Refugee Council of Australia

AUSTRALIAN HUMAN RIGHTS COMMISSION

SUBMISSION ON THE OPCAT IN AUSTRALIA CONSULTATION PAPER

JULY 2017

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 190 organisations and 1,000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the Government's decision to ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), and this opportunity to provide feedback on its implementation.

This submission focuses on the implementation of OPCAT in relation to immigration detention. RCOA also endorses the OPCAT Joint Network's submission on the broader principles underpinning the implementation of OPCAT. This submission addresses in turn each of the consultation questions set out in the Discussion Paper.

1. Experience of the inspection framework

RCOA's role in immigration detention

1.1. RCOA has long been concerned about the policies and conditions of immigration detention in Australia. As a national umbrella body, many of our members are involved in supporting people who are, or have been, in immigration detention. Through monthly network meetings, annual consultations and ongoing contact with these members, RCOA regularly hears of concerns about individuals in detention as well as systemic issues in immigration detention.

1.2. RCOA also advocates directly to the Australian Government and is in contact with detention monitoring bodies on matters raised by its members and others supporting people in detention. We also occasionally facilitate connections between civil society members and detention monitors, by providing key contacts to detention monitors, and inviting detention monitors to networks or special meetings on issues of common interest.

1.3. In the past two years, RCOA has increased its work in this space through the Detention Research Project. This Project aims to identify and research key issues arising in detention. In the past year, this Project has been focused on recording barriers to access to detention and putting forward recommendations to address those issues. To be able to identify the issues and make

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recommendations, RCOA consulted with detention visitors nationally. [1] The Project is due to launch this report in August.

Inspection framework

1.4. Currently, there are four main monitors of immigration detention in Australia:

- The Commonwealth Ombudsman
- The Australian Human Rights Commission (AHRC)
- The United Nations High Commissioner for Human Rights (UNHCR), and
- The Australian Red Cross.[2]

1.5. The scope, powers and frequency of these monitoring regimes differ widely (see Table).

	Ombudsman	**AHRC**	**UNHCR**	**Australian Red Cross**
Type	Government oversight body	Government oversight body	United Nations refugee body	Non-governmental organisation and auxiliary to government
Focus	Administration	Human rights	Refugee rights	Humanitarian
Jurisdictionl	Australia (including Christmas Island), Nauru, PNG	Australia (according to Government)	Australia (including Christmas Island), Nauru, PNG	Australia (including Christmas Island). Australian Red Cross supports the International Committee of the Red Cross (ICRC) in its monitoring visits to Manus Island and Nauru
Powers	Entry and access to detention facilities Power to require information Own motion investigations Handling of complaints Statutory review of long-term detention Compliance and removal	Handling of complaints Power to require information Own motion inquiries	By agreement	By agreement
Frequency of visits	1–2 visits a year at each location	Varying	Not public	Regular and frequent,
Public reports	Own motion reports published, visit reports discretionary	Some visit reports	No (with exceptions)	No

1.6. In addition to these main monitors, the Minister's Council on Asylum Seekers and Detention (MCSAD) is appointed as an advisory council and regularly visits immigration detention and reports

[1] A brief has been published on this research: Refugee Council of Australia, *Visitors' Access to People in Detention* (20 December 2016) <http://www.refugeecouncil.org.au/publications/detention-visitors/>.
[2] 'Immigration Detention Monitoring', *Australian Red Cross* <http://www.redcross.org.au/immigration-detention-monitoring.aspx>.

back to the Minister. Its powers, however, are informal and there is no public information on the visits or their reports.[3]

1.7. A wide variety of civil society groups and individual visitors also visit people in detention regularly and advocate on their behalf. Selected visitors are members of Community Consultative Groups at each detention facility, which may provide an opportunity for visitors to provide feedback on detention issues to staff. However, such visitors are not monitoring bodies and the arrangements of the Community Consultative Groups are informal.

1.8. RCOA observes that the Australian Government has already nominated the Ombudsman as the National Preventive Mechanism (NPM) under OPCAT, in part because of its existing role as a detention monitor. In our view, the AHRC would be the more appropriate NPM given its human rights focus and the potential conflicts of interest within the Ombudsman (see below). RCOA strongly recommends that, in the absence of that designation, the AHRC should continue to have a strong role in immigration detention monitoring.

