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National Aboriginal and Torres Strait Islander Legal Services
TRUE JUSTICE FOR OUR PEOPLE

CHANGE THE RECORD
Smarter Justice. Safer Communities.

Ending Human Rights Abuses Behind Bars

Submission on Australia's state party report to the Committee Against Torture pursuant to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (75th Session)

3 October 2022
Change The Record, Human Rights Law Centre and the NATSILS

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Change The Record

Change the Record is Australia's only national First Nations led justice coalition of Aboriginal peak bodies, Aboriginal Legal Services, Family Violence Prevention and Legal Services, health, human rights, legal experts and non-Indigenous allies. The Human Rights Law Centre and the National Aboriginal and Torres Strait Islander Legal Services are foundational members of Change the Record's Steering Committee. We all work to end the incarceration of, and family violence against, Aboriginal and Torres Strait Islander people.

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The NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) is the peak national body for Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) in Australia. NATSILS brings together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. NATSILS are the experts on the delivery of effective and culturally responsive legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives us a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander peoples. NATSILS represent the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (**ATSILS Qld**);
- Aboriginal Legal Rights Movement in South Australia (**ALRM**);
- Aboriginal Legal Service (NSW/ACT) (**ALS NSW/ACT**);
- Aboriginal Legal Service of Western Australia Ltd (**ALSWA**);
- North Australian Aboriginal Justice Agency (**NAAJA**);
- Tasmanian Aboriginal Legal Service (**TALS**); and
- Victorian Aboriginal Legal Service Co-operative Limited (**VALS**).

NATSILS was established as the peak body for ATSILS in 2007. Initially operating as a body to share best practice in the provision of legal assistance services to Aboriginal and Torres Strait Islander peoples, over time NATSILS has evolved and grown into a highly coordinated body that has expanded its sphere of influence to include broader issues in addition to those of service provision.

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Human Rights Law Centre

The Human Rights Law Centre is a leading Australian human rights advocacy organisation that uses a combination of strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including Aboriginal legal services, community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre previously made a submission to the Committee Against Torture on the issues to be included in Australia's List of Issues prior to Reporting in June 2016, and is separately providing a submission in collaboration with the Andrew & Renata Kaldor Centre for Refugee Law and the Refugee Council of Australia addressing issues in Australia's refugee protection and immigration detention regimes.

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The authors of this submission acknowledge the traditional owners of the unceded land on which all of our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation.

1. Executive summary

This joint submission is made by Change The Record, the Human Rights Law Centre and the NATSILS, to the Committee Against Torture (**the Committee**) in respect of Australia's compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**the Convention**). The submission responds to Australia's state party report dated 16 January 2019 that is due to be considered by the Committee during the upcoming 75th Session, and builds on the Human Rights Law Centre's submission to the Committee on the issues to be included in the List of Issues prior to Reporting.

The upcoming review of Australia's state party report by the Committee provides a long overdue opportunity for the recently elected federal Albanese government to show leadership where successive, previous federal governments have failed to take initiative to end human rights abuses in places of detention. Mistreatment that can amount to torture and cruel, inhuman or degrading treatment is too common in prisons and police cells across the country. Urgent action is needed from all levels of government in Australia to:

- ban the barbaric and archaic use of:
    - solitary confinement;
    - routine strip searching;
    - spit hoods and restraints; and
    - excessive use of force involving police dogs;
- ensure that people in places of detention:
    - are not exposed to excessive heat; and
    - can access health care of the same quality that is available in the community;
- end the over-imprisonment of people with disabilities in places of detention.

Independent oversight and greater transparency of what goes on behind bars is also urgently needed, with regular unannounced visits that shine a light on mistreatment critical in helping to prevent human rights abuses in the first place. While the federal Australian government ratified the UN's anti-torture protocol - the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**) - on 21 December 2017, implementation has been postponed and January 2023 looms as the current deadline for implementation across the country. No Australian jurisdiction has committed to a completely OPCAT-compliant system of monitoring places of detention, and little progress has been made towards implementation in a number of jurisdictions (notably Victoria and New South Wales). The Committee should recommend that the federal government urgently commit to adequately and jointly fund OPCAT-compliant mechanisms with the states and territories and that the New South Wales and Victorian governments engage in full and transparent consultations with civil society as a matter of priority.

Ending human rights abuses behind bars starts with ending the country's mass imprisonment crisis, and ending the mass imprisonment of Aboriginal and Torres Strait Islander peoples in particular. Over the decade to 2020, Australia's prison population has skyrocketed in both number and proportion of the population. This is not due to an increase in crime - while the incarceration rate has grown by about 25%, over the same period the crime rate fell by around 18%. Due to a toxic combination of the ongoing impacts of colonisation, systemic racism and discriminatory policing, Aboriginal and Torres Strait Islander peoples are criminalised and deprived of their liberty at alarming rates across the country. Most concerningly, over 500 Aboriginal and Torres Strait Islander people have died in police and prison custody since the Royal Commission into Aboriginal Deaths in Custody handed down its final report in 1991. No one has ever been held criminally responsible for any of these deaths.

The Committee should recommend that all Australian governments work to end mass imprisonment and deaths in custody by:

1. Repealing dangerous and discriminatory bail laws; mandatory sentencing laws and prison sentences for minor offending.
2. Raising the minimum age of criminal responsibility from 10 to at least 14 years old.

3. Calling on the Northern Territory government to fully implement all of the recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory.
4. Committing to Aboriginal-led oversight over implementing, monitoring and assessing all the recommendations of the Royal Commission into Aboriginal Deaths in Custody.
5. Ending racist policing, the practice of police investigating police and legislating for independent investigations of complaints of police misconduct and deaths in custody.

2. Recommendations

Ending mass imprisonment and deaths in custody

1. The Committee should recommend that all Australian governments end mass imprisonment by repealing mandatory sentencing laws and prison sentences for minor offending.
2. The Committee should recommend that jurisdictions with dangerous and discriminatory bail laws repeal those laws and replace them and create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk.
3. The Committee should recommend that all Australian governments raise the minimum age of criminal responsibility from 10 to at least 14 years old.
4. The Committee should recommend that the Northern Territory government fully implement all of the recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory.
5. The Committee should recommend that all Australian governments commit to Aboriginal-led oversight over implementing, monitoring and assessing all the recommendations of the Royal Commission into Aboriginal Deaths in Custody.
6. The Committee should recommend that all Australian governments end racist policing, require police accountability by ending the practice of police investigating police and legislating for independent investigations of police misconduct complaints deaths in custody.

Ending torture and other cruel, inhuman or degrading treatment

7. The Committee should recommend that all jurisdictions strictly prohibit the use of solitary confinement, by any name, in Australian prisons.
8. The Committee should recommend that state and territory laws be amended to clearly define the circumstances in which a person may be lawfully separated from other people in prison (limited to exceptional cases, subject to appropriate safeguards).
9. The Committee should recommend that all Australian governments ban the use of spit hoods (or similar devices) in law.
10. The Committee should recommend that all jurisdictions ensure that all use of restraints is documented and publicly reported on in a nationally-consistent way.
11. The Committee should recommend that all Australian governments ensure people in all places of detention are safe from extreme temperatures through decarceration, retrofitting, improving insulation, and installing air conditioning and other climate controls.
12. The Committee should recommend that the federal government expand access to Medicare and the Pharmaceutical Benefits Scheme to incarcerated people. This should include granting an exemption under section 19(2) of the Health Insurance Act 1973 (Cth) to allow health care providers in prisons to claim Medicare and Pharmaceutical Benefits Scheme subsidies.
13. The Committee should recommend that all forms of privatisation in Australian corrections systems be reversed and prevented in future.
14. The Committee should recommend increased access to culturally safe Aboriginal community-controlled health services for people in prisons.

