



Refugee Council of Australia

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES INQUIRY INTO THE RATIFICATION OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees and the organisations and individuals who support them. It has more than 165 organisational and 695 individual members. RCOA promotes the adoption of flexible, humane and practical policies towards refugees and asylum seekers both within Australia and internationally through conducting research, advocacy, policy analysis and community education. RCOA consults regularly with its members and refugee community leaders, and this submission is informed by their views.

RCOA welcomes the opportunity to contribute to the Joint Standing Committee on Treaties inquiry into the ratification of the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The treatment of asylum seekers subject to indefinite mandatory detention has been a key issue of concern for RCOA and its members since the policy was introduced in 1994. We believe the ratification of OPCAT would be an important step towards improving conditions for asylum seekers subject to this policy.

RCOA notes that the National Interest Analysis makes a strong case for ratification of OPCAT, and it is not the intention of this submission to reiterate these arguments in detail. Rather, we wish to highlight the benefits of ratification within the context of the issues faced by asylum seekers subject to indefinite mandatory detention. We also wish to make some additional comments about the implementation of the OPCAT through the national preventative mechanism.

1. The benefits of ratification for asylum seekers

1.1. Australia's policy of indefinite mandatory detention for asylum seekers arriving without authorisation has been the subject of international scrutiny and concern for many years. Concerns about immigration detention have been raised not only by the Committee Against Torture, but also by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, the Working Group on Arbitrary Detention and the Special Rapporteur on the Right to Health.¹

¹ See Committee Against Torture (2008). *Concluding Observations: Australia*. CAT/C/AUS/CO/3, 22 May, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/421/66/PDF/G0842166.pdf?OpenElement>, 11, 22 & 25-26; Human Rights Committee (2009). *Concluding Observations: Australia*. CCPR/C/AUS/CO/5, 7 May, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/422/14/PDF/G0942214.pdf?OpenElement>, 23-24; Committee on Economic, Social and Cultural Rights (2009). *Concluding Observations: Australia*. E/C.12/AUS/CO/4, 12 June, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/428/99/PDF/G0942899.pdf?OpenElement>, 25 & 30; Committee on the Elimination of Racial Discrimination (2010). *Concluding Observations: Australia*. CERD/C/AUS/CO/15-17, 13 September, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/449/00/PDF/G1044900.pdf?OpenElement>, 24;

- 1.2. While mechanisms do currently exist for independent review and oversight of detention facilities and conditions, these have been shown to be inadequate in safeguarding the rights of asylum seekers subject to indefinite mandatory detention. As noted in our August 2011 submission to the Joint Select Committee inquiry into immigration detention, at present the only formal review mechanism available to people in long-term detention is oversight by the Commonwealth Ombudsman. Over a number of years, the Ombudsman has prepared detailed reports taking into account the mental and physical health and wellbeing of individuals detained, many of which have recommended the individual be released from immigration detention. However, the Government is not obliged or compelled to act on the recommendations of the Ombudsman, and most recommendations for release have not been acted upon until the person is granted a substantive visa. In addition, the Ombudsman has no authority to interview and report on a person's detention until he or she has been detained for a period of more than six months.
- 1.3. Similarly, while the Australian Human Rights Commission conducts inspections of immigration detention facilities, its reports on detention conditions are advisory in nature and its recommendations are frequently disregarded, even when issues of serious concern are raised.
- 1.4. RCOA acknowledges that the introduction of additional mechanisms for review under the OPCAT alone would not ensure that concerns are acted upon when they are raised (see Section 2 for further discussion of this issue). However, we believe the formal system of regular oversight by both national and international bodies envisaged by OPCAT would have several advantages over existing review mechanisms.
- 1.5. Firstly, it would help to ensure that basic standards of detention are applied consistently both across the detention network and within individual facilities. RCOA has received feedback from its members and others working with asylum seekers in immigration detention indicating that standards of treatment for asylum seekers can vary both within and between facilities. Introducing a regular process of review across all immigration detention facilities would help to ensure that guidelines and policies on detention standards are applied in a more consistent manner.
- 1.6. Secondly, the introduction of a process which has a specific mandate to prevent cruel, inhuman and degrading treatment would help to raise awareness about human rights standards, both amongst the agencies responsible for managing immigration detention and any state and Federal government bodies involved in the national preventative mechanism. Increased knowledge about what may constitute cruel, inhuman and degrading treatment would assist these agencies in identifying issues before they arise or deteriorate to the point where a human rights violation has occurred.
- 1.7. Finally, regular oversight of immigration detention by both national and international reviewers would improve accountability and transparency within the immigration detention network. The introduction of a more formalised process for reviewing detention conditions, and the assessment of these conditions against specific human