1.9. We also wish to emphasise the importance of ensuring that both UNHCR and Australian Red Cross continue to be involved in the monitoring of detention. These monitors have a distinctive role to play in immigration detention. As people are being detained by the Australian Government, there are understandably systemic issues of trust and understanding for any monitor that is part of the Australian Government. As well, given the long-term and regular presence of these monitoring bodies in the detention space and given the prolonged detention some people are experiencing, there may be some long-established and trusting relationships with these detention monitors that we would not wish to be disrupted.

1.10. We note that in some jurisdictions civil society organisations are formally part of the NPM. In the detention space, this could undermine the role of UNHCR and Red Cross, especially in a context where part of their value resides in the fact that they are not part of the Government that is detaining people. While we therefore recommend closer cooperation between the bodies, we do not recommend that UNHCR or Australian Red Cross be included within the NPM itself.

Recommendation 1

The existing immigration detention monitors should continue to be involved in monitoring immigration detention.

Scope and value of detention monitoring

1.11. Our first comment is that no matter how good the detention monitoring becomes, it will not go to the root of the fundamental problems in immigration detention: its indefinite, arbitrary and prolonged nature. These issues are the causes of much of the suffering of those in detention. Ultimately, they require legislative solutions and political will.

1.12. This is especially so because, even under OPCAT, recommendations by monitoring bodies will remain just that: recommendations. In the past few years, RCOA has observed a decreasing willingness of the Government to accept recommendations or even to comply with compulsive powers. For example, in a recent report by the Ombudsman on the cancellation of visas, the Ombudsman observed that the Department had not provided all the information lawfully required during the investigation.[4]

1.13. Nevertheless, we believe there is considerable value in the monitoring of detention and potential for OPCAT to improve the existing regime. For too long, immigration detention has been

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[3] Department of Immigration and Border Protection, 'Minister's Council on Asylum Seekers and Detention' (19 June 2017) <http://www.mcasd.gov.au:80/Pages/Welcome.aspx>.

[4] Commonwealth Ombudsman, *The Administration of People Who Have Had Their Bridging Visa Cancelled Due to Criminal Charges or Convictions and Are Held in Immigration Detention* (December 2016) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf>, 1, 5, 9.

an exceptional regime. The main experience of the Ombudsman and the AHRC have been in the immigration detention space. This has estranged the immigration detention monitoring regime from the experience and expertise of those monitoring prisons and other State detention facilities.

1.14. One suggestion that we would make is to share best practices across detention facilities by, for example, bringing in a monitor from another jurisdiction to accompany immigration detention visits. For example, in the UK the HM Inspectorate of Prisons also covers immigration detention, young offender institutions, customs facilities and other detention facilities, providing greater consistency across different types of detention facilities.[5]

1.15. We also believe that the multiple detention monitors can be confusing for those in detention, as they each have a different focus and different powers to help people. A more coordinated approach which clearly outlines the role of each monitor and their powers, and which would enable cross-referral of complaints to other monitors (as discussed below), would relieve those in detention (and those supporting them) of the need to distinguish between the subtleties of each detention monitor's role.

1.16. We also strongly endorse the position of the OPCAT Joint Network that implementing OPCAT involves a fundamental shift from reactive monitoring to preventative monitoring, and share its concern that the implementation of OPCAT should not assume that it is 'business as usual'.

Recommendation 2

To implement OPCAT properly, current monitoring of immigration detention needs to shift from being reactive to preventative.

Transparency and accountability

1.17. The secrecy that surrounds much of the current inspection regime makes it very difficult for us to comment in detail on the effectiveness of the monitoring regime. As noted above, there is limited public information on the detention visits. This lack of transparency, the non-binding nature of recommendations, and the limited feedback also makes it very difficult for advocates to know who to advocate to, and what, if any, are the outcomes of such advocacy.

1.18. In turn, this secrecy makes it more difficult for those in detention to understand the purpose of such monitoring or the value in participating in it, which clearly undermines the purpose of monitoring. Visitors commonly report that, after years in detention, people are disengaged from any potential visits as they do not see any results.

1.19. This lack of transparency is not, of course, limited to the monitoring of detention. A more fundamental issue is that we do not even know what the detention policies or procedures are. For example, although we are aware that the Australian Border Force has developed Standard Operating Procedures for many aspects of detention, including on critical issues such how people are risk assessed for the purposes of being restrained, we have been advised that those Procedures cannot be disclosed. It is therefore impossible for civil society to understand if the procedures are being violated.

