



Preventing ill-treatment and promoting humane conditions of detention:

Australia's ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Submission to the Joint Standing Committee on Treaties

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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1. Overview

The Human Rights Law Centre (**HRLC**) strongly supports Australia's ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**).¹

The HRLC welcomes and endorses the National Interest Analysis (**NIA**) prepared by the Attorney-General's Department² which, in our view, provides a comprehensive overview and analysis of the issues relevant to Australia's ratification of OPCAT.

2. Background

Australia signed OPCAT on 19 May 2009. The Optional Protocol aims to prevent ill treatment and promote humane conditions of detention through the establishment of independent bodies to monitor and oversee places of detention. In particular, the Optional Protocol provides for a system of regular visits to places of detention by designated inspectorates, or 'national preventative mechanisms' (**NPMs**), and also by the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**).

Australia is already a party to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**Convention against Torture**), which imposes a range of obligations in relation to preventing and redressing acts of torture and other forms of ill-treatment. Australia also has obligations in this regard under the *International Covenant on Civil and Political Rights*, including the obligation under article 10 to ensure humane conditions of detention.

It is not only in the interests of persons deprived of liberty, but also the broader community, that all places of detention – whether prisons, psychiatric hospitals, immigration detention centres police cells or disability facilities – promote rehabilitation and reintegration. It is fundamental that all detainees are treated with basic dignity and respect. Independent inspections and oversight are critical in this regard.

3. Obligations

As identified in the NIA, ratification of OPCAT would give rise to two key obligations:

¹ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (New York, 18 December 2002).

² National Interest Analysis [2012] ATNIA 6.

- at the international level, it would require that Australia allow and facilitate visits by the SPT to places of detention in Australia; and
- at the domestic level, it would require that Australia establish or designate independent NPMs with sufficient independence, functions and powers to regularly visit places of detention.

3.1 Subcommittee on the Prevention on Torture

Under OPCAT, Australia would be required to:

- allow and facilitate visits by the SPT;³ and
- guarantee to the SPT:⁴
 - unrestricted access to places of detention;
 - unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of places and their location; and
 - the opportunity to conduct private interviews with detainees and other relevant persons, such as medical personnel.

As the NIA identifies, it is intended that the necessary steps to provide for SPT visits take place prior to Australia's ratification of OPCAT.

3.2 National Preventative Mechanisms

Article 3 and Part IV of the Optional Protocol set out the obligations concerning the establishment or designation of independent NPMs. As the NIA identifies, one or several bodies may be identified as the national preventive mechanism, including decentralised bodies that are compliant with the requirements of OPCAT.⁵

The obligations required by OPCAT relating to NPMs include:⁶

- guaranteeing the functional independence of the NPMs and the independence of personnel;
- making available the necessary resources for the performance of the functions of the NPMs;
- granting NPMs the power to regularly examine the treatment of persons deprived of their liberty, including the liberty of choosing where it will visit and a right of access to places of detention;

³ Articles 4 and Part III of the Optional Protocol sets out the obligations of each State Party to receive and support the SPT to undertake its functions of investigation and inspection.

⁴ See articles 12 and 14 of OPCAT.

⁵ NIA para 18.

⁶ See NIA paras 19 and 20 and articles 18, 19 and 20 of OPCAT.

- granting NPMs the power to make recommendations to relevant authorities with the aim of improving the treatment and conditions of persons deprived of their liberty and preventing torture and other ill-treatment;
- granting NPMs the power to submit proposals and observations concerning existing or draft legislation;
- providing NPMs with information concerning the numbers of detainees, the location of their places of detention, and information concerning the treatment of detainees and their conditions of detention;
- providing NPMs with the opportunity to conduct private interviews with detainees and the liberty of choosing who it will interview; and
- granting a right of NPMs to contact and meet with the SPT.