Committee on the Rights of the Child (2005). *Concluding Observations: Australia*. CRC/C/15/Add.268, 20 October, [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6f6879be758d0e8ec12570d9003340ba/\\$FILE/G0544374.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6f6879be758d0e8ec12570d9003340ba/$FILE/G0544374.pdf), 62 & 64; Economic and Social Council (2002). *Report of the Working Group on Arbitrary Detention: Visit to Australia*. E/CN.4/2003/8/Add.2, 24 October, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/153/91/PDF/G0215391.pdf?OpenElement>, passim; Grover, A. (2010). Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Mission to Australia. A/HRC/14/20/Add.4, 3 June, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/139/47/PDF/G1013947.pdf?OpenElement>, Sections IV (B) & V.

rights standards, would help to ensure that the agencies charged with managing immigration detention are transparent in their operations and maintain standards of treatment compatible with human rights. Additionally, the introduction of a process which focuses on international human rights standards rather than on domestic laws and regulations alone would introduce a degree of accountability not only to government and international agencies but also to the individuals subject to immigration detention.

Recommendation 1:

RCOA recommends that the Australian Government ratify the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

2. Mechanisms to facilitate implementation of recommendations

- 2.1. As noted above, one of the key issues with existing mechanisms for oversight and review of immigration detention is that the recommendations of reviewers have been frequently ignored. This has occurred even when concerns have been raised about conditions which could be considered tantamount to inhuman or degrading treatment.
- 2.2. To ensure that the ratification of OPCAT has the greatest possible impact on human rights standards, it is crucial that formal processes are developed to facilitate the consideration and implementation of recommendations made by international reviewers and the national preventative mechanism. Unless such processes are developed, the impact of the systems of review envisaged by OPCAT on human rights standards in detention facilities is likely to be limited.

Recommendation 2:

RCOA recommends that the Australian Government develop processes to facilitate consideration and implementation of recommendations made by national and international reviewers under OPCAT processes.

3. Involvement of independent representatives in the national preventative mechanism

- 3.1. The National Interest Analysis indicates that some existing monitoring and complaints bodies will be designated to form the national preventive mechanism. RCOA in general supports this approach. However, we believe that there is also a need for representatives independent of state and Federal governments to be involved in the national preventative mechanism. These could include NGO representatives, legal advocates, academics and other experts in the field.
- 3.2. In RCOA's view, the involvement of independent representatives is crucial to ensuring impartiality as well as ensuring public trust and confidence in the integrity of the mechanism and the veracity of its recommendations. Additionally, independent representatives would bring skills and experience to the preventative mechanism which representatives from government agencies may lack.

Recommendation 3:

RCOA recommends that representatives independent of both state and Federal governments be involved in the national preventative mechanism.

4. Costs of implementation

- 4.1. While the involvement of existing agencies in the national preventive mechanism would, as noted in the National Interest Analysis, reduce the costs of implementing OPCAT, there is nonetheless a need to ensure that all bodies involved in the mechanism are adequately resourced. It is important to consider that inspections of immigration detention facilities may entail higher costs than would be the case with other detention facilities, given that several major facilities are located in remote areas. Without adequate resourcing, it is unlikely that the preventative mechanism will be able to satisfactorily fulfil its mandate in relation to immigration detention. Adequate resourcing has been an issue in the current monitoring space, as the increasing number of people detained for long periods of time (and thus requiring an investigation by the Ombudsman's office) has not been met with a sufficient increase in resourcing for the Ombudsman to carry out these duties.
- 4.2. Additionally, in considering the costs of implementation, RCOA wishes to emphasise the point (noted in the National Interest Analysis) that the implementation of OPCAT could in fact be a cost-saving measure. Australia's current immigration detention policies are extremely costly both for the individuals detained and for the community more broadly. Initially, these costs result from detaining in closed facilities (often in remote location) people who pose no risk the community, for unnecessarily prolonged periods; and secondly, from the impact of prolonged indefinite detention on the mental health of detainees, which increases their need for specialist health care and support both whilst in detention and after release. Additionally, consideration must be given to the increasing costs associated with compensation afforded to former detainees who pursue remedy for either unlawful detention or negligence during their time in immigration detention.
- 4.3. The introduction of review processes under OPCAT, which would facilitate the identification of cases where detention is arbitrary, damaging to mental health or otherwise infringing upon human rights, could play a key role in reducing the high costs currently associated with immigration detention.

Recommendation 4:

RCOA recommends that the national preventative mechanism be properly resourced to ensure that it can adequately carry out its mandate.

The Refugee Council is grateful for the opportunity to provide this submission to the Joint Standing Committee on Treaties and is happy to provide additional information or testimony as required.