain that a complaint is not ‘an abuse of the Committee’s process or manifestly unfounded’.[[38]](#footnote-38)

*Interim Measures Requests*

1. The Australian Government strongly disagrees with the assertion that non-compliance by a State Party with an interim measures request (IMR) is indicative of a State Party’s unwillingness to implement article 22 of the Convention in good faith.[[39]](#footnote-39) States Parties are required to consider and respond to an IMR from the Committee in accordance with Rule 114(3). However, where a State has considered an IMR in good faith and demonstrated to the Committee that it has considered the particular circumstances of the author and, having done so, considers that the author is not at risk of irreparable damage, it is the Australian Government’s firm view that any subsequent actions that are inconsistent with the IMR, such as removal, are not evidence that the State Party failed to fulfil its obligations to cooperate with the Committee.

*Merits*

1. Australia disagrees with the statement that a State Party bears a burden of proof to investigate allegations and verify information on which a complaint is based in situations where the complainant has demonstrated that he or she cannot obtain documentation relating to his or her allegation of torture.[[40]](#footnote-40) Under article 22 of the Convention and Rule 113, a complaint will only be admissible where the author has substantiated his or her claim and can demonstrate *substantial grounds for believing* that he or she would be in danger of being subjected to torture.[[41]](#footnote-41)
2. Australia strongly disagrees that an ‘internal flight alternative’ should be considered inadmissible unless the Committee has received reliable information prior to the enforcement of the deportation that the State of deportation has taken effective measures to guarantee full and sustainable protection of the rights of the person concerned.[[42]](#footnote-42) Australia reiterates that a State’s obligations under article 3 will only be enlivened where there are substantial grounds for believing that a person would be in danger of being subjected to torture. It considers that this same standard should apply to an assessment of whether the individual could relocate to another part of the country.

Diplomatic assurances

1. The draft General Comment indicates that diplomatic assurances should not be used as a ‘loophole’ to undermine the *non-refoulement* obligation.[[43]](#footnote-43) The Australian Government considers that diplomatic assurances may be relevant to whether a state is fulfilling its *non-refoulement* obligations under article 3. This position is consistent with international law.[[44]](#footnote-44) Factors relevant in assessing a diplomatic assurance will include the content of the diplomatic assurance and its reliability and credibility in the specific context of the individual in respect of whom the assurance is sought. These are relevant considerations in determining whether there remain substantial grounds for believing that an individual is in danger of being subjected to torture in the receiving country.

The distinction between duties and obligations of States Parties and policy recommendations

1. Australia notes that the draft General Comment frames much of its discussion as imposing ‘duties’ and ‘obligations’ on States Parties where there is no such legal basis in the Convention. Such comments should be reframed as recommendations only.[[45]](#footnote-45)
2. Australia reiterates its support for the work of the Committee and avails itself of this opportunity to renew to the Committee the assurances of its highest consideration.

