

Australian Lawyers Alliance

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Joint Standing Committee on Treaties

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Parliament House

Canberra ACT 2600

2 April 2012

Dear Committee Secretary,

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment

The Australian Lawyers Alliance welcomes the opportunity to provide a submission to the Joint Standing Committee on Treaties on the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (OPCAT).

The Australian Lawyers Alliance (ALA) was previously a signatory in an open letter to the Attorney General in December 2011, calling for ratification of OPCAT.

A. Overview

The ALA submit that ratification of OPCAT is overdue and should be effected so as to give effect to the fulfilment of rights in the Convention.

Australia was a signatory to the Convention in 1985, and ratified it in 1989. Australia was a signatory to the Optional Protocol in 2009, and out of the 71 signatories, is one of only 21 countries, that have not ratified OPCAT.¹ This contrasts with the Democratic Republic of Congo, Tunisia, Turkey, Panama and Ecuador, who have ratified OPCAT in the last 2 years. Ratifying OPCAT would be an important step for Australia to demonstrate its commitment to human rights, especially in regards to those who are imprisoned and in detention.

Relevance in Australia

¹ United Nations Treaty Collection, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Punishment* (2012) Last updated 11/3/12
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en

OPCAT allows for visits and screening of places in which persons are deprived of liberty, which ‘means any form of detention or imprisonment.’² In Australia, this is most likely to apply to situations such as immigration detention and prisons. The ALA is already aware of a range of human rights abuses occurring within immigration detention centres and Australian prisons.

Definition of ‘cruel, inhuman and degrading punishment’ and its relation to Australian practices

A recent Canadian case found that **mandatory sentencing** could constitute as ‘cruel, inhuman or degrading punishment’ for an offence.

Currently, mandatory sentencing does occur in Australia, in relation to people smuggling offences under the *Migration Act 1958* (Cth), and variations of mandatory sentencing are also operating in state jurisdictions, and currently being considered by the State legislature³.

Strip searching may also be constituted as cruel, inhuman or degrading punishment.⁴ In the case of *Frerot v France* [2007] ECHR Application No 70204/01 (12 June 2007). The European Court of Human Rights held that particular strip searches conducted on the applicant violated the prohibition on degrading treatment in article 3 of the European Convention on Human Rights (‘ECHR’).⁵

Strip searches occur in Australia within prisons and immigration detention facilities, of detainees, asylum seekers and unlawful fishermen. Strip search powers and processes could potentially be in breach of international human rights and require review.

B. The current situation

The treatment of asylum seekers, persons awaiting to be charged with people smuggling offences, and the detaining of unlawful fishermen within immigration detention is likely to attract international scrutiny under OPCAT.

Severe mental trauma of asylum seekers in detention

The severe impact on mental health of asylum seekers has been well documented. Lip sewing, suicides, riots, depression and post traumatic stress disorder are all occurring within immigration detention centres.⁶

² Article 4, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Punishment*.

³ For example, see the *Law Reform Amendment Bill 2011* (Qld) , which proposes mandatory minimum non-parole periods for some offences.

⁴ <http://www.hrlrc.org.au/files/RN8AE1HIY5/Frerot%20v%20France.pdf>

⁵ Ibid.

⁶ See Australian Lawyers Alliance, ‘Australia’s Immigration Detention Network’ (2011). Accessible at <http://www.lawyersalliance.com.au/public.php?id=109>

Held without charge

Persons waiting to be charged with people smuggling offences are currently detained for an average of 161 days without charge.⁷ This is ten times the period of time for a person later charged with a terrorism offence. This amounts to arbitrary detention.

Unlawful fishermen

Fishermen who were fishing unlawfully in or near Australian waters without a visa are also detained in immigration detention. In some cases, this has been unlawful detention.⁸ Persons who are unlawful fishermen can be subject to strip searches without court order, and have their boats – their livelihoods – burned. Fishermen have received no compensation for this adverse reaction, and after being returned to their home villages, usually in Indonesia, are left with crippling debts. Some turn to people smuggling as a result to support their families.⁹

Deaths in custody

There are a large number of issues necessitating greater transparency, accountability and focus on the treatment of individuals within prisons in Australia.

In Alice Springs, the suspicious circumstances surrounding the recent death of Terrence Briscoe has highlighted the need for independent investigations of deaths in custody.¹⁰ This has been dramatically seen previously in the case of the death of Patrick Doomadgee in Palm Island.

