

**Australian Human Rights Commission**

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Dear Human Rights Commissioners

**ASRC OPCAT submission**

We welcome the opportunity to comment on the OPCAT in Australia Consultation Paper questions for discussion. We have read and understood the Commission's Submission Policy.

1. The Asylum Seeker Resource Centre (ASRC) is the largest independent human rights organisation for refugees and people seeking asylum in Australia. Our programs support and empower people seeking asylum to maximise their own physical, mental and social wellbeing. As a movement, we mobilise and unite communities to create lasting social and policy change for people seeking asylum in Australia. We are proud to be owned and run by our community of volunteers and supporters.
2. Through the Detention Rights Advocacy Program and the Human Rights Law Program (HRLP), the ASRC works regularly with people detained in detention centres across Australia and offshore including the MITA facility and is familiar with the issues and concerns they face, particularly around access to services, supports, and legal assistance. The Detention Rights Advocacy Program is the only program of its type in Australia and has been a core part of our services to people seeking asylum for 15 years. We have provided a range of legal and non-legal services to people in immigration detention and have an in depth understanding of the issues faced by our clients in immigration detention and how these issues interact with overarching legal obligations and standards. Our submission is based on our longstanding and comprehensive work with people in immigration detention.
3. The ASRC strongly supports the Government's announcement of its intention to ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* and welcomes the opportunity to provide a submission to the Australian Human Rights Commission (**the Commission**) on the 'OPCAT in Australia Consultation Paper.'
4. The ASRC's submission focuses on its experience with immigration detention of people seeking asylum. This includes asylum seekers in immigration detention facilities in Australia under section 189 of the *Migration Act 1958 (the Act)* as well as people in offshore detention centres who are subject to regional processing arrangements under 198AD of the Act.

## Responses to OPCAT in Australia Consultation Paper questions

### **1. *What is your experience of the inspection framework for places of detention in the state or territory where you are based, or in relation to places of detention the Australian Government is responsible for?***

In summary, the current oversight mechanisms and inspection frameworks in relation to immigration detention facilities are vastly inadequate.

Over the last 18 - 24 months a number of changes have occurred, with various contributing factors. The implementation of Australian Border Force (ABF) as the operational arm of the Department on 1 July 2015 and the associated centralisation of control is one of these factors. In addition, the renewal of the Serco Immigration Services contract for detention services held less budget allocation for recreation and other wellbeing services. The following are some examples of these changes:

- An increase in transfers between centres based on operational requirements with little consideration for the welfare of people in detention, including in some cases the movement of people interstate away from their spouses and children;
- An increase in the use of 'behaviour management plans' with little consideration of mental health and underlying vulnerability;
- An increase in arbitrary room searches and other security measures inappropriate to some vulnerable cohorts. The implementation of the 'enhanced escort procedure' (physical holding for all people regardless of risk rating while escorting them to external appointments, including medical and mental health appointments);
- Less collaboration between detention operations (now the responsibility of ABF) and case management (remaining DIBP), leading to a decreasing focus on welfare and wellbeing in the day to day operations of the centre; and
- The accommodation of larger numbers of people in smaller spaces, due to the closure of a number of detention centres across the network.

In this context, strengthening measures for oversight and enshrining human rights mechanisms is more critical than before.

### **Difficulties with existing inspection frameworks**

In relation to immigration detention, the existing inspection framework is currently compromised by the following factors:

- The obligation of those conducting inspections to maintain confidentiality and to refrain from public comment;
- The difficult power imbalance between organisations that do not adhere to the above obligations and Australian Border Force, resulting in the need to be cautious in public and direct advocacy so as not to lose access to places of detention;

Currently, immigration detention facilities are inspected by the following organisations:

- The Australian Red Cross
- UNHCR Australia

- Immigration Ombudsman
- Australian Human Rights Commission
- Minister's Council for Asylum Seekers and Detention

With the notable exception of the Australian Human Rights Commission, the other organisations listed above have obligations to advocate for change directly to the Department, Australian Border Force (ABF) and their stakeholders, and to refrain from sharing information regarding conditions of detention outside of that relationship. This results in a lack of accountability in the detention environment, and does not create incentive for detention service providers to ensure that they do not breach the human rights of detainees, nor refrain from engaging in conduct that could constitute cruel, inhumane and degrading treatment or torture.

The ASRC's Detention Rights Advocacy Program has had a number of reports from people in detention that when visits are scheduled by the above organisations, there are sudden efforts to create improvements to recreational areas, the quality of food served, and the cleanliness of the compound areas and facilities.

