



## The limitations of monitoring immigration detention in Australia

Caroline Fleay\*

*Australia's mandatory detention policy allows for non-citizens without a valid visa to be held in sites of immigration detention on an indefinite basis. This means that asylum seekers who arrive without a valid visa can be detained from their time of arrival to Australia until their protection claim is finalised, unless ministerial discretion is exercised to enable their release into the community. Thousands of asylum seekers who arrived by boat have consequently endured long periods of indefinite detention in prison-like conditions in facilities established by the Australian government, both within Australia and in offshore locations. Many of these sites are in remote locations and there is limited monitoring provided by formal state and non-state bodies across this detention network that is systematic, transparent and independent. There are also few civil society groups and individuals with the capacity to assume a monitoring role. This article explores the inhibiting factors of monitoring immigration detention in Australia and offshore locations, and the prospects for securing systematic and transparent independent scrutiny should Australia ratify the Optional Protocol to the Convention against Torture (OPCAT). It also highlights the limits of an OPCAT-consistent monitoring system in the promotion and protection of the rights of asylum seekers.*

**Keywords:** immigration detention, monitoring, Australia, asylum seekers, OPCAT

### Introduction

Immigration detention centres established by the Australian government are places that remain largely hidden from the majority of the population. The centres detain non-citizens without a valid visa, the majority being asylum seekers<sup>1</sup> who arrived to Australia by boat and who can remain detained until their protection claims are

\* Senior Lecturer, Humanities Research and Graduate Studies, Centre for Human Rights Education, Curtin University. Email: c.fleay@curtin.edu.au.

1 For example, as at 31 January 2015, 71 per cent of people detained in immigration detention centres in Australia were asylum seekers who had arrived by boat (DIBP 2015, 6).

finalised. There is limited independent monitoring of these facilities by formal state and non-state bodies. There are also few civil society groups and individuals with the capacity to visit and provide a monitoring role. Breaches of human rights are inherent within a system that allows for the indefinite detention of people. In addition, as places where their freedom of movement is denied and their lived experiences are utterly reliant on those employed within the detention system, there is 'the ever present potential for [further] abuse' (Taylor 2010, 1). A regularised and transparent system of independent scrutiny is imperative in such environments in order to ensure that reports on operations across the detention network, including the impacts on those it detains, are in the public domain. Securing such a system would also be an important acknowledgement by the state that its sites of detention should be under such scrutiny.

While the few bodies that do visit immigration detention centres play an important role in shining a much-needed spotlight on this system and produce significant reports, little of this monitoring has been systematic and regularised across the detention network, nor are all of their reports placed in the public domain. In this regard, the monitoring of these bodies falls far short of the requirements of OPCAT that came into force in 2006. While Australia signed OPCAT in 2009, it is yet to ratify it and thus be subject to its requirements on the monitoring of places of detention.

This article explores the shortcomings of the monitoring of Australia's immigration detention network and the prospects for its expansion. As this network was designed in an effort to deter the arrival of asylum seekers by boat, it is the detention of asylum seekers that will be the focus of this discussion. After first providing an overview of the detention of asylum seekers in Australia, the article explores the factors that inhibit monitoring and the criteria of a monitoring system that would be required by Australia's ratification of OPCAT. It also highlights the limits of an OPCAT-consistent monitoring system in the promotion and protection of the rights of asylum seekers.

## **The detention of asylum seekers in Australia**

Asylum seekers<sup>2</sup> arriving to Australia without a valid visa are subject to the mandatory detention policy. This means that they can be detained in secure immigration facilities until their protection claims are finalised by the Department of

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2 According to the Convention Relating to the Status of Refugees, an asylum seeker is someone who arrives in another country and makes a protection claim on the basis that they have a well-founded fear of persecution should they return to their own country. Once their protection claim has been accepted, they are considered to be a refugee.

Immigration,<sup>3</sup> unless the Minister for Immigration exercises his or her discretion to allow for their earlier release under s 46A of the *Migration Act 1958* (Cth). In effect, this is indefinite detention and, for many asylum seekers in Australia over the past 15 years, this has meant years in prison-like conditions where there has been little systematic and transparent independent scrutiny. Mandatory detention was first adopted by the Labor government in 1991 and enshrined in legislation the following year as the *Migration Amendment Act 1992* (Cth) and the *Migration Reform Act 1992* (Cth). Mandatory detention was a response to the increased number of boat arrivals of asylum seekers to Australia, from none between 1982 and 1988 to approximately 200 each year from 1990 to 1992 (Phillips and Spinks 2013, 22). The legislation sought to act as a deterrent for future asylum seekers and effectively discriminates between asylum seekers arriving by boat and those arriving by plane (Viviani 1996, 20–21).