1.20. To increase transparency, RCOA recommends that the NPM should report publicly on its visits, in addition to the required annual report. We note that this is a common practice, already operating in Sweden, France, Germany, the Netherlands, Switzerland, and the UK. These countries have adopted varying practices to ensure publication does not unduly impede cooperation by authorities.

1.21. RCOA does not suggest that either UNHCR or Red Cross, as non-governmental monitors, should be required to report publicly. However, we believe greater transparency of the monitoring regime, including regular publication of thematic reports and recommendations by the Ombudsman

[5] 'What We Do', (14 February 2014) *HM Inspectorate of Prisons* <https://www.justiceinspectorates.gov.uk/hmiprisons/about-hmi-prisons/>.

and the AHRC, would promote the purpose of detention monitoring. We would recommend that the Ombudsman aims for best practice rather than the threshold of annual reporting recommended by OPCAT, particularly as issues in detention can change rapidly over time.

1.22. We would also encourage greater transparency of the standards used in detention monitoring. We understand that human rights standards for immigration detention were developed by the AHRC a few years ago.[6] We are also aware that UNHCR, the Association for the Prevention of Torture, and the International Detention Coalition have jointly published practical guidelines for detention monitors across the world.[7] It remains unclear to us which, if any, of these guidelines are used by the detention monitors in Australia. To ensure compliance with OPCAT, any standards used should be based on human rights standards.

1.23. To improve the accountability of detention monitoring, we also believe that it would be useful for the NPM to have clear reporting against such standards, or other clearly defined key performance indicators. For example, these could include standards relating to the frequency of visits; engagement with civil society; use of specialist expertise; reports and other engagement with government; and the number of thematic reports.

Recommendation 3

To improve the transparency and accountability of detention monitoring, the NPM should be required to publish its visit reports, standards for inspection, and performance against key benchmarks or standards.

Gaps in the framework

1.24. RCOA's consistent view is that the offshore processing centres in Nauru and on Manus Island are under the effective control of Australia and Australia is jointly responsible for the detention of people in these places. As the *Guidelines on National Preventive Mechanisms* states, "the jurisdiction of the State extends to all those places over which it exercises effective control."[8]

1.25. We therefore recommend that, to comply with our international obligations, our ratification of OPCAT should extent to Australia's offshore processing centres, and strongly disagree with the Australian Government's stated position that they are not included in our ratification of OPCAT. We also note that the Nauru Government has ratified OPCAT but has yet to establish an NPM, while Papua New Guinea has not ratified OPCAT.

1.26. In relation to detention in Australia, our key concerns are about the frequency of visits to more remote detention facilities, such as Yongah Hill and Christmas Island. We note from the Ombudsman's reports that in 2015–2016 the office visited both places twice, and we are aware informally that other visits by detention monitors have taken place.[9] However, given the distance of these places from centres of population and their relative inaccessibility to visits from members of civil society or regular supporters, we strongly recommend that such remote centres need to be monitored more regularly to fulfil the function of preventative monitoring.

1.27. Members of civil society who have visited these places consistently report significant human rights concerns in these facilities. Visitors to both places have reported to us that they have come across people who have never had any visitors, and reported their fears about the wellbeing of this

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[6] Australian Human Rights Commission, *Human Rights Standards for Immigration Detention* (11 April 2013) <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention>.
[7] United Nations High Commissioner for Refugees, Association for the Prevention of Torture and International Detention Coalition, *Monitoring Immigration Detention – A Practical Guide* (31 May 2015) <http://idcoalition.org/publication/monitoring-immigration-detention-a-practical-guide/>.
[8] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms* (No CAT/OP/12/5, 9 December 2010) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsquBlBCPFD%2bXLNadyD9hiZ4SGqsp7QTyjY12aNwfqi3CFkvYEqp%2bUSHT%2fCEAk5saRSeK0Q8FOnukzOhJMO2O6T%2frttROW5qBoyJYZCbh7io7>, [24].
[9] Commonwealth Ombudsman, *Annual Report 2015-2016* <http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/41584/ombudsman-annual-report15-16.pdf>, [48].

group and the reality of extremely protracted detention. The increased number of people who have recently been in prison has also changed the security environment of those facilities, to the detriment of those inside.

1.28. A key gap in the existing detention framework is that the existing detention monitors visit closed immigration facilities, but do not (to our understanding) visit Alternative Places of Detention, which are not considered closed immigration facilities. These would include temporary accommodation such as motels, State hospitals, mental health facilities, and potentially prisons.

