

OPCAT in Australia: Australian Human Rights Commission Consultation

RACP Rep to roundtable discussion held 8/6/17: A/Prof Karen Zwi

Consultation Overview

The Attorney-General has requested that the Human Rights Commissioner conduct [civil society consultations](#) on how the OPCAT should be implemented in Australia. The primary focus of the consultation is the design, coordination and implementation of domestic inspection processes, namely the National Preventive Mechanism (NPM).

The NPM takes a preventive rather than a reactive complaints-driven approach. Through regular and unannounced visits, the NPM identifies problematic detention issues before ill treatment occurs or before it escalates. The NPM can then seek to address such problems through regular dialogue with detention authorities. The NPM complements, rather than replaces, existing oversight systems.

The Commonwealth Attorney-General has indicated that multiple bodies from the federal, state and territory governments will be responsible for inspection responsibilities. The work of the various inspection bodies will be supported by a national coordinating mechanism responsible for coordination and capacity building. The Attorney-General has announced that the Commonwealth Ombudsman would perform the national coordinating function.

The Government is likely to invoke Article 24 of OPCAT to provide an initial 3-year implementation period for the NPM. Australia can progressively implement OPCAT by establishing an NPM with a broad mandate but with an initial limited focus. The NPM can then develop long-term strategies to ensure full coverage.

RACP Position

The RACP has previously called for Australia's ratification of the OPCAT on the basis of its positions on [The Health and Wellbeing of Incarcerated Adolescents](#) and [Refugee and Asylum Seeker Health](#).

The position statement on adolescent incarceration includes the following recommendation:

"The Royal Australasian College of Physicians (RACP) will advocate to governments to make changes to improve health and social outcomes for adolescents who are either in incarceration, or who have been released into the community.

Accordingly the RACP will advocate to the governments of Australia and New Zealand to ratify the United Nations High Commissioner for Human Rights Optional Protocol to the Convention against Torture (OPCAT)."

This was reiterated in the RACP's submission to the [Royal Commission into the Protection and Detention of Children in the Northern Territory](#) made in October 2016.

In relation to refugee and asylum seeker health, the RACP was a signatory to an [open letter](#) published in October 2015 calling on the Australian Government to ratify the OPCAT. The letter stated:

“The prohibition and prevention of torture and other forms of ill-treatment in places of detention is a cornerstone of human rights and an ethical imperative for professionals providing healthcare and welfare support to those in places of detention.

The ratification and implementation of OPCAT will strengthen Australia’s domestic monitoring of places of detention, enhance the prevention of torture and cruel, inhuman and degrading treatment, and avoid or remediate working environments that undermine the capacity of health professionals and social workers to provide ethical and quality care.”

Opening Comments/Key messages

The RACP welcomes the Australian Government’s commitment to ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

The RACP’s recommendation that the Australian Government ratify the OPCAT was based on RACP positions on adolescent incarceration and the harms of immigration detention, and the evidence of the need for greater oversight to minimise and prevent any harmful physical and mental health impacts associated with these settings.

In its submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory in 2016, the RACP noted that ratification of OPCAT was necessary to:

“ensure the protection of young detainees from physical and psychological harm and provide an enquiry mechanism to examine accusations of acts which contradict Australia’s obligations under OPCAT.”¹

We hold to this position and look forward to continued engagement in consultation processes to ensure that the mechanisms of OPCAT are equipped to protect and promote physical and mental health in detention settings.

Notes from the meeting by K Zwi (no minutes will be circulated and no record of attendees was given):

- Mentioned above position of RACP. Note this applies to jails, mental health units, aged care facilities, immigration detention, juv justice centres.
- Present were wide range of 25-30 stakeholders eg juvenile justice, jail consumer advocate, mental health professionals and advocates, disability NGOs and advocates, Aboriginal organisation, refugee lawyers and advocates (John Highfield, National Justice Commission, RACS), children’s commissioner rep, Wealth ombudsmen, AHRC, RACP.
- Key huge issue identified is that Nauru and PNG are excluded from this process by the C’wealth terms. AHRC advocating that this be reversed. If it is not then suggestions discussed were:
 - o Some believe that these facilities are not legitimate so should be excluded;
 - o others that we should highlight that C’Wealth needs to fulfil its obligations and has a responsibility to articulate how oversight should occur offshore.

¹ This is from the RACP Northern Territory Committee’s supplementary submission to the Royal Commission - <https://www.racp.edu.au/docs/default-source/default-document-library/submission-royal-commission-protection-detention-children-nt-dec2016.pdf>.

- Person from Asia Pacific Forum (Kieran Fitzpatrick) said they were involved in getting Nauru to address their obligations as they have already ratified OPCAT, but that PNG had not and would unlikely sign or ratify.
- Finally, an option is to footnote every document that Nauru and PNG have been excluded thus this issue requires a different approach.
- It was made clear that OPCAT is not set up as an advocacy body and is essentially confined to looking at standards and procedures of those detained ie not why they have been detained or if there are alternatives to detention. People raised that this could be role of the AHRC.
- OPCAT was presented as a new procedural safeguard that will hopefully better draw attention to human rights issues in relation to all forms of detention, and provide better mechanisms to resolve issues but is not a panacea and advocacy, legislative challenges and other mechanisms to improve things should continue.
- OPCAT will co-ordinate visits to detention centres and allow for learning across settings. C'wealth will co-ordinate but implementation rests with State and Territ. Much discussion about resources for this.
- This level of international oversight and the development of national standards applicable in all detention settings is thought to improve standards and conditions. An important question is how this differs from many previous and current inspections, reports and visiting agencies in actually eliminating torture, degrading and inhuman practice – not clear how OPCAT will do this precisely but generally considered by the group as shining a bit more official light on these issues. One advantage I can see is that if standards currently applied to prisoners were applied to detainees, they would be far better off eg capacity to study, amount of space, visitors, access to legal aid etc.
- The importance of the direct living experience of the detainee voice and the Aboriginal voice was raised. The structures appear not to include this though many advocates and NGOs are likely to be present. AHRC will further explore this.
- The structure of the inspection and monitoring committees was discussion and cautions mentioned regarding having unfettered access to detained people, surprise visits, truly independent, cross-disciplinary and highly trained people on the inspection panels, capacity to make reports public.
- The critical issue of implementation of recommendations was discussed. The ethos was described as negotiating with detention providers to rectify issues and only if this did not happen, to make issues public. Alternative view is that inspection seldom reveals information new to managers, and some torture/degrading treatment is intentional eg in the case of immigration detention. Some suggested carrots eg accreditation of facilities.
- Other issues raised:
 - Calling out prolonged detention, detention without trial and arbitrary detention – I think this may be most effective for highlighting immigration detention issues
 - Amend ABF act so professional can speak out
 - the need for transparency and data (eg we do not know how many Aboriginal kids in custody or in local area commands); this can identify place based trends.
 - Standards around seclusion, family separation, restraint, detainee transport (eg handcuffing/shackling), medication usage

My overall impression: this may improve the situation for some detainees but is not enormously more empowered to address the issues than any current processes. The issues of immigration detention may get some exposure through this process, as the arbitrariness and minimal attention to basic standards in detention will become obvious. The lack of capacity to enforce recommendations is critical and is no better than any previous processes but we can only hope the international oversight and civil society and state-territory collaboration to work together as a result of ratifying OPCAT draws attention to human rights violations and helps to address them.