15. The Committee should recommend that the federal government expand access to the NDIS to incarcerated people.
16. The Committee should recommend the federal government review the Social Security Rules and amend them to ensure that people receiving the Disability Support Pension and access to services continue to receive this support while incarcerated and upon their release.
17. The Committee should recommend that procedures be put in place to systematically screen people entering prison for all types of health conditions and disability upon entry and provide reasonable accommodations and access to appropriate services.

Preventing torture and implementing best practice oversight

18. The Committee should recommend that the federal government show national leadership on ending torture behind bars through OPCAT implementation, and urgently commit to adequately and jointly fund NPMs with the states and territories.
19. The Committee should recommend that the New South Wales and Victorian governments take urgent action to engage with full and transparent consultations with civil society to implement OPCAT as a matter of priority.
20. The Committee should recommend that all Australian governments enact OPCAT-complaint NPMs, and in particular, that the Northern Territory government address the lack of functional independence of the NPM model proposed there, and that the South Australian government reintroduce laws to effectively implement OPCAT.

3. Ending mass imprisonment

Australia is in the midst of a mass imprisonment crisis. Imprisonment rates are on the rise, and a third of the prison population are detained on remand in pretrial detention, yet to be found guilty or sentenced for the alleged offending they were arrested for.[1]

The increase in incarceration rates can be in part attributed to governments' wanting to appear 'tough on crime' to support 'community safety'. Yet a recent Inquiry into Victoria's criminal legal system recommended an overhaul of the state's criminal legal system in recognition of the fact that the current, punitive approach is "not reducing crime or improving community safety".[2] Similarly, the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory found that "locking kids up does not stop them breaking the law and does not make the community safer."[3] This is consistent with an increasing body of evidence from around the world, which demonstrates that prisons actually undermine community safety. A landmark study from America recently found that: "incarceration cannot be justified on the grounds it affords public safety by decreasing recidivism".[4]

First Nations peoples are over-imprisoned across the country, and have endured and resisted settler-colonial violence on this continent for more than 230 years. At June 30 2021, 30% of the adults locked away in Australian prisons were First Nations, despite First Nations peoples making up 3.2% of the population at the 2021 Census. In 2021, a First Nations adult was 13.5 times more likely to be imprisoned than a non-Indigenous adult. Despite all Australian governments signing up to the National Agreement on Closing the Gap, with a target of reducing the rate of Aboriginal and Torres Strait Islander adults held in custody by at

[1] United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Keynote address by Dr Alice Edwards to the Australian National OPCAT Symposium (9 September 2022).
[2] Victorian Parliament Legal and Social Issues Committee, Inquiry into Victoria's criminal justice system (Final report, 24 March 2022).
[3] Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Report Overview (17 November 2017).
[4] Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson, and Francis T. Cullen, Custodial Sanctions and Reoffending: A Meta-Analytic Review, Crime and Justice Volume 50, Number 1 2021.

least 15%, over the first two years of the agreement the rate continued to increase, following a decade-long trend.[5]

Notably, governments across the country continue to introduce discriminatory laws that contradict the agreements they make with the community like the National Agreement on Closing the Gap as well as state and territory-based Aboriginal Justice Agreements. A clear example of this is the introduction of amendments to the Youth Justice Act in the Northern Territory last year that have made it harder for children to get bail in certain cases, restricted access to diversion opportunities and have exponentially increased numbers of children on remand.

The mass incarceration of Aboriginal and Torres Strait Islander peoples is a product and tool of Australian colonialism, causing immense harm to First Nations peoples and communities and representing an urgent human rights crisis. Harm is caused by the fact of racialised mass deprivation of liberty in and of itself, and by conditions in custody giving rise to the risk and occurrence of torture and cruel, inhuman and degrading treatment towards children and adults alike.

Over 500 Aboriginal and Torres Strait Islander people have died in police and prison custody since the Royal Commission into Aboriginal Deaths in Custody handed down its final report in 1991. No one has been held criminally responsible for any of these deaths. To paraphrase Darumbal and South Sea Islander scholar Amy McQuire: *There cannot be this many victims and no perpetrators.*[6] The Guardian Australia's Deaths Inside database tracks every known Indigenous death in custody from 2008 to 2021 and charts at least 474 Aboriginal and Torres Strait Islander deaths in custody since the Royal Commission.[7] Recent deaths mean that this number is now widely understood to be over 500 deaths in custody, and recent data indicates that Aboriginal and Torres Strait Islander peoples are six times more likely to die in custody than non-Indigenous people.[8]

Governments across Australia need to urgently address the causes of the mass imprisonment of First Nations peoples, with the central finding of the Royal Commission into Aboriginal Deaths that the primary driver of Aboriginal deaths in custody was the mass imprisonment of Aboriginal and Torres Strait Islander peoples. Many of the recommendations made by the Royal Commission into Aboriginal Deaths in Custody remain outstanding, despite Australia's state party report claiming otherwise. The Deloitte Access Economics' *Review of the implementation of the Royal Commission into Aboriginal Deaths in Custody* (dated 24 October 2018) relied on by the Australian government to support the proposition that the majority of the Royal Commission's recommendations "have been adopted and implemented across all levels of government" is incorrect and has been widely and heavily criticised for its potential to misrepresent the extent to which the Royal Commission recommendations have been implemented.

Governments across the country have consistently shown a preference for investing in prisons and policing over supporting people and communities. Australian governments - at all levels - have failed to adequately invest in public housing, support services and community-based alternatives to policing, or taken up the task of winding back even the worst excesses of the Australian prison industrial complex. The physical, social, emotional, and spiritual costs of racist law and order politics on First Nations peoples and communities, meanwhile, remains unbearable. The time to change this is now.

Need to raise the minimum age of criminal responsibility to at least 14 years old

Ending mass imprisonment starts with raising the minimum age of criminal responsibility to at least 14 years old. As the Committee will be aware, the minimum age of criminal responsibility in Australia is just 10 years old. In 2020-21, 72% of children in custody aged 10-17 were detained on remand, meaning that they were in pre-trial detention without having been convicted or sentenced.[9] This is too often due to dangerous and discriminatory laws which prevent the granting of bail even for crimes which are unlikely to result in a custodial sentence. The majority of children detained on remand ultimately do not receive a custodial

[5] Australian Government Productivity Commission, Socioeconomic outcome area 10: Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system.
[6] Amy McGuire, There cannot be 432 victims and no perpetrators, The Saturday Paper (6 June 2020).
[7] The Guardian Australia, Deaths Inside: Indigenous Australian deaths in custody.
[8] Lorena Allam, 'Beyond heartbreaking': 500 Indigenous deaths in custody since 1991 royal commission, The Guardian Australia (6 December 2021).
[9] Australian Institute of Health and Welfare, 31 March 2022, Youth justice in Australia 2020–21.

sentence.[10] It is also not uncommon for children who would otherwise be released to be remanded in custody because they would experience homelessness, as governments across Australia have failed to invest in adequate crisis and transitional accommodation.[11]

Aboriginal and Torres Strait Islander children are drastically and disproportionately overrepresented in prisons. On an average day in 2020-21, 48.7% of children aged 10-17 in prisons nationwide were First Nations children.[12] Nationally, a First Nations child is 14.4 times as likely to be incarcerated than a non-Indigenous child. In the Northern Territory, an Aboriginal child is more than 30 times as likely to be incarcerated, and in Western Australia, 24 times as likely.[13] Territory Families, Housing and Communities data consistently shows that the number of Aboriginal children in detention fluctuates between 90-100% of all children in detention in the Northern Territory and, at the time of writing, 97% of children in detention in the Northern Territory are Aboriginal.[14]

The lack of implementation of the recommendations made by the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory in the 5 years since its final report was handed down is unacceptable, particularly in light of recent announcements made by the Northern Territory government to build a new youth prison.