The Coalition government maintained the mandatory detention policy following its election in 1996 and expanded the immigration detention network to include sites in remote locations within Australia and on Nauru and Papua New Guinea's (PNG's) Manus Island.<sup>4</sup> Thousands of asylum seekers remained in these sites of detention for many months and, for some, up to seven years (Briskman, Latham and Goddard 2008, 112). However, by 2005 there were growing concerns about the impacts of mandatory detention on asylum seekers within some sections of the Australian community. There were also concerns expressed by a growing number of Coalition government backbenchers who finally persuaded Prime Minister John Howard to release women and children and most long-term detainees from detention. The monitoring efforts of the immigration detention system provided by a few state and non-state bodies are likely to have contributed to this, in addition to the monitoring and campaigning efforts of a range of civil society groups (Fleay 2010, 121–26). All highlighted the mental health problems associated with prolonged detention (see the next section of this article).

By the time of the 2007 election, and after five years of very few boat arrivals compared with the 1999–2002 period,<sup>5</sup> the Australian Labor Party (ALP) introduced a platform that included a softening of the mandatory detention policy (ALP 2007). After its election, the Labor government closed the immigration detention centres on

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- 3 The department responsible for immigration matters in Australia will be referred to here as the Department of Immigration.
  - 4 The Coalition government negotiated agreements with Nauru and PNG in 2001 to establish sites of immigration detention on their territory in return for increased Australian aid assistance (Briskman, Latham and Goddard 2008, 104–05; Metcalfe 2010, 41–42).
  - 5 In 2001, 5516 asylum seekers arrived to Australia by boat. Over the following five years, 140 arrived (Phillips and Spinks 2013, 22).

Nauru and Manus Island and announced that 'detention in Immigration Detention Centres [would only] be used as a last resort and for the shortest practicable time' and children would not be placed in a detention centre (Evans 2008, 7–8).

But, as increasing numbers of boats of asylum seekers began to reach Australian shores,<sup>6</sup> the Labor government expanded the immigration detention network across Australia once again in an effort to deter the arrival of asylum seekers (Bowen 2011). By the end of 2011, thousands of men, women and children had been detained in various forms of immigration detention for many months — for some, more than two years (Fleay and Briskman 2013).

As time spent in immigration detention grew, numbers of protests within the detention centres increased, as did calls for their release by civil society groups and individuals and formal state and non-state monitoring bodies. The Labor government appeared to respond to this and in October 2010 announced that the majority of families and children would be released from detention centres by June 2011. Although a bare majority was released by this date, it took months for other women and children to be released. In November 2011, the government announced that men not considered a risk to the community would also be allowed to leave detention before their protection claims were finalised. After a slow start, hundreds of men were subsequently released (Hartley and Fleay 2012).

However, as numbers of asylum seekers arriving by boat continued to increase in 2012, as well as reports of deaths at sea when boats capsized en route, the Labor government adopted further policies to try to deter boat arrivals. This included re-opening the offshore processing centres on Nauru and Manus Island after the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) was passed in federal Parliament in August. Over 600 asylum seekers who arrived to Australia by boat from 13 August 2012 were detained there over the following months.

By early 2013, there were regular reports of mental and physical health problems, including incidents of self-harm and suicide attempts, in both sites of detention (AAP 2013; Barlow 2013). While some asylum seekers detained on Manus Island and Nauru were subsequently transferred back to Australian detention centres, others who had more recently arrived to Australia by boat were sent to both islands. This followed the Labor government's announcement in July that all future asylum seekers arriving by boat would be sent to Manus Island and never resettled in Australia, and in August that a small number would be resettled in Nauru (Burke 2013a; 2013b). The Coalition

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6 In 2009, 2726 asylum seekers arrived by boat to Australia, compared with 360 who arrived in the previous three years (Phillips and Spinks 2013, 22).

government maintained this stance following its election in September 2013 and also announced plans to expand the capacities of the sites of detention on Nauru and Manus Island (Maley and Wilson 2013). As at the end of January 2015, there were 1825 asylum seekers detained on the islands, including children in the Nauru offshore processing centre (DIBP 2015, 3).