As the NIA identifies, it is intended that Australia make a declaration under article 24 of the Optional Protocol to allow up to three years for Australia to take the necessary steps to ensure that NPMs are designated or established that comply with the requirements of OPCAT.⁷ The HRLC agrees that this provides a clear and reasonable timeframe for ensuring the necessary administrative and legislative steps are taken to ensure implementation of OPCAT.⁸

The HRLC agrees with the NIA's assessment that Australia's system for inspection of places of detention, while substantial, currently does not fully meet the OPCAT requirements.⁹ However, in many cases, relatively minor changes could be made to the structure, mandate or powers of existing monitoring and complaints bodies in order to comply with OPCAT's obligations.¹⁰

4. Reasons for Ratification

The HRLC considers the benefits of ratification of OPCAT include:

4.1 Fulfilment of existing international legal obligations

Australia has obligations under international law to prevent and redress torture and ill-treatment and to guarantee that all persons deprived of liberty are 'treated with humanity and with respect for the inherent dignity of the human person'.¹¹ Evidence and experience from comparable jurisdictions, such as the United Kingdom and New Zealand, demonstrate that

⁷ NIA paras 2 and 25.

⁸ See NIA para 26.

⁹ NIA para 27.

¹⁰ NIA para 30.

¹¹ See, particularly, article 2 of CAT and articles 7, 9 and 10 of the ICCPR.

ratification and implementation of OPCAT would positively contribute to the fulfilment of these existing international legal obligations.

As recognised in the NIA, Australian law already strongly prohibits the use of torture in all its forms¹² and there are already many mechanisms in place for oversight and inspection of places of detention.¹³ However, the NIA also acknowledges that there are varying levels of oversight throughout Australia, as well as gaps in monitoring, which could be addressed by implementing OPCAT.¹⁴ Additionally, many of the mechanisms that do exist lack institutional, functional or practical independence.

4.2 Protecting the human rights of persons deprived of liberty

The HRLC considers that ratification of OPCAT will play an important role in ensuring the protection of the human rights of people deprived of their liberty. This includes (but is not necessarily limited to) persons subject to arrest and detention, prisoners, involuntary psychiatric patients, asylum-seekers and others in immigration detention, and juvenile detainees.

This is important for three key reasons:

(a) *Complaints-based systems are not sufficient*

The system of periodic and follow-up visits required by OPCAT recognises that a comprehensive system of inspection and investigation is required *in addition to* a complaints-based system in order to adequately protect the human rights of persons deprived of their liberty. This is the case for two key reasons:

- First, complaints-based systems are, typically, reactive and ill-adapted to identifying and responding to systemic human rights issues.
- Second, in many situations of detention, there is a significant power imbalance between the detaining authority and detainees. As a result, detainees who have been the subject of ill-treatment may be reluctant to make complaints about their treatment. This is particularly the case where there is no independent body to which such complaints may be made.

For these reasons, the HRLC considers that a complaints-based system alone is manifestly inadequate. Investigation and inspection mechanisms are also essential to ensure that the human rights of persons deprived of their liberty are properly protected.

(b) *There are significant human rights issues in Australian places of detention*

While, generally speaking, persons in detention in Australia are treated with dignity and humanity, it is also clear that there remain serious and well-documented human

¹² NIA para 5.

¹³ NIA para 9.

¹⁴ NIA para 9.

rights issues in relation to some places and forms of detention and in regards to some detainee population groups. For example:

- In April 2011, an independent report tabled in Western Australia's parliament described prison conditions in that state as "intolerable and inhumane".¹⁵
- Recent reports from Victoria's Ombudsman have been similarly critical, variously describing conditions in youth detention facilities, police cells and the Melbourne Custody Centre as 'appalling', 'disgraceful' and incompatible with basic human rights.¹⁶
- Immigration detention facilities have been described by Australian of the Year Professor Patrick McGorry as 'factories for mental illness' and by the Australian Medical Association as 'a form of child abuse'.¹⁷
- Inhumane conditions also persist in many mental health and disability services. Investigations reported in *The Age* newspaper in late 2011 revealed the deaths of at least 36 people in Victorian psychiatric wards in the last three years, together with widespread allegations of physical and sexual abuse of patients.¹⁸

Accordingly, it is clear that further steps need to be taken by Australia to address ongoing issues of concern in places of detention. As indicated in the previous section, monitoring and oversight of places where people are deprived of their liberty is crucial in this regard.