1.29. Another key gap within the existing framework arises if people are held in detention at sea, as occurred between 1 and 27 July 2014 on the *Ocean Protector*, without any access to a detention monitor or outside parties. Clearly, such a situation is exceptional but also raises extremely grave human rights concerns that directly go to Australia's international human rights obligations. In our view, it is essential that such a gap must be remedied.

1.30. We would also emphasise that detention monitors should have both the power to enter premises unannounced, and access to all places in detention including CCTV cameras, especially where people are secluded or isolated. Our understanding is that many detention visits are negotiated in advance (especially in the case of the non-governmental monitors who do not have access as of right). In our view, this is far from best practice. We have heard consistent reports from detention visitors that, when such monitors or important parties such as politicians or officials visit, the facility and the people within it are made to look better than they are normall.

Recommendation 4

To implement OPCAT, detention monitors should have jurisdiction to monitor offshore processing centres, all Alternative Places of Detention, and detention at sea.

Recommendation 5

Detention monitors should be resourced to monitor remote detention facilities more frequently, and for their visits to be normally unannounced.

Composition of detention monitoring bodies

1.31. We would also argue that the composition of detention monitoring bodies should be more diverse, and ideally include monitors from different disciplinary and cultural backgrounds. As discussed below, the treatment of people's physical and mental health issues concern in immigration detention is a key concern. The lack of ongoing health expertise within the existing monitoring bodies is therefore troubling, although we understand that medical experts are brought in on an ad hoc basis by some monitors. This is expressly raised in the *Guidelines on National Preventive Mechanisms*.[10]

1.32. We would also recommend that appropriate training, including in cross-cultural communication and the effects of torture and trauma on people's behaviour, should be an essential requirement in the training of detention monitors.

Recommendation 6

Detention monitoring bodies should include more diverse composition, including from different disciplines and cultures, and should include health care expertise. Detention monitors should be trained in cross-cultural communication and the effects of torture and trauma.

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[10] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms* (No CAT/OP/12/5, 9 December 2010) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsquBlBCPFD%2bXLNadyD9hiZ4SGqsp7QTyjY12aNwfqi3CFkvYEqp%2bUSHT%2fCEAk5saRSeK0Q8FOnukzOhJMO2O6T%2frttROW5qBoyJYZCbh7io7>, [20].

Relationship between detention monitoring bodies

1.33. The lack of transparency in the detention monitoring regimes makes it difficult for us to comment on how effective the working relationship is between the existing monitors. We understand informally that the monitors do meet quarterly, but such meetings do not include representatives from civil society so we are unable to comment on the scope or effectiveness of such meetings.

1.34. From the perspective of civil society, this makes our advocacy unduly difficult. When, for example, we seek to raise an individual case, we will generally ask if those raising the issue with us have raised this issue with the Ombudsman, AHRC, UNHCR or Red Cross, or MCSAD before we take it up.

1.35. This creates a significant burden on individuals who are generally volunteering, as they go back and forth between different monitors and contacts in an attempt to resolve the problem, especially as the monitors will not generally provide feedback on any outcomes from their advocacy.

1.36. RCOA also seeks to raise systemic issues in detention. Our work is made more difficult by the fact that there are different potential avenues through which we can raise such issues, with different levels of access. As we generally do not receive feedback on the effectiveness of any advocacy, we are unable to target our advocacy more effectively. As well, such systemic advocacy is often difficult because the monitors typically require more specific details to resolve any issues, which raises issues of consent and privacy.

1.37. We would therefore greatly welcome a clear and transparent coordinating mechanism between those involved, ideally with appropriate information-sharing arrangements so that detention monitors can be aware of whether such issues have already been raised by others and, if so, any progress on those issues.

1.38. One possible mechanism for improving the coordination between civil society and detention monitors would be to include as part of the quarterly meetings between detention monitors, some representatives from civil society to inform monitors of issues emerging on the ground and to put forward (with consent) appropriate individual cases of concern.

1.39. Similarly, we believe there should be other ways to streamline communication between individual advocates and the four detention monitoring bodies, so that (for example) there could be a shared portal where complaints could be lodged to all those involved. This could also be a more effective and efficient use of resources between the existing bodies.

1.40. Another area of improved coordination would be the timing of visits. RCOA may, but does not always, hear of planned detention visits. A better system of coordination between civil society and detention monitors may assist in planning visits to ensure more regular monitoring and to enable civil society to provide input in a more streamlined way.