Other asylum seekers who arrived to Australia by boat since 13 August 2012 have been detained in Australian immigration detention centres. By the end of January 2015, some 26,168 of these asylum seekers had been released into the community on bridging visas (DIBP 2015, 3), but with no right to work<sup>7</sup> and only minimal financial support from the state, and none had yet had their protection claims finalised (Mares 2014). Those who continue to be detained at this time include 1382 people who have been held in immigration detention centres within Australia for more than one year and 228 for more than two years (DIBP 2015, 10). These include asylum seekers recognised as refugees but who are of interest to, or have been charged by, the Australian Federal Police (AFP) during the Labor government's term in office. They face ongoing detention until AFP investigations are completed and any charges heard in a court (Senate Legal and Constitutional Affairs Legislation Committee 2013, 147). Others are refugees who have been issued an adverse security assessment by Australia's security organisation (Gordon 2013). They also face ongoing indefinite detention.

In summary, Australian legislation continues to allow for the indefinite detention of non-citizens without a valid visa, including asylum seekers who arrive to Australia by boat. While thousands of asylum seekers have been released from detention before their protection claims are finalised, given that the Minister for Immigration retains the discretion to do so, others continue to remain in detention for many months or years. Many continue to endure lengthy periods of detention in Australia and on Nauru and Manus Island, and legislation enshrining mandatory detention remains unchallenged. This is despite the findings of state and non-state monitoring bodies and civil society groups that call for an end to mandatory detention.

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7 However, in December 2014, the former Minister for Immigration, Scott Morrison, agreed to grant the right to work to asylum seekers in the community as one of the concessions made to cross-bench Members of Parliament to gain their support for the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) in federal Parliament (Yaxley, Norman and Gul 2015).

## The limitations of monitoring immigration detention in Australia

For the more than two decades since Australia adopted the mandatory detention policy, there have been limited monitoring mechanisms to provide oversight of the immigration detention system. Formal state and non-state monitoring bodies that visit immigration detention centres include the Commonwealth Ombudsman, the Australian Human Rights Commission (AHRC),<sup>8</sup> parliamentary committees and the Minister for Immigration's advisory groups. Visits to immigration detention centres are also conducted by the Australian Red Cross and Amnesty International Australia (AIA), a number of UN human rights agencies, and a range of civil society groups and individuals.

While these organisations and individuals have been able to undertake some monitoring and raise serious concerns about the impacts of long-term detention, this section of the article highlights the barriers they face that have meant that the monitoring has largely been ad hoc and, in some cases, lacking in transparency. Barriers include the lack of financial resources to engage in systematic monitoring by organisations independent of the government. Others include the reliance on the Australian government and its contracted managers to gain access to sites of detention, the added barrier of territorial sovereignty for bodies seeking access to sites of detention on Nauru and Manus Island, and confidentiality conditions that further inhibit some forms of monitoring.

### **Lack of financial resources**

Most organisations and individuals who have undertaken a monitoring role of Australian-funded immigration detention sites have been hampered by resource limitations. This is not just an issue of how their operations are funded but also reflects the number and location of Australian-funded immigration detention centres in remote parts of Australia, as well as on Nauru and Manus Island. Travel costs alone to these sites inhibit monitoring.

While both the Commonwealth Ombudsman and the AHRC have documented concerns about conditions within Australia's immigration detention centres and the impacts of long-term detention since the late 1990s, they have had limited resources to do so. The Commonwealth Ombudsman's roles include that of immigration oversight, giving it a mandate to inspect immigration detention centres, investigate complaints made on behalf of or by those detained, and make public reports. In addition, it is required under ss 486N and 486O of the *Migration Act* to assess the

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8 Formerly known as the Human Rights and Equal Opportunity Commission (HREOC).

'appropriateness of the arrangements for the detention of a person who has been in detention for two years or more' (Commonwealth Ombudsman 2005). Regular reports and recommendations of the Ombudsman critical of mandatory detention have been tabled in federal Parliament. For example, the findings of its investigation into incidences of self-harm and suicide in Australia's immigration detention centres in 2013 included that 'immigration detention in a closed environment for a period of longer than six months has a significant, negative impact on a detainee's mental health' (Commonwealth Ombudsman 2013). However, despite its mandate, the Ombudsman has not had the resources necessary to conduct regular inspection visits of immigration detention centres. Its work has been largely 'complaints driven' and it has not been able to undertake a systematic monitoring role (Harding 2012, 4). Nor are its recommendations binding on the Australian government.