The severely disproportionate incarceration of First Nations children, and the systematic and structural racism and discrimination that it belies, is degrading in and of itself.

The minimum age of criminal responsibility in Australia must be urgently raised to at least 14 years of age, without caveats or carve-outs. Rather than punishing and caging children, Australian governments must ensure children and their families have safe homes to live in, adequate incomes, and the care and support needed to heal and eventually thrive.

Need to fix dangerous and discriminatory bail laws

Dangerous and discriminatory bail laws have been enacted across the country, with reverse onus provisions flipping the usual process of bail on its head and making time behind bars the default setting for too many Aboriginal and Torres Strait Islander peoples in too many circumstances. This issue is particularly acute in Victoria where changes were made to the state's bail laws in response to a specific act of violence committed by one man. More people are being needlessly imprisoned because of:

1. The reverse onus provisions, which require a person to show that 'compelling reasons' or 'exceptional circumstances' exist for them to be released on bail. If a person is unable to meet the applicable legal test, then bail must be refused.
2. The broad range of offending captured by these reverse onus provisions. Previously, the 'exceptional circumstances' test applied only to the most serious offences. Now, if people engage in repeat, low-level wrongdoing – like shoplifting or possessing drugs – they can be held to the same standard as people accused of the most violent and dangerous crimes.

As highlighted by the recent Inquiry into Victoria's criminal legal system: "women, particularly Aboriginal women and women experiencing poverty, are disproportionately remanded under current bail legislation."[15] This is because – as also found by the Inquiry – the criminal legal system does not appropriately or fairly balance the maintenance of community safety with the presumption of innocence.[16] Regularly, over half the women in Victorian prisons are unsentenced.[17] This includes Gunditjmara, Dja Dja Wurrung, Wiradjuri and

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[10] For example see: Department of Communities and Justice NSW, 2022, Statistics: young people in custody, 'Proportion of young people with a remand episode who receive or do not receive a control order within 12 months'.
[11] YFoundations, Young, in trouble and with nowhere to go: Homeless adolescents' pathways into and out of detention in NSW (January 2022).
[12] Australian Institute of Health and Welfare, Youth justice in Australia 2020–21 (31 March 2022).
[13] Sentencing Advisory Council Victoria, Indigenous young people in detention (2022).
[14] Northern Territory Department of Territory Families, Housing and Communities, Youth Detention Census, Week commencing 12 September 2022, Average daily number in detention – by Aboriginal status.
[15] Parliament of Victoria (Legislative Council: Legal and Social Issues Committee), Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 449.
[16] Parliament of Victoria (Legislative Council: Legal and Social Issues Committee), Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 459.
[17] See Corrections Victoria: Monthly time series prison and Community Corrections data.

Yorta Yorta woman Veronica Marie Nelson who died in custody on remand in January 2020 at the Dame Phyllis Frost women's prison after being arrested and imprisoned for low-level offending.

Reverse onus bail provisions should never apply to children. Yet in the Northern Territory and in Queensland, amendments to youth justice laws in recent years have contributed to more children being driven into prisons by making it harder for children to get bail in certain cases. The harsh measures in the Northern Territory fly in the face of the recommendations made by the Royal Commission and Board of Inquiry into the Protection and Detention of Children and represent a backflip by the Northern Territory government, who previously accepted all the recommendations made by the Royal Commission in principle.

Need to decriminalise minor offending

The Royal Commission into Aboriginal Deaths in Custody was clear in its recommendation that "governments should legislate to abolish the offence of public drunkenness". Yet the offence of being drunk in a public place remains criminalised in Queensland and Victoria, although a commitment has been made in Victoria to decriminalise public drunkenness and replace it with an Aboriginal-led, public health response by November 2023. This commitment followed the preventable death of Yorta Yorta woman Tanya Day in police custody. Consistent with the staunch and ongoing advocacy of the family of Tanya Day, members of Victoria Police should not be involved in the public health response and responding to incidents of people being drunk in public places. Members of Victoria Police must not – in any circumstances – have legislative powers to detain people, transport people to and/or lock people up in police cells for being drunk in a public place. This is of paramount importance because, in jurisdictions that have decriminalised public drunkenness, police cells continue to be used and Aboriginal and Torres Strait Islander peoples remain significantly over-represented in police cells and at risk of dying in custody.

Notably, in New South Wales and the Northern Territory, civil 'protective custody' regimes have replaced laws that previously decriminalised public drunkenness and still allow police to lock up people found drunk in a public place just pursuant to different powers. The 2016 death in police custody of Wiradjuri woman, Rebecca Maher, who was detained pursuant to New South Wales' 'protective custody' regime demonstrates that alternatives that allow for police to detain people in cells are still deadly.

In many places, including Victoria, it also remains an offence to engage in obscene, indecent, threatening language and behaviour in public[18] and begging in a public place remains an offence punishable by 12 months' imprisonment ().[19] Recent amendments to the Sentencing Act 1995 (NT) and Criminal Code 1983 (NT) in the Northern Territory have also increased the maximum sentence for spitting at a first responder from 5 to 10 years.

Need to abolish mandatory sentencing

Several Australian jurisdictions have mandatory sentencing laws with particularly punitive regimes in place in the Northern Territory and Western Australia (both being jurisdictions which imprison Aboriginal and Torres Strait Islander peoples at a higher proportion than the national figure). People experiencing homelessness, poverty and/or drug dependence continue to be punished for minor offences instead of being offered support. While non-payment of fines is no longer criminalised except as 'a last resort'[20] in Western Australia (following extensive advocacy by the family of young Yamatji woman Ms Dhu, who died in police custody after being arrested for unpaid fines), other forms of minor offending remain criminalised across the country.

Need for greater police accountability

There is an urgent need for greater police accountability across Australia - police officers will continue to act with impunity so long as police investigate the actions of their colleagues. So long as the status quo of police

[18] See s 17 of the Summary Offences Act 1966 (Vic).
[19] See s 49 of the Summary Offences Act 1966 (Vic).
[20] Aaron Fernandes, WA parliament passes bill to end controversial imprisonment of people for unpaid fines, SBS News (17 June 2020).

investigating the actions of other police officers in relation to complaints of police misconduct and deaths in custody also persists it will, and undermines the ability for current systems to deliver any justice to people who experience police misconduct and for the families of people whose loved ones die in custody.

Current systems allow police to use excessive force and act with impunity for their actions. This includes - for example - the disproportionate level of interaction between the police and Aboriginal and Torres Strait Islander peoples in Western Australia, and increasing rates of excessive use of force, with Aboriginal men three times more likely than non-Indigenous men to have a Taser deployed on them, and Aboriginal women more likely than non-Indigenous to have a Taser deployed on them.[21]

In Victoria, while the Independent Broad-based Anti-Corruption Commission (**IBAC**) has the power to investigate complaints of police misconduct, in practice, the overwhelming majority of complaints by the public are sent back to the police for investigation. Consistent with the calls of the Victorian Aboriginal Legal Service, the Victorian government must consult with the families of Aboriginal and Torres Strait Islander peoples who have died in custody regarding the appropriate mechanism for independent investigation of police-contact deaths. The current Systematic Review of Police Oversight (**Review**) presents a long overdue opportunity for the Victorian government to create a best practice Police Ombudsman.