Recommendation 7

A clear and transparent coordinating mechanism between detention monitors should be established, with institutionalised opportunities for engagement with civil society including through preparation for visits.

Independence and legislative changes

1.41. An important element of OPCAT is the requirement for independence. We raise several concerns here, including: the adequacy of funding; the absence of a formal legislative mandate for detention monitoring; and the risks of political interference even with formally independent bodies.

1.42. We are deeply concerned at the suggestion that no additional funding will be provided to ensure compliance with OPCAT. We are strongly of the view that the existing immigration detention monitoring regime cannot be properly preventative with such a limited schedule of visits and always subject to constrained financial resources. We note that currently the Ombudsman only visits each site once or twice in a financial year, which cannot be considered sufficient to comply with a

'preventative' rather than a responsive regime. There is also no key performance indicator or legislative mandate which requires a minimum number of visits. Thus, when considering the allocation of resources, there is no requirement that ensures the funding of detention monitoring is given priority over other functions of the Ombudsman's office.

1.43. The risks of inadequate funding to monitor detention are real. For example, we are aware that in recent years the AHRC has had insufficient funding to visit detention centres. In our view, resourcing for the governmental monitoring bodies should be ring-fenced as an additional budget line item.

1.44. Further, neither UNHCR nor Red Cross have any guaranteed funding to continue their monitoring roles, and so these monitors are also at risk of losing out to competing priorities within their broader remit. Indeed, much of the detention monitoring conducted by Red Cross is conducted by volunteers, given constraints on resourcing.

1.45. In addition, we believe that the detention monitoring regime should be expressly established in legislation. Currently, the *Ombudsman Act 1976* (Cth) does not specify detention monitoring as a function of the Ombudsman's office, and its powers of entry and to compel the production of information are general in nature. While the Act gives the Ombudsman powers to investigate, the kind of investigation captured by the Act does not fit readily on to the model of preventative monitoring envisaged by OPCAT. Further, the Act is focused on administration rather than on human rights standards.

1.46. We also believe that the detention monitoring role should be clearly separated from the Ombudsman's role in handling complaints in detention. These are, in our view, distinctive roles and a complaints-focused role is likely to detract from the Ombudsman's preventative role under OPCAT.

1.47. RCOA would also observe that Michael Manthorpe, the newly appointed Commonwealth Ombudsman, was previously employed by the Department of Immigration.[11] This also raises concerns about a perception of independence. We would also observe generally that it is important for detention monitors themselves to be perceived as impartial.[12]

1.48. While the AHRC has legislative powers to handle complaints, it does not have broader powers to compel information or to insist on unannounced inspections. Nor does its Act specifically confer as a function the monitoring of detention. As well, while the AHRC is required to monitor human rights standards, the Schedule to its Act does not include as one of these standards the Convention against Torture itself.

1.49. RCOA therefore disagrees strongly with the view of the Australian Government that no additional legislation is required. In our view, it is essential to enact legislation establishing the NPM, conferring specific functions of detention monitoring on the Ombudsman and the AHRC, setting out its preventative and human rights-focused mandate, and clearly setting out its relationship with other detention monitors. This is consistent with the SPT's *Guidelines on National Preventive Mechanisms.*[13] We also believe that the Convention against Torture needs to be included in Schedule 1 of the *Australian Human Rights Commission Act*.

1.50. We note that Sweden similarly ratified OPCAT with the intention of providing no additional resources or a legislative mandate, against the objections of the designated NPM. In that case, the

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[11] Stephen Easton, 'Visa and Citizenship Boss Appointed Commonwealth Ombudsman', *The Mandarin* (4 May 2017) <http://www.themandarin.com.au/78575-immigrations-visa-and-citizenship-boss-appointed-commonwealth-ombudsman/>.

[12] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms* (No CAT/OP/12/5, 9 December 2010) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsquBlBCPFD%2bXLNadyD9hiZ4SGqsp7QTyjY12aNwfqi3CFkvYEqp%2bUSHT%2fCEAk5saRSeK0Q8FOnukzOhJMO2O6T%2frttROW5qBoyJYZCbh7io7>, [18]-[19], [30].

[13] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms* (No CAT/OP/12/5, 9 December 2010) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsquBlBCPFD%2bXLNadyD9hiZ4SGqsp7QTyjY12aNwfqi3CFkvYEqp%2bUSHT%2fCEAk5saRSeK0Q8FOnukzOhJMO2O6T%2frttROW5qBoyJYZCbh7io7>, [7].