The recommendations of the AHRC are not binding on the Australian government either. However, it has been able to adopt a more systematic approach to the monitoring of immigration detention centres at various times over the past 15 years, including the publication of the observations and recommendations of the Commission's many visits to detention centres. AHRC Human Rights Commissioners have consistently raised concerns about the impacts of detention following these visits and called for an end to mandatory detention (for example, see HREOC 1998; 2004; AHRC 2011). But the expansion of the immigration detention network over the past four years and the lack of adequate resources to continue to visit all sites of detention have meant a reduction in the AHRC's monitoring role (Branson 2012). In 2012, the AHRC announced that it would 'continue to conduct short visits to detention sites ... [but it would be] no longer able to undertake detailed monitoring and reporting of conditions of immigration detention' (2012, 35). Despite this, in 2014 the AHRC conducted an inquiry into the impacts of immigration detention on children. This provided a public forum that allowed organisations and individuals with expertise in this area to raise their concerns, and these were subsequently documented in a public report that provides a damning critique of the practice of detaining children (AHRC 2015).

Other human rights organisations have faced similar financial barriers to monitoring Australian-funded detention centres in a systematic fashion across the network. AIA has visited a range of immigration detention centres over the past five years in particular, both within Australia and on Nauru and Manus Island, and released public reports documenting the human rights concerns it found (for example, see AIA 2012a; 2012b; 2013). However, funding considerations have hampered its ability to regularly visit all sites of detention.

A range of civil society groups and individuals face similar financial limitations. There are many groups and individuals who visit immigration detention centres but, given the constraints of distance and travel costs, most are located in or near Australian capital cities. These groups and individuals provide an important source of emotional support to the individuals detained there and often advocate on their behalf. Many work to raise awareness of the abuses endemic in the detention system to the wider Australian community. Some seek to do both. Given the restricted access of the media to sites of immigration detention in Australia and offshore (see Media Alliance 2013), some sections of the Australian media draw on the findings of advocates and work with them to raise greater public awareness of the impacts of immigration detention (for example, see ABC *Four Corners* 2011; 2013).

Academic researchers are part of this broader social movement. Throughout the past 20 years of mandatory detention, a growing body of research has explored the impacts of the mandatory detention policy. Much of this research highlights that long-term and indefinite detention results in despair and mental health issues that often manifest in self-harming, and that the treatment of such anguish in detention is largely futile (for example, see Silove, Steel and Mollica 2001; Newman, Proctor and Dudley 2013). While some of this research includes visits to sites of immigration detention centres (for example, see Fleay and Briskman 2013), the costs of doing so once again effectively limit the capacity of this form of monitoring, as do restrictions placed on such research by government officials.

### ***Barriers to gaining access to sites of immigration detention***

There is a range of barriers to gaining access to sites of immigration detention both within Australia and offshore that have been faced by various monitoring bodies. Within Australia, all formal and informal visits to these sites require the prior approval of the Department of Immigration and the contracted operators of the particular facility. For parliamentary committees, the access sought relies on the composition of their members. A number of parliamentary committees have conducted inquiries into immigration detention. In 2001 the parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) visited the remote detention centres and made recommendations that included alternatives to detention for women and children, and that time limits be placed on the detention of asylum seekers (2001). Notably, the Committee's report included that 'most Committee members were shocked by what they saw during their visits' in relation to:

... the despair and depression of some of the detainees, their inability to understand why they were being kept in detention in isolated places, in harsh physical conditions with nothing to do. [JSCFADT 2001, 65–66.]



In 2008, the parliamentary Joint Standing Committee on Migration conducted an inquiry into immigration detention in Australia and recommended that detention be limited to 90 days, unless there was a 'demonstrated and specific risk to the community' posed by the release of an asylum seeker (2008). Similarly, in 2012, the parliamentary Joint Select Committee on Australia's Immigration Detention Network released its report into Australia's immigration detention system and recommended that 'all reasonable steps be taken' to limit the detention of asylum seekers to 90 days (2012). However, while these inquiries can play an important role in monitoring the immigration detention system, their terms of reference, frequency and recommendations are dependent upon the Members of Parliament that comprise the Committees.