While the Review was prompted by one of the most extreme cases of police misconduct in recent history and the Royal Commission into the Management of Police Informants, abuse of police power is most often meted out on the most marginalised members of the community. Consistent with the recommendation made by the Inquiry into Victoria's criminal legal system, the Review should establish a new independent body to investigate allegations of police misconduct.[22] That body should be an independent Police Ombudsman that is responsible for investigating all complaints of police misconduct (other than customer service matters) and systemic failings. It must be:

- Independent of the police: institutionally, practically, culturally and politically.
- Properly resourced: to ascertain whether police have breached legal or disciplinary standards, and whether they have acted in compliance with human rights obligations.
- Thorough and prompt in its investigations: conducts timely interviewing of suspects and witnesses and has enforceable timelines for investigation.
- Transparent and open to public scrutiny: able to regularly and publicly report on police complaints including outcomes, disciplinary action, civil litigation and prosecutions.
- Complainant centred: is culturally appropriate and enables the complainant to fully participate in the investigation.

Systemic racism in policing, the lack of robust police accountability mechanisms and the excessive use of force used by police against Aboriginal and Torres Strait Islander peoples are set to be examined in the Northern Territory during the current coronial inquest into the death of Warlpiri teenager Kumanjayi Walker inquest. Kumanjayi Walker was shot by Constable Zachary Rolfe on 9 November 2019, with Constable Rolfe subsequently charged and found not guilty in relation to the second and third shots he fired at Kumanjayi Walker.

Recommendations

1. The Committee should recommend that all Australian governments end mass imprisonment by repealing mandatory sentencing laws and prison sentences for minor offending.
2. The Committee should recommend that jurisdictions with dangerous and discriminatory bail laws repeal those laws and replace them and create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a

[21] See Corruption and Crime Commission, The Use of Taser Weapons by Western Australia Police, 4 October 2010, 93 and 126.
[22] Parliament of Victoria (Legislative Council: Legal and Social Issues Committee), Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 256.

specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk.

3. The Committee should recommend that all Australian governments raise the minimum age of criminal responsibility from 10 to at least 14 years old.
4. The Committee should recommend that the Northern Territory government fully implement all of the recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory.
5. The Committee should recommend that all Australian governments commit to Aboriginal-led oversight over implementing, monitoring and assessing all the recommendations of the Royal Commission into Aboriginal Deaths in Custody.
6. The Committee should recommend that all Australian governments end racist policing, require police accountability by ending the practice of police investigating police and legislating for independent investigations of police misconduct complaints deaths in custody.

4. Ending torture and other cruel, inhuman or degrading treatment

Stopping the use of solitary confinement

Solitary confinement is defined as the confinement of people in prison for 22 hours or more a day without meaningful human contact.[23] It is a cruel practice that causes irreparable harm to the people who are subjected to this form of physical and sensory isolation. Under international law, solitary confinement may only be imposed in exceptional circumstances. While Australian jurisdictions tend not to use the term, overly broad laws permit the practice using different language: 'separation', 'segregation', 'seclusion' or 'isolation'. The name given to the treatment is less important than the fact of it.

Prolonged solitary confinement is for a time period in excess of 15 consecutive days. Prolonged solitary confinement and the "deliberate infliction of severe mental pain or suffering may well amount to psychological torture".[24] Frequently renewed measures which, in conjunction, amount to prolonged solitary confinement are also a form of torture.[25]

The Royal Commission into Aboriginal Deaths in Custody found solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander peoples and noted that "it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention."[26]

Despite this, children across Australia are locked up in solitary confinement in breach of the Havana Rules which strictly prohibit the practice.[27] A report by the Northern Territory Office of the Children's Commissioner found that, on 17 February 2021, four children detained at the Don Dale Youth Detention Centre were placed in 'separation' following a critical incident involving concerns of self-harm. All four children had complex needs as a result of neurological impairment and complex trauma. Rolling lockdowns following the incident saw children in Don Dale's H block, where the most vulnerable children are held, detained in their cells for up to 23.5 hours a day over the week to 24 February 2021. Medical assessments of the four children involved in the incident during their confinement were limited to an examination through

[23] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 44.
[24] Nils Melzer, 'United States: prolonged solitary confinement amounts to psychological torture, says UN expert' (Media Release, 28 February 2020).
[25] Nils Melzer, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, UN Doc A/HRC/43/49 (14 February 2020) 15.
[26] Report of the Royal Commission into Aboriginal Deaths in Custody (Final report, 1991).
[27] United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), UN Doc A/RES/45/113, [67].

the hatches in their cell doors due to staff shortages.[28] Nearly all the children detained at Don Dale during the Commissioner's visit were Aboriginal children.

A report by the Western Australian Inspector of Custodial Services into the Banksia Hill Youth Detention Centre describes the use of solitary confinement at the facility in detail, finding its use constituted cruel, inhuman and degrading treatment. One child was forced to spend more than 22 hours a day in their cell for 15 out of 27 days in November 2021. This included one period of five continuous days and a second period of six continuous days. The report also tells the story of a 16 year old boy who was in solitary confinement while acutely suicidal, and contains an interview with a 15 year old boy who spoke of being confined, witnessing severe self-harm, and wanting to die. The report found that the treatment of children at Banksia Hill breached the Mandela Rules, Havana Rules and Beijing Rules.[29]

In Victoria, the Ombudsman has repeatedly expressed concerns about women and children being detained in solitary confinement in contravention of the Mandela Rules and the state's own Charter of Human Rights and Responsibilities, and has recommended that the Victorian Government "establish a legislative prohibition on 'solitary confinement', being the physical isolation of individuals for "22 or more hours a day without meaningful human contact."[30]

Solitary confinement is regularly used in adult prisons and during the Covid-19 pandemic was a restrictive practice deployed as a primary mitigation tool. At the peak of the pandemic, in many places across the country including Victoria and NSW, people entering prisons were required to 'quarantine' for 14 days in the equivalent of solitary confinement, regardless of their Covid-19 risk profile. In Victoria, some people were only allowed out of their cells for 15 minutes a day. Throughout the pandemic, prisons have repeatedly been put into 'lockdowns', also replicating the conditions of solitary confinement for extended periods of time.

Recommendations

1. The Committee should recommend that all jurisdictions strictly prohibit the use of solitary confinement, by any name, in Australian prisons.
2. The Committee should recommend that state and territory laws be amended to clearly define the circumstances in which a person may be lawfully separated from other people in prison (limited to exceptional cases, subject to appropriate safeguards).

Ending routine strip searching

Routine strip searching involves forcing people to remove their clothing in front of prison guards on a regular basis. The Mandela Rules provide that intrusive searches, including strip searches, should be undertaken only if absolutely necessary.[31] As pointed out in Australia's state party report, procedures for strip searches vary between jurisdictions. In many, overly broad laws permit routine strip searching in circumstances significantly less than this and as a matter of prison routine.