Parliamentary Ombudsman was forced to petition Parliament (successfully) for additional resources and a legislative mandate.

1.51. We also believe that there should be a formal agreement which spells out the role of UNHCR and Red Cross in the context of the implementation of OPCAT, and enshrining their role as detention monitors. Without such an agreement, these monitors could have their access unilaterally withdrawn or be sidelined in the new arrangements.

1.52. Another aspect that requires legislative amendment to ensure the proper functioning of monitoring bodies is to ensure legislative protection of whistleblowing.[14] This is especially critical in the detention context, where the secrecy provisions of the *Australian Border Force Act* have had a significant chilling effect on civil society.

1.53. Finally, we observe that even formal legislative guarantees of independence can be threatened by political interference. The recent very public attacks on the legitimacy of the Australian Human Rights Commission for its own motion inquiry into children in detention, leading to budget cuts and the clear withdrawal of support for its President from the Government, undermine both its credibility and its functional independence. For detention monitoring to have value, the Government must not only guarantee the independence of the monitors, but respect that independence.

Recommendation 8

To ensure financial and operational independence, there should be increased and ring-fenced resourcing for detention monitoring, and those functions should be entrenched in legislation and in formal agreements.

2. How should implementation of OPCAT be documented?

2.1. As discussed above, legislation is required to address key issues including the function, mandate and powers of the Ombudsman and the AHRC, and the protection of its resourcing and whistleblowers.

2.2. In addition, it is necessary to spell out in a formal agreement the relationship between NPM and related monitors, including non-governmental monitors. We would also argue that the role of civil society should be addressed expressly in this agreement, including the role of forums such as Community Consultative Groups and individual detention visitors.

Recommendation 9

OPCAT should be implemented through legislation addressing the function, mandate and powers of the NPM and its relationship with other monitoring bodies including non-governmental monitors. Legislation repealing or amending the secrecy provisions hindering whistleblowing should also be passed.

The relationship between the NPM, other monitors and civil society should also be expressly addressed in a formal agreement.

3. Key issues in immigration detention

3.1. There are many critical and urgent issues in immigration detention today. The most significant of these are the prolonged and arbitrary nature of detention, with the average length of detention now well over a year. RCOA is aware of cases where people have been in detention eight or nine years.

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[14] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms* (No CAT/OP/12/5, 9 December 2010) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsquBlBCPFD%2bXLNadyD9hiZ4SGqsp7QTyjY12aNwfqi3CFkvYEqp%2bUSHT%2fCEAk5saRSeK0Q8FOnukzOhJMO2O6T%2frttROW5qBoyJYZCbh7io7>, [27]..

3.2. A stark issue in immigration detention is its arbitrary nature. People are often unaware of the reasons for their prolonged detention and never know when and under what circumstances they will be released. RCOA is aware of cases of people who remained in prolonged detention due to adverse assessments by the Australian Security and Intelligence Organisation. A small number of people in this group are spending their seventh of eighth year in detention despite having had their adverse security assessment overturned more than a year ago.

3.3. A long-standing issue that contributes to the prolonged and arbitrary nature of immigration detention is the sheer inadequacy of detention review. This has long been identified as a breach of our international human rights obligations. There is no effective judicial review of detention, as the *Migration Act 1958* (Cth) effectively reduces the role of the court to identifying only if a person holds a valid visa.

3.4. The process of Departmental review of detention decisions is shrouded in obscurity. There is no public information on the scope of this review, who conducts it, how reviews of detention decisions are triggered, or how civil society can provide information relevant to the review. There appears to be no written policy or clearly identified criteria for why people remain in detention.

3.5. The little public information there is available exposes alarming gaps in the administrative review process. The Ombudsman's reports reveal, for example, that when a person's bridging visa is cancelled because of pending criminal charges, no review is automatically triggered when those criminal charges are dropped.[15]

3.6. Ultimately, review within the Department is no substitute for independent and impartial review before a tribunal that can compel a remedy, as is required under our international legal obligations.

3.7. Another long-standing issue is the secretive and arbitrary transfer of people across detention facilities. One of the reasons RCOA established the Detention Research Project was to help advocates find people they were visiting and supporting in detention after they had been suddenly transferred. Transfers typically happen without notice, without explanation and often at times when people would find it difficult to reach out to their emotional or legal supports.

