



23 January 2023

Hon Andrew Giles MP

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Hon Clare O'Neil MP

Minister for Home Affairs

House of Representatives

Parliament House

Canberra ACT 2600

Cc:

Hon Mark Dreyfus KC MP

Attorney-General

Ms Lorraine Finlay

Australian Human Rights Commissioner

Mr Iain Anderson

Commonwealth Ombudsman

Via e-mail: andrew.giles.mp@aph.gov.au
clare.oneil.mp@aph.gov.au
attorney@ag.gov.au
lorraine.finlay@humanrights.gov.au
ombudsman@ombudsman.gov.au

Dear Ministers

Australia's OPCAT compliance – civil society recommendations in relation to immigration detention

We write to express our concern that Australia has failed to meet the deadline for implementing the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**), which was extended to 20 January 2023. The failure to meet this deadline has serious implications for people detained by Australia in its immigration detention system.

Our organisations work in various capacities with people seeking asylum and refugees who are or have been detained onshore and offshore, including through the provision of individual legal assistance and psychosocial support, research, policy and law reform.

This document sets out seven broad recommendations which would assist Australia to meet its obligations under OPCAT.

The first six are recommendations that we made to the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**UN SPT**), ahead of its visit to Australia in October 2022. These recommendations reflect the differing expertise, views and priority areas of each of our organisations

The seventh recommendation relates to the resumption of the UN SPT visit. We share the disappointment of the Commonwealth Government and many other civil society organisations that the UN SPT was unable to complete its visit in 2022, after being denied access to facilities in Queensland and New South Wales, and are eager to see that visit resume.

In addition to the seven recommendations set out in this document, we fully endorse the 'Road Map to OPCAT Compliance'¹ published by the Australian Human Rights Commission (**AHRC**) in October 2022. The Road Map contains a series of concrete recommendations to ensure that the Commonwealth, state and territory governments fulfil Australia's OPCAT obligations in a coordinated way.

Representatives from our organisations would be pleased to meet with you to share our expertise and discuss the details of implementing any of the recommendations set out below or in the Road Map.

Recommendations

1. *Mandatory immigration detention*

We recommend that Australia review and reform its system of mandatory immigration detention, including these key provisions of the *Migration Act 1958* (Cth):

- s 189 (mandatory detention);
- s 197C (irrelevance of Australia's *non-refoulement* obligations to remove unlawful non-citizens, leading to indefinite detention and constructive refoulement); and
- s 501 (particularly mandatory visa cancellation).

2. *Length of time in immigration detention*

We recommend:

- the introduction of legislation preventing indefinite immigration detention, for example through maximum timeframes that people can be detained and effective judicial oversight of the necessity and reasonableness of detention in individual cases;

¹ Australian Human Rights Commission, 'Road Map to OPCAT Compliance', 17 October 2022, https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf.

- an urgent, independent and transparent review of the appropriateness of detention for all persons currently held in immigration detention, with a focus on those who have been detained the longest; and
- that, wherever possible, alternatives to detention in detention centres, such as community detention and bridging visas, should be used.

3. *Conditions of immigration detention*

We recommend:

- the introduction of clear legislative standards to ensure that people in immigration detention have reasonable access to outdoor spaces and the natural environment, education, psychosocial services (including funded access to interpreting services), and healthcare;
- that all people in immigration detention have access to funded legal advice and assistance, and that access to legal assistance is not unreasonably interrupted by sudden transfers between detention facilities;
- the introduction of clear legislative standards for risk assessments and the use of restraints;
- that the use of spithoods and solitary confinement cease as a matter of urgency, and that such practices be prohibited by legislation;
- the immediate closure of the immigration detention facilities on Christmas Island which has been shown to be an unsuitable place of detention and poses an unacceptable risk of cruel, inhuman or degrading treatment or punishment;
- the closure of all alternative places of detention (APODs) that are not fit for purpose, such as Kangaroo Point and the Park Hotel;
- that APODs be used only as a last resort and a short-term measure, and that all relevant oversight bodies be informed of the fact and location of APODs without delay and be granted reasonable access; and
- that transfers between immigration detention facilities do not occur without a multidisciplinary assessment, approval from an independent authority and prior notice to legal representatives and family members of the detained person.