Being subjected to routine strip searching is humiliating and degrading for anyone, and is particularly harmful to children and women who are also victims/survivors of abuse, trauma or neglect. Victoria's anti-corruption watchdog - the Independent Broad-based Anti-corruption Commission - recently reported that the General Manager of Port Phillip Prison told one of its investigators that strip searches were "one of the options available to assert control" over people in prison.[32] Routine strip searching can be characterised as

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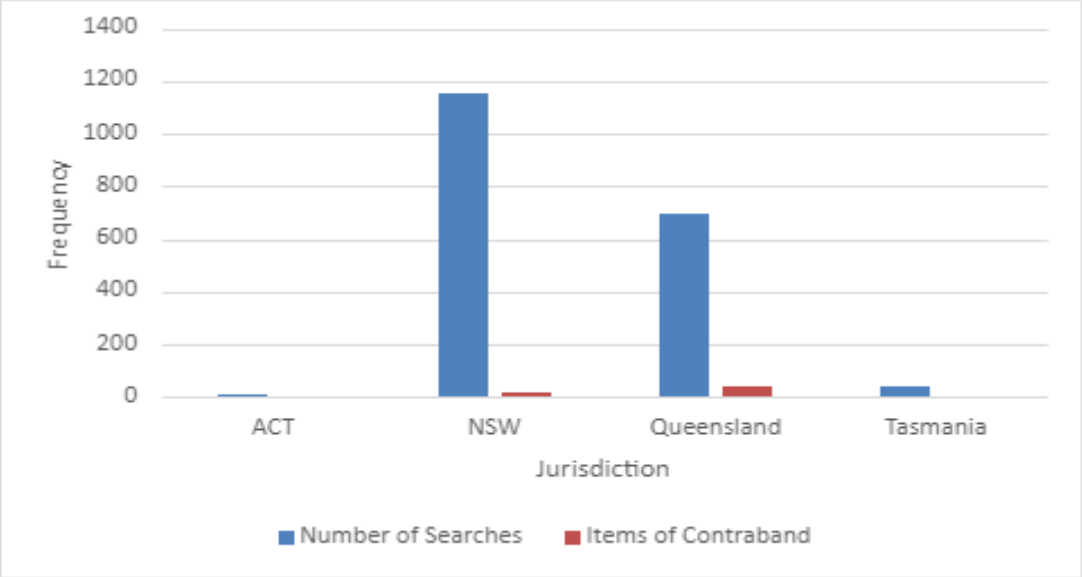
[28] Office of the Children's Commissioner NT, Don Dale Youth Detention Centre Monitoring Report 2021 (6 October 2021) 10.
[29] Office of the Inspector of Custodial Services Western Australia, 2021 Inspection of the Intensive Support Unit at Banksia Hill Detention Centre (March 2022).
[30] Victorian Ombudsman, 'Unlawful and wrong' - solitary confinement and isolation of young people in Victorian prison and youth justice centres (5 September 2019); Victorian Ombudsman, 30 November 2017, Implementing OPCAT in Victoria - report and inspection of Dame Phyllis Frost Centre; Victorian Ombudsman, Investigation into the imprisonment of a woman found unfit to stand trial (16 October 2018).
[31] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 52.
[32] Independent Broad-based Anti-corruption Commission, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021) 53.

"unlawful assaults verging on systemic sexual assault"[33] and mean that "prison is not and cannot be a therapeutic community."[34]

Evidence from Australia and around the world has consistently shown that routine strip searching does not have a deterrent effect, and that reducing strip searches does not increase the amount of contraband in prisons. In the United Kingdom, the use of alternative search measures has not had negative impacts on safety or security and, in Australia, the reduction in strip searching at two women's prisons in Western Australia did not lead to an influx of contraband being brought into these facilities.[35]

In many states and territories – particularly Queensland and NSW – there are insufficient safeguards to protect people's dignity and privacy. This is demonstrated by data that the Human Rights Law Centre regularly obtains via Freedom of Information laws in relation to the rate at which children and women in prison are being routinely strip searched. Data extracted in the below tables are for the 7-month period between 1 October 2020 and 30 April 2021, except where otherwise noted.

Table 1: Strip search data - children



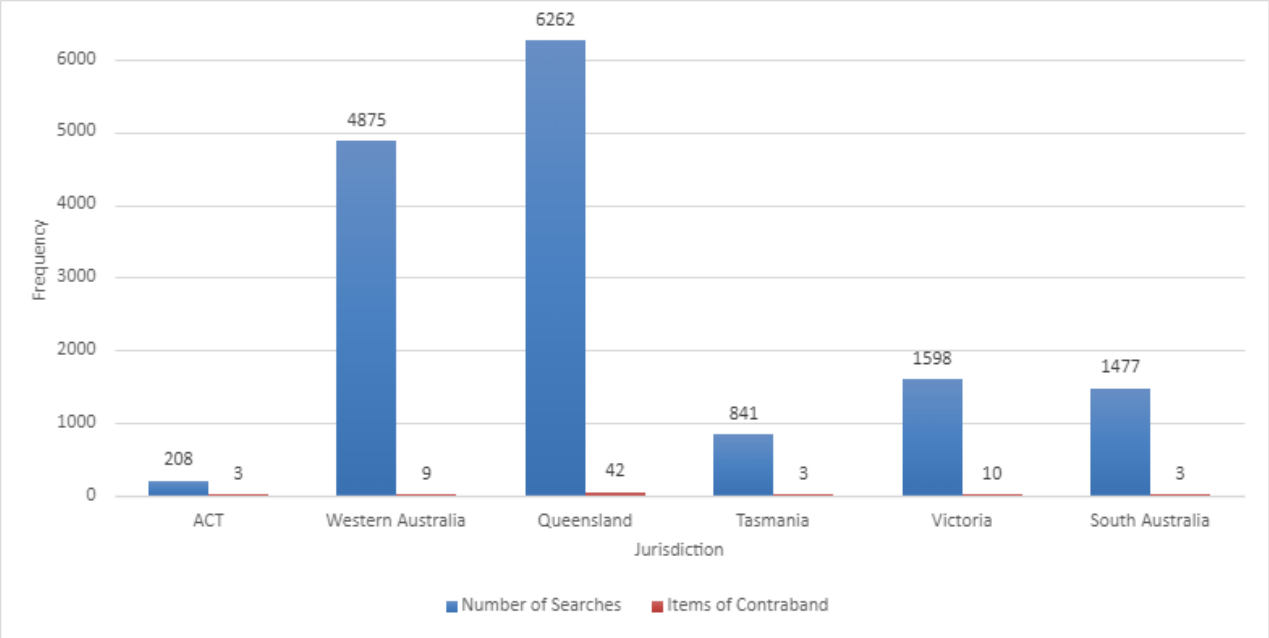
Notes:

- In response to the Human Rights Law Centre's most recent FOI requests:
    - NT, WA and South Australia have said that there were no strip searches in Don Dale and Alice Springs youth prisons, Banksia Hill youth prison and the Adelaide Youth Training Centre youth prison for the period of 1 October 2020 and 30 April 2021:
        - NT said it was not their policy to conduct personal searches routinely and accordingly no personal searches had been undertaken since approximately 2017;
        - WA denied the FOI request on the basis that any registers or records of strip searches do not exist; and
        - SA stated that a review of documents indicated that no strip searches took place at the Adelaide Youth Training youth prison.
    - NSW reported 1 month (April 2021) worth of data for Frank Baxter and Cobham Youth prisons that we have adjusted this to reflect a 7 month time period consistent with the other datasets.

[33] Debbie Kilroy, 'Strip-Searching: Stop the State's Sexual Assault of Women in Prison' (2003) 12 Journal of Prisoners on Prisons 34- 37.
[34] Flat Out Inc, Submission No 980 to Victoria, Royal Commission into Family Violence (29 May 2015).
[35] See, eg, Lord Carlile, An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes, 2006 The Howard League for Penal Reform, 173; the Office of the Inspector of Custodial Services, Strip searching in Western Australian Prisons (March 2019) 9.

- Victoria has made a commitment that data will be published quarterly, commencing with quarter one 2022-2023 (Jul-Sept), with retrospective data from 1 July 2020 published soon after. It will include (as total figures):
    - number of body scanner searches completed;
    - number of unclothed searches completed; and
    - monthly average of unclothed searches for that quarter.

