14 October 2022

Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)
Office of the United Nations High Commissioner for Human Rights (OHCHR)
8-14 Avenue de la Paix
CH 1211 Geneva 10
Switzerland

Distinguished Subcommittee Members

SPT Visit to Australia in October 2022 – civil society recommendations in relation to immigration detention

The Public Interest Advocacy Centre (PIAC), the Refugee Council of Australia (RCOA), Amnesty International Australia, the Refugee Casework and Advice Service (RACS), the Asylum Seeker Resource Centre (ASRC), the Human Rights Law Centre, the Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney, SCALES Community Legal Centre, Human Rights For All, Professor Mary Anne Kenny and Dr Anthea Vogl welcomed the opportunity to provide additional information to the SPT delegation in relation to Australia's treatment of asylum seekers and refugees at the civil society meetings on 4 and 5 October 2022.

Our organisations work with asylum seekers and refugees across a variety of contexts, including onshore and offshore detention, the provision of individual legal assistance and psychosocial support as well as research, policy and law reform.

To further assist the Subcommittee, we have prepared this document which collates the key recommendations made by our respective organisations in our separate submissions and presentations to the SPT. These recommendations reflect the differing expertise, views and priority areas of each of our organisations, and provides an overview of the priority areas for reform in order for Australia to fulfil its obligations under OPCAT.

As outlined in our various submissions and presentations, many features of Australia's system of detaining asylum seekers, refugees and migrants are indicative of systemic risks of torture. Features of this system include:

- arbitrariness and a lack of transparency, for example in relation to decisions whether to release or continue to detain, transfers between detention facilities, and risk assessments.

- secret detention in undisclosed places, especially ‘alternative places of detention’ (APODs);
- indefinite detention;
- isolation, both within detention facilities and as a result of restrictions on community and civil society access;
- unreasonable obstacles to accessing legal and health services;
- limited independent oversight, as well as government antipathy to the limited oversight that does exist; and
- government resistance to civil society engagement.

We note that Australia has a history of not accepting recommendations from reviews and investigations conducted by international and domestic human rights mechanisms in relation to its treatment of refugees and asylum seekers. In the rare instances where recommendations have been accepted, few have been implemented. Against this backdrop, we strongly recommend that the Subcommittee provide its guidance to Australia in clear, specific and robust terms.

Recommendations

1. *Mandatory immigration detention*
   We recommend that the Subcommittee provide clear guidance for Australia to 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 that the Subcommittee:
   - advise Australia to introduce 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;
   - urge Australia to institute 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
   - strongly recommend to Australia that, wherever possible, alternatives to detention such as community detention and bridging visas should be used.

3. *Conditions of immigration detention*
   We recommend that the Subcommittee:
   - provide an explicit opinion as to the circumstances in which Australian immigration detention practices might amount to cruel, inhuman or degrading treatment or punishment, and/or torture;
   - advise Australia to introduce 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;
   - recommend that Australia take steps to ensure 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;
   - advise Australia to introduce clear legislative standards for risk assessments and the use of restraints;

- recommend that the use of spithoods and solitary confinement cease as a matter of urgency, and that such practices be prohibited by legislation;
- recommend the immediate closure of the immigration detention facilities on Christmas Island and any other detention facility in which people risk being exposed to cruel, inhuman or degrading treatment or punishment;
- recommend the closure of all alternative places of detention (APODs) that are not fit for purpose, such as Kangaroo Point and the Park Hotel;
- recommend 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
- recommend 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 that the Subcommittee advise Australia to:
   - amend the *Migration Regulations* by inserting a new provision to require a minimum standard of healthcare in immigration detention, commensurate with Australian community standards. This must be complemented by training, education and robust review, and clear access to recourse when those standards are not met;
   - urgently audit existing healthcare policies, and include an updated agreed standard of care in the contractual renewals with IHMS or other health providers appointed to deliver services to immigration detainees;
   - ensure free access by detainees to independent medical services (i.e. other than those provided by detention contractors);
   - review practices regarding treatment of people with psychiatric conditions and disabilities, and cease using of solitary confinement as a management tool;
   - mitigate the risks of COVID-19 by ensuring that all detainees and staff (who wish to be) are vaccinated;
   - reiterate to Australia that the use of solitary confinement is an unacceptable approach to reduce the risk of COVID-19, and that it should instead follow the advice of medical professionals to reduce the spread of COVID-19 in places of immigration detention;
   - review reg 5.35 of the *Migration Regulations* (medical treatment without consent), and amend it to ensure compliance with best medical advice and Australia's international human rights obligations; and
   - ensure 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 in regional processing countries*
   In light of Australia's insistence that its international obligations do not extend to people who may be detained in Nauru and Papua New Guinea pursuant to offshore processing, and recent international attempts to replicate this policy in the United Kingdom and Denmark, we recommend that the Subcommittee:
   - remind Australia, and any other State considering the same policy, that States cannot contract out of or circumvent their international obligations by relying on other States to do what they cannot do themselves;
   - clarify the nature and scope of a State party's obligations under OPCAT in circumstances where it is involved in depriving people of liberty in the territory of another State – including where the detention is a shared or joint policy between the State party and the State in which detention occurs; and

- advise Australia that its international 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, 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.

6. *Detention at sea*
   We recommend that the Subcommittee, in the strongest and most specific possible terms:
   - remind Australia that its obligations under OPCAT extend to wherever it exercises jurisdiction, including at sea;
   - recall that the policy objective of not disclosing information about interception practices to people smugglers cannot be invoked to justify a blanket denial of any transparency or accountability in relation to detention at sea;
   - advise Australia that 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
   - remind Australia that the NPM (Commonwealth Ombudsman) must be granted oversight of all places where people may be deprived of their liberty, including at sea. The Subcommittee might also consider recommending to Australia that oversight bodies such as UNHCR, the Red Cross and the Australian Human Rights Commission be permitted to be deployed on interception vessels.

7. *National Preventative Mechanism (NPM)*
   Australia has nominated the Office of the Commonwealth Ombudsman to be the NPM overseeing immigration detention, but we are yet to see sufficient practical progress in implementing a coordinated and effective system of monitoring and prevention. We recommend the Subcommittee advise Australia to:
   - introduce 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;
   - recommend a minimum annual budget for the NPM to immunise its functions from politicisation; and
   - ensure that budget it sufficient to allow the NPM to fulfil its functions under OPCAT effectively.

We are happy for these recommendations to be made available as a public document.

Yours sincerely

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The Refugee Council of Australia
Amnesty International Australia
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The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney
National Justice Project
SCALES Community Legal Centre
Human Rights For All
Professor Mary Anne Kenny
Dr Anthea Vogl
Dr Sara Dehm