3.8. When people in detention are transferred, they cannot tell their friends or visitors where they have been transferred to, or why. These transfers have profound effects on people, as they disrupt their established support systems and often impede their access to emotional and legal support, and even their rights of legal representation and appeal.

3.9. A more recent issue that RCOA has been tracking is the increased use of force within detention facilities, especially after the introduction of the Australian Border Force and the increase in the security measures. We hear consistent reports of inappropriate use of force, especially by Emergency Response Teams. Visitors report that a single person will suddenly be surrounded by several men in full riot gear. We constantly hear of incidents where people's frustrations with prolonged detention or the failure to resolve issues are misunderstood or inappropriately responded to by force.

3.10. A related issue is the increased use of restraints when people are to be transported to medical appointments, including torture and trauma centres. Such use of restraints, together with the constant presence of security guards, has deterred people from going to health appointments or counselling. The use of restraints is also deeply traumatic for many people, given their past experiences of persecution. Although this issue has been raised consistently with the relevant authorities by many advocates, including RCOA, and new procedures have been put in place, we continue to hear reports of inappropriate use of restraints which cannot be explained by the Department. For example, we have heard of children transferred to Australia from offshore facilities in extremely poor health being subjected to such restraints, when they are clearly in no position to cause harm.

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[15] Commonwealth Ombudsman, *The Administration of Peole Who Have Had Their Bridging Visa Cancelled Due to Criminal Charges or Convictions and Are Held in Immigration Detention* (December 2016) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf>.

3.11. Another related issue is the use of seclusion and isolation in immigration detention facilities. While we hear occasional reports of concern, for obvious reasons, this is often very difficult for advocates to identify, since no one will generally be able to visit such people, obtain sufficient details to complain, or to verify the reasons for such seclusion. Under OPCAT, the NPM should be required to have unrestricted accessed to these people with an opportunity to have a private conversation.

3.12. As well, recent years have seen the environment in detention facilities generally become more insular. For example, a so-called 'pilot' in Melbourne which enabled trusted visitors to take people on outings has been cancelled, outside excursions discontinued and programs and activities offered by detention service providers have not been able to offer meaningful mental stimulation and opportunities for learnings new skills. The Australian Border Force has also removed access to mobile phones for people in detention.

3.13. As noted above, RCOA is about to publish a report on reduced access to immigration detention for visitors. This research, based on interviews with detention visitors, records new restrictions on access, including reduced visiting space, arbitrary visiting rules, the imposition of inappropriate and inaccurate drug-testing, and changes in the security environment more generally.

3.14. Finally, a critical issue in immigration detention is the treatment of people with health issues, especially mental health issues and disabilities. Almost all people now in detention have serious mental health issues because of the prolonged time they spend in detention, but such issues are commonly not treated properly. We are concerned about the reports of over-medication of people in detention with mental health issues, especially by sleeping pills. The limited access to mental health support is exacerbated by the increasing isolation and securitisation of detention. There also appears to be no framework for the treatment of people with disabilities in detention: indeed, in recent Senate estimates the Department could not even identify the numbers of people in detention with disabilities.[16]

3.15. In our view, a very productive step in any OPCAT staged implementation would be to conduct a thorough audit of the treatment of health issues in detention facilities nationally, including Christmas Island. Healthcare, after all, should not depend on the reason for detention, and should therefore be consistently managed and treated throughout detention facilities. It is also clearly one of the most significant gaps in existing monitoring frameworks, and one in which best practice from other jurisdictions, including overseas jurisdictions, would be most readily applicable.

Recommendation 10

In implementing OPCAT, key priorities for urgent review include:

a) - *Review of healthcare in detention facilities, especially support for mental health and disabilities*

b) *Indefinite and arbitrary detention, including review of detention*

c) *Practices of isolation, including seclusion and restriction of visitor access*

d) *Practices of restraints used during transport.*

4. NPM's involvement with civil society

4.1. One outcome we would very much hope to see from the ratification of OPCAT is greater involvement of civil society in detention monitoring. As discussed above, currently the immigration detention monitoring regime is opaque and there are limited channels for civil society engagement.

4.2. This is a wasted opportunity. As we discuss in our forthcoming report on detention visitor access, visitors to detention are an extremely valuable and timely source of information. They see the facilities more regularly, and know those in detention very well. Yet they have limited channels

[16] Senator Rachel Siewert, *Detainees with Disability* (Question on Notice , No SE16/160, 12 February 2016) <http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legconctte/estimates/sup1617/DIBP/index>.

for advocacy, and these are typically very difficult for them to engage, especially since these people are all visiting on their own time and their priority is supporting those they know.