(c) Comparative experience is illustrative of OPCAT's benefits

Evidence and experience from comparable jurisdictions which have already ratified and implemented OPCAT, such as New Zealand and the United Kingdom, demonstrate that independent inspectorates can contribute significantly to preventing and redressing torture and ill-treatment in places of detention and that this has tangible social and economic benefits.¹⁹

For the reasons outlined above, the HRLC agrees with the NIA's assessment that ratification of OPCAT would minimise instances giving rise to concerns about the treatment and welfare

¹⁵ Office of the Inspector of Custodial Services (WA), *Report of an Unannounced Inspection of Roebourne Regional Prison* (February 2011), v.

¹⁶ See, eg, Ombudsman Victoria, *Investigation into the Use of Excessive Force at the Melbourne Custody Centre* (November 2011); Ombudsman Victoria, *Conditions for Persons in Custody* (July 2006); Office of Police Integrity, *Update on Conditions in Police Cells* (June 2010); Ombudsman Victoria, *Investigation into Conditions at the Melbourne Youth Justice Precinct* (October 2010).

¹⁷ See, eg, Australian Medical Association, *Submission to the Joint Select Committee on Australia's Immigration Detention Network* (25 September 2011).

¹⁸ See, eg, Nick McKenzie and Richard Baker, 'State urged to act on "shocking" death rates in mental health care', *The Age* (Melbourne), 5 September 2011.

¹⁹ NIA para 10.

of people detained in prisons and other places of detention in Australia.²⁰ In this respect, ratification of OPCAT would play a valuable role in enhancing the protection of the human rights of persons deprived of liberty in Australia.

4.3 Complementing and strengthening existing domestic mechanisms

As recognised in the NIA, ratification of OPCAT would support and strengthen the measures already in place in Australia.²¹

Australia already possesses a relatively comprehensive complaints-based system for persons in detention. Actors in this system include the Australian Human Rights Commission, state and territory commissions, the Commonwealth Ombudsman, state and territory ombudsmen, anti-discrimination boards, health services commissioners and so on. This system *responds* to instances of ill-treatment in detention.

However, mechanisms to *prevent* ill-treatment in places of detention throughout Australia are not as well developed. Where detention inspectorates do exist they often lack proper independence. They are often agencies that form part of, or are answerable to, the government departments that are responsible for the administration of the relevant places of detention. In Victoria, for example, the Office of Correctional Services Review is an internal business unit within the Department of Justice. It reports to the Secretary of the Department – the very Secretary with responsibility for correctional management. The problem of lack of independence is not confined to corrections. The 36 deaths in psychiatric facilities, referred to above, were investigated by the Office of the Chief Psychiatrist, an office which 'has responsibility under the Mental Health Act for the medical care and welfare of persons receiving treatment or care for a mental illness'.

An additional concern with existing mechanisms is that their findings are often not published. The Victorian Office of Correctional Services Review, for example, does not make its reports public. This has the potential to undermine the transparency, credibility and effectiveness of these agencies.

The HRLC considers that the system of investigation and inspection required by OPCAT would complement and strengthen Australia's existing mechanisms. Furthermore, ratification of OPCAT would provide an important imperative to review existing mechanisms to ensure that they meet important standards of independence, transparency and accountability.

4.4 Fostering best practice in detention monitoring and prevention of ill-treatment

As recognised in the NIA, monitoring of places of detention in accordance with OPCAT will achieve a more national and comprehensive approach with a greater ability to identify gaps and issues particular to individual Australian jurisdictions, or commonly experienced by all.²²

²⁰ NIA para 11.

²¹ NIA para 5.