Table 2: Strip search data - women



Notes:

- In response to the Human Rights Law Centre's most recent FOI requests:
    - Queensland only reported 4-months (January 2021 to 30 April 2021) of data for Brisbane Women's prison, Numinbah prison, Helana Jones prison and Townsville prison that we have adjusted this to reflect a 7 month time period consistent with the other data sets.
    - Victorian data is for the 7 month period from June 2020 – December 2020.
    - The NT provided the following data:
        - Over a 15-month period between May 2020 – June 2021, there were 100 strip searches conducted on women held in sector 4 at Darwin Correctional Centre. Only one item of contraband (a wooden shiv) was identified.
        - Over a 4-month period between March 2021 – June 2021, there were 664 strip searches conducted on women upon reception to Darwin Correctional Centre. Only one item of contraband, being "papers with address on" was identified.
        - Over a 9-month period between September 2020 – May 2021, there were 5,367 strip searches conducted on men and women at Darwin Correctional Centre due to visitations. Only 3 items of contraband were identified; the type of contraband was not listed or was redacted. There was no way to disaggregate this data on the basis of gender.
    - Western Australia has provided inconclusive data that indicates that the number of items identified could be 5 or 9 items. At the time of writing, the Human Rights Law Centre are trying to clarify this issue (and note that 9 items are reflected in the above table).
- The Human Rights Law Centre believes that the elevated number of items identified as contraband in Queensland prisons is due, in part, to how contraband is categorised (and, for example, lip gloss, a piece of paper and coffee and sugar from the kitchen were identified as contraband in circumstances where they are not dangerous). This also raises serious concerns about whether such contraband could be identified through using less invasive search practices.

Alarmingly, in response to the Human Rights Law Centre's request in NSW, Corrective Services confirmed that they do not have a record of the number of times women are strip searched in prison. There is no

register or logbook of strip searches, as there is in other jurisdictions. Strip searches "are mainly conducted as part of centre routine, procedure and policy" but are not recorded each time. This is in contravention of the Mandela Rules, which provide that "the prison administration shall keep appropriate records of searches, in particular strip and body cavity searches and searches of cells, as well as the reasons for the searches, the identities of those who conducted them and any results of the searches."[36]

There is no reason to subject people in prison to a practice that can scar them for life when prison authorities can instead use safer, less invasive and more effective search methods like x-ray wands and body scanners.

Recommendations

1. The Committee should recommend that all Australian governments ban the practice of routine strip searching in law, and clearly stipulate that strip searching should only ever be permitted as a last resort in response to specific and reasonable intelligence of contraband and after less intrusive measures have been exhausted.
2. The Committee should recommend that the reasons for any strip search, and the basis for the specific and reasonable intelligence, must always be documented, in order to ensure transparency and accountability.

Banning the use of spit hoods and restraints

Use of force and restraint against - including the use of spit hoods on - people in prisons is poorly regulated and largely unreported. The use of spit hoods is regulated by a patchwork of different laws, policies and practices around the country. There is little available information about the use of spit hoods in adult facilities as data on incidences of use of restraints and force in custody are not consistently reported publicly.

The Mandela rules prohibit the use of restraint which are inherently degrading or painful and provide that any other instruments of restraint should only be used as authorised by law and in extremely narrow and limited circumstances.[37] The routine use of spit hoods across Australia contravenes these rules.

There is no safe way to use spit hoods. Spit hoods have been implicated in the deaths of people in custody, including Aboriginal and Torres Strait Islander peoples. In 2019 Wiradjuri, Kookatha and Wirangu man Wayne "Fella" Morrison tragically died after being restrained by this dangerous and degrading device.

Around the world, human rights organisations have called for spit hoods to be banned as they pose a threat to people's life and safety, as well as being humiliating, archaic and traumatising devices.

Unfortunately, in Australia, only one jurisdiction has banned the use of spit hoods in law to date, being South Australia (following ongoing and powerful advocacy led by the family of Wayne "Fella" Morrison).

Distressingly, spit hoods are used on children in the ACT, Queensland and the Northern Territory; and overly broad laws permit their use on adults in other jurisdictions despite safer alternatives existing.

Recent reports have emerged of spit hoods and mechanical restraint chairs being used in police stations across the Northern Territory on children as young as 12 years old. Spit hoods were used on children in Northern Territory watch houses 27 times from 2018 to February 2022, with 21 of those instances happening in the last two years.[38] Police officers also used mechanical restraint chairs against six children during this time. This is at odds with the intention of recommendations made by the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory which

[36] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 51.
[37] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 47.
[38] Zizi Averill and Amanda Parkinson, Australian spit hood ban petition as NT police reveal use on kids NT News (22 February 2022).

recommended maintaining a prohibition on the use of spit hoods in youth detention centres.[39] This is still yet to occur.[40]

Spit hoods have been used at least 138 times in Queensland corrections settings between 2015 and 2022. In that time, the devices were used against children detained in police watch houses. Following community pressure, on 20 September 2022 the Queensland police commissioner announced spit hoods will be banned in watch houses, however the devices will continue to be used in adult prisons.[41]

According to the Guardian Australia's Deaths Inside database,[42] from 2008-2019 at least 14 First Nations people died in custody as a direct result of a medical episode following use of physical, mechanical and/or chemical restraint:

- DG, a 39 year old father of 4 from the Northern Territory, died in hospital of a heart attack in 2008 after being restrained, handcuffed and put in the back of a police van while unconscious.
- LV, a 27 year old man from Queensland, went into respiratory failure in 2010 while he was being held face-down by hospital staff and police, handcuffed and injected with a sedative. He had taken himself to hospital to seek help for a mental health crisis.
- NRR, a 37 year old man from Queensland, died in 2013 from cardiac dysrhythmia caused by being restrained and held down in the prone position by six people during a citizen's arrest.
- David Dungay Jr., a 26 year old Dunghutti man from NSW, died in 2015 in Long Bay jail. Guards entered his cell to forcibly stop him eating biscuits, dragged him to another cell, held him face-down and injected him with sedatives. Mr Dungay told guards he couldn't breathe 12 times before he died.
- Shaun Charles Coolwell, a 33 year old Mununjali man from Queensland, died in 2015 after police pinned him face down in the prone position and handcuffed him, and paramedics injected him with a chemical sedative while he was unconscious and likely already in cardiac arrest. In 2011 Mr Coolwell's older brother died after being restrained in the same way while in hospital for a mental health crisis.
- JFW, a 34 year old man from Western Australia, died in 2015 after being held face-down on the ground during a citizen's arrest by a retired police officer twice his weight.
- Wayne Fella Morrison, a 29 year old Wiradjuri, Kookatha and Wirangu man from South Australia, died in 2016 after 14 prison guards pinned him to the ground and forced him into a spit hood.
- Fred, a 35 year old man from Western Australia, died in 2016 of a heart attack after being restrained by police and injected with sedatives. His heart condition was known to the WA police force but the officers attending were not aware.
- JTW, a 37 year old woman from Victoria, died in 2017 after suffering a heart attack while handcuffed. Police were arresting her under Victoria's Mental Health Act. Her mother died a day later upon hearing the news of her daughter's death.
- PR, a 50 year old man from South Australia, died in 2017 after being handcuffed and restrained in a prone position. He repeatedly asked for heart medication upon his arrest, but police denied his requests.
- Chad Riley, a 40 year old Noongar man from Western Australia, died in 2017 after being shot with a stun gun by police, then becoming unresponsive while restrained face-down.
- DK, a 34 year old man from Western Australia, died in 2018 from multiple organ failure after cardiac arrest after being restrained.