Access for international bodies to monitor any immigration detention centres in Australia is reliant on the permission of the Australian government. Such permission was secured and some monitoring has been provided by UN human rights agencies at various times over the past 15 years. These include the UN High Commissioner for Refugees (UNHCR), which has criticised the long-term detention of asylum seekers in Australia and the offshore sites of detention on numerous occasions (2003). Other UN human rights agencies that have visited some of Australia's immigration detention centres include the UN Working Group on Arbitrary Detention (2002) and the UN High Commissioner for Human Rights (UNHCHR), which both produced critical reports. In relation to his 2002 visit to the Woomera immigration detention centre in a remote region of South Australia, Justice Bhagwati, the Regional Advisor for Asia and the Pacific of the UNHCHR, expressed that he 'was considerably distressed' by the despair he had witnessed and 'felt that he was in front of a great human tragedy' (Bhagwati 2002). The UN Human Rights Committee has also investigated the cases of a number of individuals detained in Australian immigration detention centres and found that they have been subject to illegal detention and inhuman or degrading detention (*Sydney Morning Herald* 2013).

Access to some of Australia's sites of detention was particularly problematic during the Coalition government's previous term in office, when some of the detention centres prohibited visitors. For example, the Curtin Immigration Detention Centre in remote north-western Australia only allowed officials from relevant government agencies and the private operator to visit detainees while it was in operation from 1999 to 2002.

While the Labor government allowed for non-official visits to Australia's immigration detention centres during its recent term in office, entry and the extent of access once inside were still dependent on permission from immigration authorities. For the regular visitor, this permission could vary each time (Fleay and Briskman 2013,

126). When a visitor wrote about the conditions in the Darwin centres for an online news site in August 2013, he was denied further access as a personal visitor by the Department of Immigration on the erroneous grounds that he was considered a journalist and thus should be subjected to their restricted access (Pynt 2013). Similar experiences are evident in the aftermath of the Coalition government's 2013 election. For example, in October 2013, Victoria's Commissioner for Children and Young People was denied permission by the Department to visit children held in that state's immigration detention centres (ABC News 2013).

### ***Territorial sovereignty in offshore sites of detention***

Added barriers to access are evident for the Australian-funded sites of detention on Nauru and Manus Island, given not only their remote location but also issues of territorial sovereignty. For example, it was extremely difficult to gain access to the offshore processing centre on Nauru for more than four years following its initial opening in 2001. Until 2005, those who tried to visit who were not employed by the Australian government or by companies contracted to provide services to the centre were denied the required visa from the Nauruan government. This was reportedly due to Australian government pressures to deny such visits, and access to the centre was not always assured even after some Australian visitors gained entry in 2005 (Metcalf 2010, 206).

Access to the re-established sites of detention on Nauru and Manus Island is once again dependent on the permission of the sovereign state on whose land the centre resides. This time some international organisations have been allowed to visit. The UNHCR gained permission to visit Manus Island on a number of occasions in 2013, as did AIA later in the year, and both released public reports documenting serious concerns regarding the living conditions and levels of despair evident in the centre (AIA 2013; UNHCR 2013). AIA visited again in March 2014 after the violence at the site the previous month had left one asylum seeker dead and others injured (2014a).

However, other organisations independent of the Australian and PNG governments did not gain access. For example, in February 2013, the PNG Migration Office denied permission to visit the families detained on Manus Island to ChilOut, an Australian community organisation that raises public awareness about the detention of children. The Migration Office explained to ChilOut that 'there was a "temporary ban" on all international organisations visiting the processing centre' (ChilOut pers comm, 22 October 2013).

Similarly, while a number of independent organisations have visited the detention site on Nauru, such as AIA (2012) and the UNHCR (2012), there are more recent

examples where permission has not been granted. AIA and the UN Working Group on Arbitrary Detention were both denied permission by the Nauru government to visit in April 2014 (AIA 2014b; Barlow 2014). In an earlier move to limit international scrutiny, the Nauru government increased the cost of a visa for journalists from A\$200 to A\$8000 in January 2014 (Jabour and Hurst 2014).

### ***Conditions of confidentiality***

Other monitoring bodies are subject to conditions in order to gain access to sites of immigration detention that largely prevent their release of public reports. This includes the Australian Red Cross, which regularly visits immigration detention centres and rarely makes public comments on these visits, consistent with its principle of neutrality. The members of the Minister for Immigration's advisory group on detention, the Minister's Council on Asylum Seekers and Detention (MCASD) formed by the Labor government in 2009, are also subject to confidentiality conditions. They are required to sign confidentiality agreements with the Australian government. This group provides advice to the Minister and the Department of Immigration on how conditions and policies of detention should be improved. Until the newly elected Coalition government disbanded it in 2013, members of the Immigration Health Advisory Group gave advice to the Department on matters related to health issues in detention centres and were similarly subject to confidentiality agreements.