The HRLC considers that accession to OPCAT will provide an important opportunity to undertake more systematic and holistic reviews of Australia's places of detention. Shifting the emphasis from the ad hoc nature of individual complaints to a proactive investigative and inspection model would enable a more systematic analysis of the compliance of Australia's places of detention with international human rights standards. This is essential in ensuring the elimination of torture and other forms of ill-treatment.

Significantly, the Optional Protocol presents an opportunity to undertake this review by reference to established international standards and with the input of international human rights experts. The Optional Protocol seeks to establish a dialogue between the international preventative mechanism, the SPT, and domestic preventative mechanisms. Article 11 of the Optional Protocol makes provision for the SPT to 'advise and assist' NPMs, to maintain direct and confidential contact, and to offer training and technical assistance. This dialogue would assist the NPM to draw on developing international human rights law and best practice in detention management.

These benefits are recognised in the NIA, which acknowledges that implementation of OPCAT will improve outcomes in the detention of people in Australia by providing a more integrated and internationally recognised mechanism for oversight.²³ The HRLC considers that the opportunity to share information, guidelines, practices and problem solving measures relating to the conditions and treatment of people in detention is particularly important given that existing responsibilities for particular situations of detention are shared between various federal and state bodies in Australia.

4.5 Demonstrating international human rights leadership

The HRLC considers that accession to the Optional Protocol would give real substance to the Australian Government's commitment to promote and provide leadership on human rights at the international level. Indeed, Australia has a long and distinguished legacy of engagement with the United Nations and leadership in the field of human rights.

As recognised in the NIA, OPCAT has now been in force for over five years and has more than 60 States Parties, together with a further 22 countries who are signatories.²⁴ Ratification of OPCAT would demonstrate the Australian Government's commitment to being a regional and global leader in the protection and promotion of human rights, further underline Australia's commitment to the values and protections of the Convention against Torture, and support efforts to ensure that other countries meet the same standards.²⁵ It would complement the Attorney-General's commitment, through Australia's Human Rights Framework, to promote and respect international human rights law, and the Foreign Minister's recent statement that Australia should strive to be an 'exemplary global citizen when it comes to protecting human rights'.

²² NIA para 5.

²³ NIA para 7

²⁴ NIA para 10.

²⁵ NIA para 5.

Ratification of OPCAT would also give effect to a number of recommendations made to Australia by respected United Nations bodies and mechanisms, including recommendations made to Australia during its Universal Periodic Review in 2011, Concluding Observations made by the Committee against Torture in 2008 and Concluding Observations made by the Human Rights Committee in 2009.

Finally, by becoming party to OPCAT, Australia would be able to participate in the nomination and election of experts to the SPT.

5. Costs

The HRLC agrees with the NIA's assessment that there would be minimal costs involved in facilitating visits by the SPT to places of detention in Australia, particularly given that the United Nations is responsible for the SPT's expenditure (as provided for in article 25 of OPCAT).²⁶

The HRLC also agrees with the NIA's assessment that the costs in designating, establishing and administering the NPMs would be modest, particularly given that significant changes are not expected to be necessary.²⁷ Where there may be costs involved in ensuring that NPMs are provided with the necessary independence as required under OPCAT and resources to perform their functions, this cost is highly likely to be more than offset by the benefits that would flow from improved risk management and other flow on effects.²⁸

In this respect, as identified in the NIA, ratification of OPCAT has the potential to minimise the costs of addressing such instances, including avoiding some costs of litigation and compensation payments.²⁹ Since ratifying OPCAT, jurisdictions such as New Zealand have found that preventing ill-treatment of detainees contributes to a costs saving in the use of the legal and health care systems arising from incidents of ill-treatment.³⁰ Monitoring and inspection of places of detention can also contribute to avoiding liability for ill-treatment in places of detention.

Accordingly, the HRLC agrees with the NIA's assessment that there is unlikely to be any disadvantages or negative impacts for Australia and that, rather, ratification of OPCAT is likely to have significant positive impacts, including economic benefits.

²⁶ NIA paras 32-33.

²⁷ NIA para 34.

²⁸ See NIA para 35.

²⁹ NIA para 11.

³⁰ NIA para 35.