[39] Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Report Overview (17 November 2017), recommendation 13.1.
[40] See for example: Samantha Dick, 'NT Government, opposition and police union support the use of spit hoods on children in police custody' ABC News (24 February 2022).
[41] Robyn Wuth, Queensland bans 'inhumane' spit hoods, Canberra Times (20 September 2022).
[42] The Guardian Australia, Deaths Inside: Indigenous Australian deaths in custody.

- Noomba, a 39 year old man from Queensland, died in 2018 after losing consciousness while police restrained him using a technique called a lateral vascular neck restraint.
- Cherdeena Wynne, a 26 year old Noongar Yamatji woman from Western Australia, died in 2019 after losing consciousness while being restrained in the prone position and handcuffed. 20 years earlier Ms Wynne's father had died in police custody after being found unresponsive in an Albany watch-house. He was also aged 26.

The lack of regulation, basic data collection and public reporting on the use of force and restraint in custody across jurisdictions is unacceptable. Across the country, hospitals and aged care facilities are required to document and report their use of seclusion and restraint,[43] with a view to minimising their use due to the potential for harm to be caused. At the very least, all institutions and settings where people are deprived of their liberty should be subject to regulation and reporting requirements around the use of seclusion and restraint.

Recommendations

1. The Committee should recommend that all Australian governments ban the use of spit hoods (or similar devices) in law.
2. The Committee should recommend that all jurisdictions ensure that all use of restraints is documented and publicly reported on in a nationally-consistent way.

Excessive use of force involving police dogs

The Aboriginal Legal Service of Western Australia has highlighted the high incidence of police dog bites and disproportionate deployment of dogs against and injury suffered by Aboriginal and Torres Strait Islander peoples in Western Australia.[44] Western Australian police are afforded broad discretion to deploy police dogs against people suspected of a crime and as a method of control and addressing broadly defined 'non-compliance' with police directions. Dogs are trained to intimidate, menace and attack on command. Limited and low-quality data is collected on their use.

Analysing available data on injuries from police dog attacks from 2015-2018, Aboriginal Legal Service of Western Australia found that of the 95 recorded incidents of injuries from dog bites, 43% of the victims were recorded as Aboriginal and 18% were aged 18 years or younger. Of the 17 juveniles, 71% were Aboriginal. Calling for the Western Australian Corruption and Crime Commission (**the CCC**) to investigate the use of dogs, the Aboriginal Legal Service of Western Australia documented the use of police dogs against Aboriginal people in circumstances where there was no danger to others and the injured person was not suspected of committing a serious offence.

A review of deployment of police dogs by the CCC found 61% of police dog deployments in 2020-21 were against First Nations peoples, which it described as "concerning". It called on WA police to explore the cause of this and implement strategies to reduce their deployment against First Nations people. It also encouraged police to "continue to identify ways to reduce the need for a police dog to apprehend a person" due to the likelihood of serious injury.[45]

The racialised use of police dogs against Aboriginal people in Western Australia causes immediate and long-lasting physical and mental harm and is reflective of systemic discriminatory over-policing. The Aboriginal Legal Service of Western Australia has recommended that accurate data on deployment of police dogs be collected, and that deployment should be more tightly limited, reported on, and regulated.

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[43] See: Australian Government, Australian Institute for Health and Welfare, Restrictive Practices in Mental Health Care (August 2022); Commonwealth Department of Health and Aged Care, Restrictive practices in aged care – a last resort (September 2022).
[44] Aboriginal Legal Service of Western Australia, 5 August 2020, The Use of Police Dogs on Aboriginal and Torres Strait Islander People in Western Australia cited in Crime and Corruption Committee, Report on the deployment of police dogs (11 May 2022).
[45] Corruption and Crime Commission, Report on the deployment of police dogs (11 May 2022) 29.

Ensuring people in prison are not subjected to excessive heat

Prisons in Australia, particularly in Western Australia and the Northern Territory, pose a current and future risk to the health and safety in the context of worsening climate change.

In 2014, the average temperature at midnight in summer in un-airconditioned cells at Roebourne Regional Prison in the Pilbara was over 35 degrees celsius.[46] In 2020, the Western Australian Inspector of Custodial Services recommended air conditioning be installed at Roebourne, but this was dismissed by the Department of Justice as a low priority. In January 2022, Roebourne saw temperatures of more than 50 degrees Celsius.[47]

In 2018, people incarcerated in the Alice Springs prison were tear-gassed by prison guards after refusing to return to their cells due to extreme heat, as internal temperatures passed 40 degrees Celsius.[48] As the climate crisis worsens and temperatures become more extreme for longer periods of time, such inhumane conditions will put people who are incarcerated at significant risk of physical harm, distress and abuse.

Heat stress for people in prison remains an ongoing issue in Northern Territory prisons, which remain unsuitable for the territory's extreme weather conditions, exacerbated by overcrowding, outbreaks of COVID-19 and increased use of lockdowns. These conditions have led to unrest within prisons, with people in prison reporting to the North Australian Aboriginal Justice Agency that they have been subjected to the use of tear gas, pepper spray and excessive force by prison officers in tactical gear, as well as significant periods of isolation (often amounting to solitary confinement).

Recommendations

1. The Committee should recommend that all Australian governments ensure people in all places of detention are safe from extreme temperatures through decarceration, retrofitting, improving insulation, and installing air conditioning and other climate controls.

Ensuring people in prison have access to equivalency of healthcare

People in prison "should enjoy the same standards of healthcare that are available in the community, and should have access to necessary healthcare services free of charge without discrimination on the grounds of their legal status".[49] Yet the standard of healthcare delivered in prisons across Australia is significantly lower than that delivered in the general community and it is well documented that Aboriginal and Torres Strait Islander peoples in particular receive a lower standard of care than non-Indigenous people in custody. According to the Guardian Australia's Deaths Inside database, First Nations people who died in custody were three times more likely not to receive all required medical care.[50]

In Victoria, in a 2017 report on an inspection of the Dame Phyllis Frost women's prison, the Victorian Ombudsman raised concerns about inadequate healthcare in the prison. The Victorian Ombudsman reported that 41% of surveyed prison staff believed in-prison healthcare at the prison was poor or very poor, and a majority of women imprisoned there reported it took a long time to see a nurse (51%) or a doctor (71%).[51]

Prison health services are the responsibility of state and territory governments, with prison health services across jurisdictions being underfunded, often privatised, and manifestly inadequate. Access to routine, specialist, allied and culturally competent care is limited and subject to long wait times. This is compounded

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[46] Office of the Inspector of Custodial Services Western Australia, Report into Thermal conditions of prison cells: 'Dangerous conditions' (18 September 2015).
[47] Douglas Smith, WA govt lashed after prisoners swelter through Australia's hottest day on record, NITV News (14 January 2022).
[48] Rani Hayman and Matt Garrick, Call for air-conditioners in 'inhumane' cells after outback heatwave triggers prison riot, ABC News (31 December 2018).
[49] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 24.
[50] Lorena Allam, Calla Wahlquist and Nick Evershed, The facts about Australia's rising toll of Indigenous deaths in custody, The Guardian Australia (9 April 2021).
[51] Victorian Ombudsman, Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre (November 2017), 72.

by a lack of access to the Pharmaceutical Benefits Scheme, Australia's national medication subsidy system, which can mean that people in custody do not receive equitable access to appropriate medication regimes.