MCASD is comprised of members appointed by the Minister and has the capacity to regularly visit detention centres. It has arguably the most direct access to the Minister and the Department of all the monitoring bodies in Australia, and the most extensive access to the immigration detention centres in Australia. A subgroup of MCASD also conducts visits to the offshore processing centre on Nauru. But while MCASD has had relatively extensive access, the confidentiality agreements that bind its members mean that their concerns are raised with the Department and the Minister in private and they are limited in their capacity to make their concerns public.

Issues of confidentiality are also evident in relation to the privatisation of a range of operations within the immigration detention network and this has served to deepen the system's lack of transparency. Detention centre management functions have been outsourced since 1997 to private corporations in all Australian-funded sites of detention. This includes contracts to Serco Australia worth A\$1.8 billion by 2013 (Hall 2013). Other functions within the detention network that are contracted and subcontracted to a range of operators include health, catering, cleaning and security services. Contractors have included non-government organisations such as the Salvation Army (until February 2014) and Save the Children Fund, which have provided humanitarian support services on Nauru and Manus Island.

Commercial-in-confidence clauses that apply to contracts between the government and contracted organisations mean that it is exceedingly difficult to access information in relation to costs and other operational matters (Loewenstein 2013, 14–24). In addition, research in the United States suggests that government agencies ‘that contract out services often are not geared up to the task of effectively supervising and monitoring the contractors’ (Shichor 1999, 242). In Australia, recent reports indicate that the Department of Immigration continues to fail to provide ‘adequate monitoring’ of the privatised immigration detention system (Loewenstein 2013, 21).

Accountability issues around who is responsible for what happens within immigration detention centres become more opaque under a system of privatisation. For example, HREOC’s (2004) report into the investigation into the treatment of children in immigration detention highlights that both the Department of Immigration and the private company contracted to operate many of Australia’s immigration detention centres attempted to avoid responsibility when reports of human rights abuses emerged. This confusion around responsibility is exacerbated when there are multiple organisations that form a complex web of contracting and subcontracting of functions within the immigration detention network, as there are in Australia and offshore.

The confidentiality agreements signed by Department of Immigration officials and employees of contracted organisations further inhibit the capacity for public reports on the impacts of detention. However, despite these agreements, one notable development within the re-established offshore sites of detention is the number of government and contracted employees who have spoken to media sources about their concerns for the safety and welfare of detained asylum seekers. For example, nine identified and 22 unidentified past and present Salvation Army employees released a public statement in July 2013 describing the recent riot in the Nauru site of detention as ‘an inevitable outcome from a cruel and degrading policy’ (Isaacs 2014, xviii). Past and present employees of contractors on Manus Island have also made public comments condemning the inhumane conditions inside this site of detention (for example, see ABC *Four Corners* 2014). In addition, serious health concerns about children detained on Nauru documented by medical professionals in a confidential report to the Department of Immigration were leaked to media sources (Laughland 2014). Those who now plan to make such public statements, however, face a new concern, given legislation adopted by the Australian Parliament in May 2015. The passage of the *Australian Border Force Act 2015* (Cth) imposes the severe penalty of two years imprisonment for ‘the unauthorised disclosures of information’ by those employed with Australia’s immigration detention network.

The multiple barriers outlined above all serve to significantly curtail the monitoring activities of both formal and informal organisations and concerned individuals. Monitoring of Australian-funded sites of immigration detention that is publicly reported, and thus helping to increase the transparency of the system, continues to be ad hoc and limited in its scope. In relation to the offshore sites, there has been a particular reliance on a few international human rights agencies with the resources to visit, although access can never be assured, as well as employees of contracted organisations who have been clearly so concerned about what they are witnessing that they were willing to defy the confidentiality agreements they have signed.

Establishing a system of monitoring throughout Australia's immigration detention network and the sites on Nauru and Manus Island that is regularised, transparent and independent of the Australian government would assist with increasing the visibility of the impacts of immigration detention on the people it holds. The requirements that follow ratification of OPCAT aim to achieve such a system. However, even with such monitoring, significant limitations remain to bring about policy change.

### **Prospects for monitoring under OPCAT**

Ratification of OPCAT would require Australia to implement a monitoring process of all places of detention consistent with the standards outlined in the Protocol. OPCAT is designed to provide the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment with a preventive mechanism and:

... establishes a dual and complementary system of regular inspections or visits to places of detention by a single international body and one or more national organs. The aim of these mechanisms is to prevent torture and other cruel, inhuman or degrading treatment or punishment. [Edwards 2008, 794.]