One of the key oversight mechanisms is the legislated requirement for the Commonwealth Ombudsman to conduct Immigration Detention Review Assessments for every person detained in immigration detention in Australia for two years or longer. The ASRC has seen a large number of these reports produced for its clients, as at 31 May 2017, 22.8% of people in detention had been there for two years or more. These assessments are based on information provided by the Department itself and its stakeholders, and to our knowledge there is no opportunity for other services who work with the subject of the assessment to provide input. Further, even where there are strong recommendations made by the Commonwealth Ombudsman that alternatives to detention must be explored, these are not enforceable and have generally not led to the release of the individual in question.

Organisations that do not have formal agreements with the Department are at constant risk of losing access to detainees. For that reason, it is necessary to engage cautiously in advocacy to the Department and its detention service providers, therefore reducing the efficacy of advocacy. In short, it is necessary to balance the need for strong advocacy with the need for access.

The ASRC's Detention Rights Advocacy Program must constantly and carefully consider all advocacy approaches, and be cautious with the use of media and public advocacy, as it remains possible at all times for ABF to deny access for the program to people in detention. Further to this, the ASRC does not have access to the compounds where its clients are held, and are therefore reliant on the descriptions of people detained to understand the issues they are experiencing.

### **The impact of detention on people with particular vulnerabilities remains a concern**

The ASRC recommends that National Preventative Mechanism (NPM) bodies responsible for inspecting places of immigration detention include individuals with the expertise to identify human rights issues and the impact of detention on people with particular vulnerabilities. Currently, the detention environment is particularly harmful to certain groups of people, and the ability to identify these groups is critical, as is considering the environment through a protection lens. Detention staff must be further trained on how to maintain the safety and dignity of individuals and ensure that basic human rights are upheld.

*Torture and Trauma survivors*

Survivors of torture and trauma have particular vulnerabilities which can result in the detention environment becoming so psychologically harmful that it could constitute cruel, inhumane and degrading treatment (CIDT). While the experience of torture and trauma is very specific to the individual, some aspects of immigration detention that can trigger intense psychological and physiological responses include the following:

- The use of restraints such as handcuffs and body belts
- Restrictive detention in or interviews in small rooms
- Use of force and physical restraint techniques
- Presence of security officers dressed in military style uniforms

Where aspects of immigration detention cause such psychological harm that it could constitute CIDT, NPM bodies must have the ability to compel the department to remove people from the detention environment.

**Case Study 1 (names and general particulars changed to preserve privacy and confidentiality)**

*Amir is a 47 year old Iranian man who claims he was severely tortured by Iranian authorities in a small room prior to fleeing Iran. He has significant injuries from this event, which cause him to suffer from chronic pain. He has been diagnosed with a serious heart condition related to chronic stress.*

*As part of regular room searches, Serco Immigration Services (detention service provider) are required to do a physical search of the inhabitant's person. Amir's room was searched as part of this process, and Amir felt fearful of the physical search, so he refused. As a result, he was escorted by Serco officers to an interview room, where he was asked to wait while guidance was sought from Australian Border Force (ABF).*

*While in the interview room, Amir started to have a trauma response. He informed officers that he could no longer remain in the interview room, but they refused to let him out and did not notify nurses. Amir started hyperventilating and experienced a trauma related flashback. He panicked and started to try to force himself out of the room. He was restrained by officers and placed in flexicuffs and pushed onto the ground. Amir's trauma response then escalated to the point where he fell unconscious. It was not until this occurred that nurses were called.*

*As a result of this incident, Amir now feels constant fear that he will again be placed in this room. He has trouble sleeping, has persistent nightmares, and his body goes through a hypervigilant physiological response whenever he sees more than two security officers standing together.*

*It is now not tenable for Amir to remain in immigration detention without continuing to experience significant psychological harm.*

*LGBTIQ identifying populations*

LGBTIQ-identifying persons are particularly vulnerable in an immigration detention environment, and can be exposed to the risk of violence, ill-treatment, sexual abuse, harassment and bullying, such that their experience may reach the threshold of cruel, inhumane or degrading treatment.

This is not least the case due to the close-knit accommodation of various cultures, including cultures that may take particularly negative views of homosexuality.

The separation of single men and families contributes to this, and can result in LGBTIQ persons or couples being accommodated in hostile environments, where they are unable to feel safe. For example, where two male de facto partners are accommodated in a compound with a large number of single adult men, this has caused anxiety and vulnerability.

Despite various approaches to the Australian Border Force and their service providers in these instances, the ASRC has been unable to secure a solution to these issues, other than for those affected to be offered accommodation in restricted/separated areas, which is inappropriate and would contribute to further mental health decline. The UNHCR's guidelines for detention of asylum seekers state that in these instances, alternatives to detention should be considered, however this has not been observed by the ASRC to have been implemented in any instance.


It is recommended that any NPM body have available to it persons with the necessary expertise to identify the impacts of immigration detention on LGBTIQ persons, and also to identify where this may be an issue even where a person may be hiding their sexuality due to fear of the surrounding population.