4. *Access to healthcare in immigration detention*

We recommend:

- amending the *Migration Regulations* by inserting a new provision to require a minimum standard of healthcare in immigration detention, commensurate with Australian community standards. This change should be complemented by training, education and robust review, and a mechanism for oversight and enforcement;
- urgently auditing existing healthcare policies, and including an updated agreed standard of care in the contractual renewals with IHMS or other health providers appointed to deliver services to immigration detainees;
- ensuring free access by detainees to independent medical services (i.e. other than those provided by detention contractors);
- reviewing practices regarding treatment of people with psychiatric conditions and disabilities, and ceasing the use of solitary confinement as a management tool;

- mitigating the risks of COVID-19 by ensuring that all detainees and staff have access to vaccination;
- managing the risk of COVID-19 in places of immigration detention according to the advice of medical professionals and avoiding the use of solitary confinement as far as possible;
- reviewing reg 5.35 of the *Migration Regulations* (medical treatment without consent), and amending it to ensure compliance with best medical advice and Australia's international human rights obligations; and
- ensuring that restraints for medical transfers in immigration detention, including handcuffing, are only used:
 - based on an individualised and current risk assessment;
 - as a last resort to prevent the likelihood of serious harm to the person or others; and
 - for the shortest necessary period of time.

5. *Detention at sea and in regional processing countries*

Australia's obligations under OPCAT extend to any place where people are subject to Australia's jurisdiction and deprived of their liberty, regardless of whether that detention occurs within or outside Australian territory, on land or at sea, at a formal place of detention or in transit, and pursuant to Australian law or the law of another State. In particular, Australia's obligations under OPCAT extend at least as far as the powers granted to Australian officers to deprive people of liberty outside Australian territory.

We recommend that:

- the National Preventative Mechanism (NPM) be empowered and properly resourced to oversee all places of immigration detention under Australian jurisdiction (that is, wherever Australia exercises *de facto* and/or *de jure* control), including at sea and in regional processing countries;
- Part 6 of the *Australian Border Force Act* be repealed or amended to allow for compliance with Australia's OPCAT obligations in relation to places of detention at sea; and
- the Commonwealth Government consider granting other oversight bodies such as the UN High Commissioner for Refugees, the Red Cross and the AHRC permission to be deployed on maritime interception vessels and assist the NPM in its functions.

6. *National Preventative Mechanism (NPM)*

We recommend:

- the full implementation of the AHRC's Road Map to OPCAT compliance;
- the introduction of a clear legislative framework for the NPM, including enforceable powers to monitor *all* places of immigration detention under Australia's jurisdiction and to conduct without-notice visits; and a minimum annual budget for the NPM, sufficient to allow it to fulfil its functions under OPCAT effectively, to immunise its functions from politicisation.

7. *Resumption of UN SPT visit*

We recommend working closely with all Australian states and territories to support their implementation of OPCAT and facilitating the urgent resumption of the SPT visit to Australia.

Yours sincerely

Amnesty International Australia

Andrew & Renata Kaldor Centre for International Refugee Law, UNSW Sydney

Asylum Seeker Resource Centre

Human Rights For All

Human Rights Law Centre

National Justice Project

Public Interest Advocacy Centre

Refugee Casework and Advice Service (RACS)

Refugee Council of Australia

Dr Anthea Vogl

Key contacts:

Lucy Geddes

Senior Solicitor, Public Interest Advocacy Centre

Lgeddes@piac.asn.au

Madeline Gleeson

Senior Research Fellow, Andrew & Renata Kaldor Centre for International Refugee Law

madeline.gleeson@unsw.edu.au

Hannah Dickinson

Principal Solicitor, Asylum Seeker Resource Centre

hannah.d@asrc.org.au