The test for whether the OPCAT mechanisms apply in particular places of detention is whether a site is one where 'people are deprived of their liberty' (OPCAT, Art 1). As Australia's immigration detention facilities do not allow for asylum seekers to leave at will, they would be subject to such monitoring.

Given that the international body established under OPCAT, the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is likely to continue visiting only a sample of a signatory state's places of detention at best every five or six years due to its financial restrictions (Harding 2012, 8), the operation of national bodies that are consistent with OPCAT's monitoring requirements becomes essential. These National Preventive Mechanisms (NPMs) are required to be adequately resourced independent bodies and comprised

of individuals with appropriate expertise, ethnic and minority group representation, and gender balance (OPCAT, Art 18). Their responsibilities include investigating the conditions and treatment of people in detention, reviewing relevant existing or draft legislation and making recommendations (Art 19). OPCAT-consistent monitoring includes 'identifying individual repression or wrongdoing', as well as investigating that the 'place of detention is being managed in a way that is decent and equitable' (Harding and Morgan 2008, 19). In order to do so, NPMs need the capacity to access any place of detention both announced and unannounced, conduct private interviews with people in detention, and be provided with any relevant information (Art 20). Resulting concerns and recommendations from visits are to be communicated to the responsible government with a view to engaging in dialogue with them (Art 22), although there is also a requirement on the government to make public the NPMs' annual reports (Art 23).

Even though there are some formal bodies that visit immigration detention centres in Australia, as outlined above they are not adequately resourced, nor do they have the capacity to provide monitoring in a systematic fashion consistent with OPCAT (Harding 2012). Ratification of OPCAT would clearly require Australia to either enhance the resources and mandate of one or some of the existing bodies with a monitoring role, such as the AHRC, or establish new institutions (Harding and Morgan 2008).

Other countries that have ratified OPCAT illustrate some of the benefits of the system. Reports from New Zealand, which ratified OPCAT in 2007, include that the monitoring process has engendered a:

... high level of cooperation by the detaining agencies and willingness to engage with the Preventive Mechanisms ... [and] an increase in referrals from staff, who recognise the benefits and potential of the OPCAT mechanism to improve conditions, eliminate risk and prevent harm. There has also been greater engagement with civil society and community organisations. [Human Rights Commission (New Zealand) 2010, 2.]

In the United Kingdom, Her Majesty's Inspectorate of Prisons (HMIP), the chief NPM, notes that while it has no statutory power to compel change, more than half of its recommendations to immigration authorities and detention operators are at least partially achieved. For example, according to HMIP reports published in 2011–12, 37 per cent of recommendations were achieved in follow-up inspections and 21 per cent were partially achieved (HMIP 2012, 108).

Aside from these potential benefits should Australia ratify OPCAT, there could also be a considerable cost benefit in adopting an OPCAT-compliant monitoring process. In

September 2013, it was reported that the Australian government had paid A\$21 million in compensation for wrongfully detaining 299 people since 2000–01, and a further A\$6.9 million in damages to ‘settle 102 claims for breaches of the government’s duty of care to people in detention centres’ (Uren 2013). Adopting an OPCAT-compliant monitoring system would arguably decrease the incidences of asylum seekers being wrongfully detained and subject to breaches of the government’s duty of care, and could help to prevent or reduce further compensation to be paid to asylum seekers.

What is more questionable is whether Australia ratifying OPCAT would mean that the offshore processing centres established in other countries at the behest of Australia would be subject to the OPCAT provisions. Edwards argues that when:

... a deal has been struck between two States in relation to the inter-country transfer of asylum-seekers and/or refugees, the general position at international law provides that such agreements cannot lead to the release of responsibility for the sending State if it is aware of or can prevent mistreatment in the receiving State (such as within a detention facility), even if it plays no subsequent role in the day-to-day or oversight operations there. [Edwards 2008, 818.]

Even if such a position is accepted, a more imperative issue is whether the detention facilities established in other countries by Australian policy could be accessed according to the OPCAT provisions when the states hosting the detention facilities are not parties to the Protocol. In stark contrast to Australia, Nauru acceded to OPCAT in January 2013 and thus has an obligation to ensure that its offshore processing centre is monitored according to the Protocol’s requirements. However, the denial of permission for AIA and the UN Working Group on Arbitrary Detention to visit Nauru in April 2014 suggests that the Nauru government is reluctant to establish independent and transparent monitoring.