Further, there should be transparent processes for determining when a person should be removed from detention and how such processes can be accessed and by whom.

### *Children*


It is well-documented that the impact of immigration detention on children is extremely grave. It is recommended that where children are detained, that any NPM body have available to it the expertise of child protection or development experts, paediatricians and child psychologists. While there are currently a very low number of children in detention, this is not legislated, and it is therefore recommended that any NPM body is composed with the detention of children in mind.





### *Survivors of sexual assault*

Survivors of sexual assault are particularly affected by the power dynamic, gender balance of security officers, and the use of physical force in immigration detention. The constant presence of triggers can cause such psychological harm that it could constitute CIDT, and as previously noted, NPM bodies must have the ability to compel the department to remove people from the detention environment where this occurs. This is particularly the case where the person has survived sexual assault perpetrated by a person/s in authority in the past.



There are a number of failings with the current oversight mechanisms as outlined above, and in summary these are:

- The inability of inspecting bodies to compel for change and an inability to make information public or refer to a different body for further investigation;
- Conflicts of interest which arise when criticism is warranted. The difficult power imbalance between organisations working in the space and the department and its service providers, due to the need for external organisations to maintain access;
- The non-binding nature of the recommendations of existing inspection bodies;
- The inability of inspecting bodies to ensure information is fed back transparently to the persons affected and their supporting external organisations; and
- The difficulties in recognising the acute impact of the detention environment on people with particular vulnerabilities.

## **2. How should the key elements of OPCAT implementation in Australia be documented?**

The ASRC strongly believes that the key elements of OPCAT implementation in Australia should be mainstreamed throughout relevant legislation such as the *Migration Act 1958* (Cth) to formally demonstrate ratification. Australia currently has a system of mandatory, indefinite detention. There are presently no substantive nor procedural limitations on the timeframes or oversight mechanisms. This practice in and of itself will need to be revisited and revised as potentially standing in conflict with ratification and a commitment to prevent cruel, inhumane and degrading treatment.

In addition, as Australia has effective control over the treatment of people seeking asylum it has transferred to another country including Nauru and Manus Island, the Commonwealth Government should continue to be responsible for ensuring their treatment is consistent with Australia's human rights obligations. This too should be reflected in Commonwealth legislation.

It must be recognised that the UN Committee Against Torture specifically called upon Australia to "ensure the Immigration Detention Standards be codified into legislation and provide for an independent monitoring mechanism" in relation to immigration detention. It follows that the key elements of OPCAT should be enshrined at law, where inspecting bodies have a source of legislated mandate and authority in order to perform their functions along with autonomous, flexible ongoing funding to assure independence.

## **3. What are the most important or urgent issues that should be taken into account by the NPM?**

### *Australia's Regional Processing Centres*

There is overwhelming evidence that the Manus Island and Nauru Regional Processing Centres (RPCs) constitute torture under the Convention through the following cumulative elements:

- the intentional infliction of severe mental or physical suffering;
- by a public official, who is directly or indirectly involved;
- for a specific purpose.

A report by Amnesty International, 'Island of Despair'<sup>1</sup> found overwhelming mental suffering, causing suicide attempts and self-harm, the violation of children's fundamental human rights, sexual harassment and assaults, physical abuse and threats, and the failure to protect people from these. This report found that this suffering was inflicted for the purpose of deterring third persons from taking boat journeys to Australia seeking protection, as clearly and repeatedly stated by the Australian Government.

The 'Nauru Files'<sup>2</sup> and a number of incident reports and other documents published by the Guardian<sup>3</sup> in relation to Manus Island, outline a clear and overwhelming trend of mental deterioration and abuse in both locations. A significant number of former staff members have given

<sup>1</sup> <https://static.amnesty.org.au/wp-content/uploads/2016/10/ISLAND-OF-DESPAIR-FINAL.pdf?x85233>

<sup>2</sup> <https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive>

<sup>3</sup> <https://www.theguardian.com/australia-news/2017/may/18/self-harm-suicide-and-assaults-brutality-on-manus-revealed>

eyewitness accounts that accord with this documentation and Amnesty's report, and confirmed that daily operations of the RPCs are conducted by Australian contractors, and decision-making power lies with the Australian Border Force.

The ASRC strongly believes that all detention centres and detainees, whether onshore or offshore, fall under the responsibility of the Australian government. Pursuant to the principle of effective control, Australia retains responsibility for human rights violations that occur in the regional processing centres based in Nauru and Papua New Guinea. This reflects international law principles and the factual circumstances including that such people are subject to transfer under section 198AD of the *Migration Act 1958*, that Australia's regional processing centres are funded by Australia, with the involvement of private contractors who have agreements with the government of Australia.