The rights of the child

Currently, there are children housed within Australian adult prisons, charged or convicted of people smuggling offences. Under the *Migration Act 1958* (Cth), minors are not to be charged with people smuggling offences. However, this has occurred, due to faulty age determination procedures such as the wrist X-ray test, which can be inaccurate by more than 2 years.¹¹

This is in violation of the *Convention of the Rights of the Child* and should attract international scrutiny. Imprisoning children with convicted sex offenders could be characterised as cruel, inhuman or degrading punishment.

⁷ ABC, Lateline, 'Alleged people smugglers held without charge' 20/02/2012
<http://www.abc.net.au/lateline/content/2012/s3435403.htm>

⁸ See for example, the outcome in *Muslimin v The Queen*

⁹ For further information, see our submission to the Senate Legal and Constitutional Affairs Committee on the *Deterring People Smuggling Bill 2011* (Cth), 'Understanding the complexities: People smuggling, deterrence and intersection with Australia's maritime regulation' (2011). Accessible at <http://www.lawyersalliance.com.au/public.php?id=115>

¹⁰ Xavier La Canna, Nine News, 'Briscoe died of alcohol poisoning:autopsy' March 27 2012
<http://news.ninensn.com.au/national/8442131/briscoe-died-of-alcohol-poisoning-autopsy>

¹¹ For more information, see our submission to the Senate Legal and Constitutional Affairs Committee on the *Crimes Amendment (Procedural Fairness for Minors) Bill 2011* (Cth). Accessible at <http://www.lawyersalliance.com.au/public.php?id=123>

Suppression of sexual abuse within Australian prisons

The ALA is also aware of cases in which persons have been sexually abused within Australian prisons, and then, once authorities have been notified, persons have been transported to other prisons in more remote areas, and denied psychological assistance.

Slave labour in Australian prisons

The ALA is also aware that the meagre wages that are earned in Australian prisons is being garnished in some prisons in the cases of those persons convicted of people smuggling offences. These persons, some of whom are the main breadwinners for their families, are literally imprisoned while their families are dying as a result of there being no family income.

C. Importance of national preventative mechanisms

OPCAT proposes within Article 17 for State parties to develop 'one or several independent national preventive mechanisms for the prevention of torture at the domestic level.' These mechanisms would have the power to:

'regularly examine the treatment of the persons deprived of their liberty in places of detention... with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment; and

'make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty...'¹²

It is clear that current mechanisms are not addressing these issues adequately.

Increased transparency is required to ensure that the human rights of persons within Australia, regardless of whether or not they are Australian citizens, are protected.

Increase its relevance to Australian laws

Another benefit in ratifying OPCAT is increasing the relevance of the Convention in Australian laws. For example, the *Extradition and Mutual Assistance in Criminal Matters Bill 2011* (Cth), which was very recently passed into law by the Senate, makes provisions in relation to 'torture', but the suggested amendments of inserting 'cruel, inhuman or degrading punishment' into the legislation as an amendment were rejected.

As a comparator, 'cruel, inhuman or degrading punishment' features in the *European Convention on Human Rights*, with 'similar provisions in the South African Constitution; the Constitution of Brazil; the New Zealand Bill of Rights Act; the Canadian Charter... and US Bill of Rights.'¹³

¹² Article 19(a), *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

¹³ At 3. Accessed 13 March 2012 at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1098&context=nyu_plltwp&sei-redir=1&referer=http%3A%2F%2Fwww.google.com.au%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dcru

OPCAT is not enough – the need for political will

The United Nations Special Rapporteur on torture, Juan E. Méndez, said that commissions of inquiry into torture and other forms of ill-treatment are effective tools in the fight against impunity. However, he stressed, 'a commission of inquiry by itself is never sufficient to fully satisfy a State's obligations under international law.'¹⁴

Essentially, the ratification of OPCAT provides a first step for the Australian government in its commitment to ensuring that torture and cruel, inhuman and degrading punishment, does not occur in Australia or any place under Australia's jurisdiction or control.

However, ratifying OPCAT will not in and of itself solve the current human rights violations occurring in immigration detention and within Australian prisons.

Ultimately, the Australian government must commit to upholding human rights standards, and providing persons violated with methods of redress and compensation.

The establishment of a *Charter of Human Rights and Responsibilities* for Australia would also assist in the increased fulfilment and protection of the rights of persons in Australia.

We are happy to provide further comment on the issues we have raised within this Submission.

Yours sincerely,

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National President

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Emily Price

Legal and Policy Officer

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11903&LangID=E>

¹⁴ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11903&LangID=E>