1. Committee Against Torture, draft *General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22*, dated 2 February 2017 (draft General Comment). [↑](#footnote-ref-1)
2. Australia accepts that Article 6 of the ICCPR, in conjunction with its Second Optional Protocol, implies an obligation on Australia not to remove a person from territory under its jurisdiction to another country where there are substantial grounds for believing that there is a real risk of the person being subjected to the death penalty in that country. [↑](#footnote-ref-2)
3. The prohibition on torture and CIDTP is contained in article 7 of the ICCPR. The UN Human Rights Committee has stated, and Australia accepts, that there is an obligation under the ICCPR not to extradite, deport, expel or otherwise remove a person from territory under its jurisdiction where there are substantial grounds for believing that there is a real risk of the person being subjected to torture or CIDTP, in violation of article 7. [↑](#footnote-ref-3)
4. Paragraph 1 of article 33 of the Refugees Convention provides that no State Party ‘shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion’. This obligation is subject to paragraph 2 of article 33. [↑](#footnote-ref-4)
5. See particularly subsections 36(2)(a) and 36(2)(aa) of the *Migration Act 1958* (Cth) and sections 15B and 22 of the *Extradition Act 1988* (Cth). [↑](#footnote-ref-5)
6. *Paez v Sweden*, CAT Communication No. 39/1996 (28 April 1997), paragraph 14.5. [↑](#footnote-ref-6)
7. *G.R.B. v Sweden*, CAT Communication No. 83/1997 (15 May 1998), paragraph 6.5. [↑](#footnote-ref-7)
8. Committee Against Torture, ‘General Comment No 1: Implementation of article 3 of the Convention in the context of article 22’, adopted 21 November 1997, UN Document A/53/44, paragraph 3. [↑](#footnote-ref-8)
9. Ibid, paragraph 1. [↑](#footnote-ref-9)
10. *Y.Z.S v. Australia,* CAT Communication No. 417/2010 (23 November 2012), paragraph 4.10. [↑](#footnote-ref-10)
11. *A. R. v The Netherlands,* CAT Communication No. 203/2002 (14 November 2003), paragraph 7.3. [↑](#footnote-ref-11)
12. Article 3(1) of the CAT; *Paez v Sweden*, CAT Communication No. 39/1996 (28 April 1997), paragraph 14.5. [↑](#footnote-ref-12)
13. *A.R v The Netherlands*, above n 11, paragraph 7.3; *Mr. G.R. v Australia*, Communication No. 605/2014,paragraph 9.4. [↑](#footnote-ref-13)
14. *A.R v The Netherlands*, above n 11, paragraph 7.3. [↑](#footnote-ref-14)
15. *G.R.B. v Sweden*, above n 7, paragraph 6.3. [↑](#footnote-ref-15)
16. As noted above, this obligation derives from article 7 of the ICCPR, the implementation of which is supervised by the UN Human Rights Committee. [↑](#footnote-ref-16)
17. Paragraph 15 of the draft General Comment; Committee Against Torture, ‘General Comment No. 2: Implementation of article 2 by States parties’, adopted 24 January 2008, UN Doc. CAT/C/GC/2, paragraph 3. [↑](#footnote-ref-17)
18. Paragraph 16 of the draft General Comment. [↑](#footnote-ref-18)
19. General Comment No. 2, above n 17, paragraph 1. [↑](#footnote-ref-19)
20. Paragraph 11 of the draft General Comment. [↑](#footnote-ref-20)
21. *G.R.B v Sweden*, above n 7, paragraph 6.3 [↑](#footnote-ref-21)
22. See, for example, Part VIII and paragraphs 28 and 45. [↑](#footnote-ref-22)
23. Paragraph 30 of the draft General Comment. [↑](#footnote-ref-23)
24. Item (d) appears to be reflective of the right to a fair hearing or fair trial under Article 14 of the ICCPR and (n) relates to Article 8 of the ICCPR. [↑](#footnote-ref-24)
25. Subparagraphs 30(g)-(k). For example, Australia rejects the assertion that ‘situations of international and non‑international armed conflict’ are indicative of human rights violations in and of themselves: paragraph 45 of the draft General Comment. [↑](#footnote-ref-25)
26. Paragraph 29 of the draft General Comment. [↑](#footnote-ref-26)
27. *A.R v The Netherlands*, above n 11, paragraph 7.3. [↑](#footnote-ref-27)
28. Paragraph 21 of the draft General Comment. [↑](#footnote-ref-28)
29. See, for example, *Dimitrijevic v Serbia and Montenegro*, CAT Communication No. 207/2002 (26 November 2002); *Jovica Dimitrov v Serbia and Montenegro* Communication No. 171/2000(21 May 2005). [↑](#footnote-ref-29)
30. Paragraph 17 of the draft General Comment. [↑](#footnote-ref-30)
31. Paragraphs 9 and 10 of the draft General Comment; General Comment No. 2, above n 17, paragraph 7. [↑](#footnote-ref-31)
32. Paragraph 31 of the draft General Comment. [↑](#footnote-ref-32)
33. Paragraph 6 of the draft General Comment. [↑](#footnote-ref-33)
34. Committee against Torture, *Rules of Procedure* (2011) UN Doc CAT/C/3/Rev.5. [↑](#footnote-ref-34)
35. Ibid Rule 113(a) and (c). [↑](#footnote-ref-35)
36. Ibid Rule 113(b). [↑](#footnote-ref-36)
37. *S.P.A. v Canada*, CAT Communication No. 282/2005 (6 December 2006), paragraph 6.2. [↑](#footnote-ref-37)
38. *Rules of Procedure*,above n 34, Rule 113(b). [↑](#footnote-ref-38)
39. Paragraph 39 of the draft General Comment. [↑](#footnote-ref-39)
40. Paragraph 40 of the draft General Comment. [↑](#footnote-ref-40)
41. Convention, article 3(1); *Paez v Sweden*, CAT Communication No. 39/1996 (28 April 1997), paragraph 14.5; paragraph 47 of the draft General Comment. [↑](#footnote-ref-41)
42. Paragraph 51 of the draft General Comment. [↑](#footnote-ref-42)
43. Paragraph 20 of the draft General Comment. [↑](#footnote-ref-43)
44. *Attia v Sweden*, CAT Communication No. 199/2002 (24 November 2003), paragraph 12.3; *Agiza v* Sweden, CAT Communication No. 233/2003 (20 May 2005), paragraph 13.4;UN Human Rights Committee, *Alzery v Sweden*, Communication 1416/2005 (25 October 2006), paragraph 11.3. [↑](#footnote-ref-44)
45. For example, Part VIII of the draft General Comment should not be titled ‘duties of States parties’ when the recommendations made by the Committee in this Part do not reflect specific obligations in the Convention. The terms ‘duty’ and ‘obligation’ should be used only to refer to legally binding provisions in the Convention to which States Parties have explicitly consented to be bound. [↑](#footnote-ref-45)