PNG is yet to either accede to or ratify the Protocol. Thus, even if Australia ratifies and institutes a system of monitoring consistent with OPCAT, any access of an Australian NPM to a detention facility on Manus Island would depend on a bilateral agreement between PNG and Australia. While a failure to secure such access would arguably mean that Australia would be in breach of its obligations (Edwards 2008, 820), the weak enforcement measures of international law suggest that the consequences for Australia would be minimal unless significant domestic and international pressures could be brought to bear around this issue. The jurisdictional and access issues in relation to PNG, and arguably Nauru if its accession to OPCAT is not followed by the establishment of an appropriate monitoring system, are further hurdles to be overcome to ensure that all sites of detention established by Australia are subject to systematic and transparent independent monitoring.



Given current political imperatives to enact policies that transport asylum seekers arriving to Australia by boat to offshore sites of detention, it is unlikely that the Coalition government will engage in any such jurisdictional debate. The government is focused on deterrence measures and the ratification of OPCAT by Australia seems a very distant prospect.

But there are also significant limits to the extent to which an OPCAT-compliant monitoring process in Australia can protect the rights of asylum seekers. As Catherine Branson, former AHRC President, outlined:

... monitoring is not enough to ensure that vulnerable people are protected from breaches of their human rights ... some people currently in immigration detention face potentially serious breaches of their human rights which will not be ameliorated by monitoring of the conditions of their detention. The human rights breaches lie ... in the fact of their prolonged and indefinite detention. [Branson 2012.]

OPCAT-compliant monitoring of immigration detention centres cannot address the breaches of human rights that are inherent in the mandatory detention system itself as it allows for the indefinite detention of non-citizens without a valid visa. These breaches are regardless of the conditions within any site of detention. Indefinite detention is contrary to Art 9 of the International Covenant on Civil and Political Rights prohibiting arbitrary detention that can be considered unjust (Brané and Lundholm 2008, 156). For asylum seekers, mandatory detention also arguably contravenes Art 31(2) of the Refugee Convention, which highlights that only those restrictions deemed 'necessary' should be placed on refugees' freedom of movement. Conclusion No 44 of the Executive Committee of the UNHCR similarly expresses that detention 'should normally be avoided'.<sup>9</sup> In this regard, an OPCAT-compliant monitoring system can only address the consequences of the fundamental problem that non-citizens, including asylum seekers, are being detained for indefinite and lengthy periods because the mandatory detention policy that is enshrined in federal legislation allows for it. However, it is the capacity of such a monitoring system to raise further awareness within the public domain, and provide another formal channel for concerns to be raised directly with the Australian government, that is its strength. This may, in turn, help to increase both public and private pressures on the Australian government to further restrict or bring an end to mandatory detention.

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9 See Brané and Lundholm (2008) for an expanded discussion on where immigration detention may contravene human rights instruments.



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## Conclusion

As outlined above, there has been little systematic and transparent independent monitoring of Australia's immigration detention system. That many reports of the state and non-state monitoring bodies and individuals who have visited detention centres raise grave concerns about the impacts of long-term and indefinite detention highlights the need for such a system to at least allow for greater transparency within the detention network. While recognising the limitations of an OPCAT-compliant monitoring system to address the human rights abuses that are inherent within the mandatory detention policy, such a system would at least provide a regularised level of transparent independent scrutiny. This may serve to mitigate the incidences of some abuses and elevate the experiences of those detained in the public domain.

In the aftermath of the September 2013 election, and a campaign leading up to it that was characterised by both major political parties trying to 'out-toughen' each other on policies that they claimed would 'stop the boats', the prospects for Australia to ratify OPCAT continue to be remote. With the Coalition government in office, it appears that Australia's 'ambivalent human rights culture [and] oversensitivity to external comment' (Harding and Morgan 2009, 117) is expanding. This will mean even less federal interest in becoming bound to external requirements to institute a process of monitoring immigration detention centres that is systematic, transparent, independent and well-resourced.

In the absence of such a monitoring system, prospects for shifting policy away from mandatory detention may be advanced through a greater understanding of the impacts of various forms of current monitoring on government policy, both within Australia and elsewhere. While some research explores this (for example, Brané and Lundholm 2008), further research is needed on monitoring activities and their impacts on detention policies and practices, including in Australia, in order to inform future advocacy. ●

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