In addition to the uncertainty of resettlement options, violence, mental health deterioration and abuse occurring in RPCs, the physical conditions are incredibly difficult, despite it being clearly possible to improve them. Some of the physical and environmental difficulties include:

- the absence of air conditioning and often fans in extreme heat
- restricted access to material needs including clothing and shoes
- overcrowded accommodation, which in the Nauru RPC is in tents rather than physical accommodation
- restricted access to communications for communication with immediate family
- difficult access to water due to its method of provision, distance from living accommodation and on occasion the lack of access to water carrying vessels
- lack of safe play areas and absence of toys for children
- restricted freedom of movement through the use of curfews and difficult transport arrangements

In circumstances of poor mental health, uncertain refugee status determination and resettlement circumstances, many people on Manus and Nauru are suffering mental health problems and injuries, from which they may never recover. Some detainees have died and others have been injured on Manus Island and Nauru in circumstances where the Commonwealth and/or detention centre operators funded by the Commonwealth can be considered negligent.

Special Rapporteur said in relation to regional processing centres:

*The internal complaint mechanism within the regional processing centres concerning abusive behaviour by service providers and guards does not provide sufficient guarantees of a due and independent investigation. The Special Rapporteur was informed that, after a sexual assault is reported to a centre's management, the perpetrators are often transferred to a different regional processing centre without investigation and prosecution. To his knowledge, none of the alleged perpetrators have been convicted so far. As a result, most of the single women marry or have a boyfriend in order to get themselves some sort of protection.*

Recent case law related to ss. 189 and 196 of the *Migration Act 1958* (Cth) has drawn attention to the possibility of indefinite administrative detention but also the Minister's public interest powers at s. 198AE. The ratification of the OPCAT demonstrates that it is not in the public interest to continue this practice. At the very least, what the Minister considers in applying his discretion to detain or release asylum seekers must be more transparent. The HRLP has clients in similar factual



scenarios where some remain in detention and others are deemed fit to reside in community detention with reporting requirements. The indefinite detention and seemingly arbitrary decision making process must be addressed and in light of ratification of OPCAT dealt with immediately.

**4. *How should Australian NPM bodies engage with civil society representatives and existing inspection mechanisms (eg, NGOs, people who visit places of detention etc)?***

One of the key issues with the current inspection framework for immigration detention in Australia is that those organisations and bodies with access to detention centres are unable to share information with external organisations.

Currently, organisations who work closely with people in immigration detention will often refer issues to the inspecting bodies, however we are unable to obtain feedback as to whether the issues we have referred have been substantiated during the inspection, raised with the detention service providers or addressed.

It is imperative that open, two-way communication is possible between NPM bodies and those organisations who work with people in detention, and that these organisations are able to have input into resolutions. Regular formal consultation and liaison must be in place whereby problems in places of detention are shared and together with the NPM solutions are developed.

Issues relating to conditions of detention are also often raised by detainees during inspections. While these issues are collated and raised by inspecting bodies, there is often no capacity to ensure that the outcome is fed back to the detainees who have raised the issue. As a result, detainees are often left with concerns that the issue identified will occur again, which can be the cause of distress.

It is imperative that NPM bodies have the capacity to provide feedback to detainees who have raised, or are affected by a particular issue, and that those affected are able to have input into the resolution.

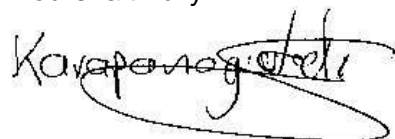
One way to ensure information is collected and issues are addressed in a timely fashion is to have a system of short term deployments from NGOs to the NPM body. NGOs with specialist capability could be nominated and seconded on a rotational basis. The secondee would be treated as an NPM employee for the period and bound by confidentiality.

Alternatively as seen in some countries in Europe that have implemented an NPM framework, the NPM body could be overseen by a board made up of different stakeholders including rights based NGOs involved in detention work. This ensures greater connectivity between those visiting detention centres regularly and working directly with detainees.

In addition, human rights NGOs such as ASRC can undertake to carry out protection mainstreaming trainings for staff at detention centres, especially given the high turnover of staff at these places. Trainings would include how to ensure the dignity and safety of detainees and ensuring access to basic human rights. A human rights organisation can work with detention staff to identify vulnerable groups in ongoing confinement and ensure they are appropriately cared for, including advocacy around their release into the community and/or that their immigration matters are heard expeditiously.

Please do not hesitate to contact should you require any further information. I can be contacted on [kon.k@asrc.org.au](mailto:kon.k@asrc.org.au)

Yours faithfully

A handwritten signature in black ink, appearing to read 'Kon Karapanagiotidis', written over a faint, larger version of the same name.

Kon Karapanagiotidis  
Founder and CEO, ASRC