4.3. RCOA often acts as a channel for their advocacy, through monthly teleconferences that help us identify emerging issues within facilities and across the country. Yet, even in our privileged position as paid advocates who have regular relationships with detention monitors, much of our advocacy relies on us reaching out or on detention monitors reaching out to us. While we meet with the Department twice a year in a formal Dialogue, detention is only one of the issues that is canvassed and RCOA itself is only one of the stakeholders in the Dialogue. Any engagement we therefore do with the Department, the Australian Border Force or with detention monitors is typically episodic rather than systemic, and 'extra' rather than 'core' business.

4.4. RCOA therefore strongly supports the establishment of a formal advisory or consultative body that would include civil society representatives, including those involved in immigration detention. As suggested above, another mechanism for better engagement would be an open session for civil society representatives at the informal quarterly meeting of immigration detention monitors.

4.5. We note, of course, the existence of the Ministerial Council on Asylum Seekers and Detention, but this is a body that gives advice directly to the Minister and is personally appointed by the Minister. Such a body cannot in our view be considered a true substitute for an open and representative advisory body for the NPMs.

4.6. Another mechanism for institutionalising a relationship between civil society and the NPM would be to require the NPM to produce a plan for engaging civil society and report against standards or benchmarks in relation to such engagement. These standards should not simply be quantitative, but should include qualitative benchmarks to ensure substantive engagement. For example, the standards could include evaluative feedback from civil society members.

4.7. As well, it would be useful for the NPM to consider how best to improve access to detention monitors on a more regular basis and to develop ongoing relationships. For example, as part of the preventative monitoring role, a hotline could be established for detention visitors to report issues more readily to detention monitors. When arranging detention visits, the NPM could ensure that plans included contact with appropriate civil society members beforehand to identify issues that may be of interest to the monitor. This could be facilitated by the advisory or consultative body.

4.8. As well as providing information, civil society could be engaged in the process of reviewing progress made by monitoring. For example, a mixed group could be used to regularly review the progress of any recommendations made by monitors. This would enable monitoring bodies to be updated more regularly on whether recommendations have been implemented on the ground. For example, RCOA has had instances where we have been assured by government authorities that certain practices have been stopped, but when we contacted detention visitors we were informed that they were still ongoing. Institutionalising this feedback loop would help minimise the (large) gap between policy and procedure, and what happens on the ground.

Recommendation 11

To build relationships between the NPM and civil society, the NPM should establish a formal advisory or consultative body and institutionalise channels of engagement, develop a plan to engage civil society, and consider establishing a mixed working group to review the implementation of recommendations.

5. Working with key government stakeholders

5.1. Currently, the Ombudsman can, but is not required to, submit reports to Parliament. Further, the Minister has some degree of control as to when it is laid before Parliament, as the requirement is to lay it before Parliament within 15 sitting days. The Act does not require any further consideration of the report before Parliament.

5.2. In our view, greater parliamentary scrutiny would be of significant benefit and we therefore endorse the suggestion made by the OPCAT Joint Network that a mechanism should be established to refer NPM reports to the Parliamentary Committee on Human Rights. This would ensure that the detention practices of the government are scrutinised by Parliament according to our human rights standards.

5.3. Further, the NPM should ensure strong engagement with statutory authorities already responsible for identified vulnerable groups, such as the various Children's Commissioners and relevant mental health authorities. Advisory or working groups involving key civil society representatives for such groups, including for LGBTI issues, should be established to ensure that information and best practice for the treatment of such vulnerable groups is widely shared.

Recommendation 12

NPM reports should be subject to review by the Joint Parliamentary Committee on Human Rights, and the NPM should establish advisory groups for key vulnerable groups including other responsible statutory authorities with relevant expertise.

6. How Australia can benefit from the SPT

6.1. In RCOA's view, the main benefit of the Subcommittee on the Prevention against Torture would be through using it to advise and assist on the development of the NPM and on best practice in the implementation of OPCAT.

7. Conclusion

7.1. RCOA welcomes the AHRC's engagement and consultation process in the establishment of the NPM. Although the fundamental issues in immigration detention cannot be cured by better detention monitoring, we are keen to support any measures that may make the lives of those in detention more humane. We look forward to participating in the next stage of the consultation.