In addition to equivalency of healthcare being required under the Mandela Rules, recommendation 150 of the Royal Commission into Aboriginal Deaths in Custody was: "That the health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public." Equivalence of healthcare is also the underlying goal of other recommendations regarding healthcare in prisons and police custody, including recommendations 127, 252, 152, 154, 133, 265 and 283.6.[52]

The recent coronial inquest into the death in custody of Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Marie Nelson in Victoria's Dame Phyllis Frost women's prison heard that the healthcare provided in prisons in inadequate, and that, if those recommendations from the Royal Commission had been implemented, Ms Nelson would still be alive.[53]

Ms Nelson, who weighed just 33kg when she was arrested, died alone in her prison cell while detained on remand after repeatedly reporting acute abdominal pain, vomiting and cramping to prison officials. Her pleas for help in the hours leading up to her death were brushed off – her condition was not monitored or assessed and was managed only with paracetamol and an anti-nausea medication. She was not examined by the duty nurse. Communication with staff was limited to exchanges through the prison intercom system and through the hatch of her cell door. Staff lied to Ms Nelson about when and whether she would see a nurse and doctor, laughed at her appearance, and told her to be quiet to avoid waking other prisoners.

The Victorian Aboriginal Legal Service submitted that her treatment was racist, deliberate, grossly negligent, inhumane and torturous, and directly resulted in her death.

The private, for-profit healthcare service sub-contracted by the Victorian government to provide prison healthcare, Correct Care Australasia, has been accused of covering up its egregious treatment of Ms Nelson in the interest of maintaining its lucrative $700m contract.[54] Correct Care Australasia's parent company, Wellpath, has also been linked to deaths in custody in the United States.

The systemic risk of avoidable deaths in custody like Ms Nelson's was and is obvious given the history of privatisation of prisons in Australia and globally. Governments are well aware that the primary responsibility of private business is the maximisation of profit, not the provision of quality health services or the prevention of mistreatment in custody.

These interests are in direct conflict, a conflict which is particularly dangerous and unchecked in the case of privatised in-prison healthcare in Victoria – the subcontracted business holds a monopoly on provision, and the people reliant on the provider for care have no recourse to influence its behaviour through the exercise of consumer rights or choice.

Recommendations

1. The Committee should recommend that the federal government expand access to Medicare and the Pharmaceutical Benefits Scheme to incarcerated people. This should include granting an exemption under section 19(2) of the Health Insurance Act 1973 (Cth) to allow health care providers in prisons to claim Medicare and Pharmaceutical Benefits Scheme subsidies.
2. The Committee should recommend that all forms of privatisation in Australian corrections systems be reversed and prevented in future.
3. The Committee should recommend increased access to culturally safe Aboriginal community-controlled health services for people in prisons.

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[52] Australasian Legal Information Institute, Recommendations of the RCIADIC, Indigenous Law Resources Reconciliation and Social Justice Library.
[53] Victorian Aboriginal Legal Service, Submissions on behalf of Uncle Percy Lovett to the Coronial Inquest into the death of Veronica Nelson (17 June 2022).
[54] Erin Pearson, Prison healthcare contractor denies cover-up after Indigenous woman's death, The Age (27 May 2022).

Ending the over-imprisonment of people with disability in prisons

The lack of adequate healthcare in Australia's prisons poses a particularly acute threat to people with disability, who are disproportionately criminalised in Australia. Disability is more common among First Nations peoples than the non-Indigenous population, and First Nations people with disability experience intersectional discrimination and disadvantage. In evidence provided to the Disability Royal Commission, the Australian Centre for Disability Law estimated that 95% of First Nations people charged with criminal offences who appear before courts have an intellectual disability, a cognitive impairment or a mental illness.[55]

For many people with disability who are incarcerated, the first time their disability is recognised is in prison. Screening for disability in prison is more often ad hoc than part of any coordinated program of support and care for incarcerated populations. As a result, many incarcerated people with disability go through the entire process of arrest, trial and sentencing without appropriate and tailored support, or recognition of complex needs or mitigating factors.

The Disability Royal Commission has heard extensive evidence of abuse and mistreatment experienced by people with disability in custody, including cruel and disproportionate use of solitary confinement,[56] disproportionate use of physical and mechanical restraints and disproportionate use of force. Human Rights Watch has also documented people with disability being subjected to physical and sexual violence, overcrowding and denial of basic needs like access to toilets.[57]

People with disability in prison are also more likely to die in custody, with an analysis of coronial inquest reports between 2010 and 2020 by Human Rights Watch finding that around 60% of people who died in prisons in Western Australia had a disability. Of those people, 58% died as a result of lack of support provided by the prison, suicide and/or violence. Alarmingly, half of those who died were First Nations people with disability.[58]

The exclusion of people who are incarcerated from access to the National Disability Insurance Scheme is a serious and unjustifiable human rights concern. It is a breach of the Mandela Rules,[59] which require equal access to healthcare for incarcerated people, and a breach of articles 12 and 13 of the Convention on the Rights of Persons with Disabilities, requiring equal access to justice and legal capacity.[60]

A person in receipt of the Disability Support Pension will also have their payment suspended for up to two years and then cancelled if they are in custody pending trial or sentencing, are incarcerated, or are in psychiatric confinement because they have been charged with an offence.[61] A submission by the Aboriginal and Torres Strait Islander Legal Service Queensland to a Senate Inquiry into the Disability Support Pension discusses this in further detail, and echo their recommendation to end the practice of cancelling payments like this.[62]

Recommendations

1. The Committee should recommend that the federal government expand access to the NDIS to incarcerated people.

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[55] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020, Overview of responses to the Criminal justice system Issues paper, 3.
[56] Finn McHugh, Cognitively impaired woman isolated for 23 hours a day Inquiry told, news.com (16 February 2021).
[57] Human Rights Watch, I Needed Help, Instead I Was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia (6 February 2018).
[58] Human Rights Watch, "He's never coming back": People with Disabilities Dying in Western Australia's Prisons (15 September 2020).
[59]United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 24.
[60] United Nations General Assembly, Convention on the Rights of Persons with Disabilities UN Doc A/RES/61/106 (24 January 2007).
[61] Commonwealth Department of Social Services, Social Security Guide, current at May 2022, '3.6.1.100 Continuation, variation or termination of DSP'.
[62] Aboriginal and Torres Strait Islander Legal Service (Qld), Submission 8, Inquiry into the Purpose, Intent and Adequacy of the Disability Support Pension, Australian Senate Community Affairs References Committee (July 2021).

2. The Committee should recommend the federal government review the Social Security Rules and amend them to ensure that people receiving the Disability Support Pension and access to services continue to receive this support while incarcerated and upon their release.
3. The Committee should recommend that procedures be put in place to systematically screen people entering prison for all types of health conditions and disability upon entry and provide reasonable accommodations and access to appropriate services.

Further, a more comprehensive system of disaggregated data collection is also required across all of the abovementioned human rights concerns. This should extend to identification of Aboriginal and Torres Strait Islander status in relation to all categories of data and encompass comparative figures as against the non-Indigenous population. This should include comprehensive data sets across all jurisdictions covering use of harmful practices including solitary confinement, strip searches, spit hoods, restraints and use of police dogs.

5. Preventing torture and implementing best practice oversight

The federal Australian Government ratified the UN's anti-torture protocol - OPCAT - on 21 December 2017. At the time of ratification, the Australian government made a declaration under Article 24 of OPCAT to postpone implementation for a period of three years to enable the establishment of its National Preventive Mechanism (NPM). Two subsequent extensions of time were sought by the Australian Government, and January 2023 looms as the current deadline for OPCAT implementation across Australia.

Australia's state party report provides that Australia's NPM will be established as a cooperative network of federal, state and territory bodies responsible for inspecting places of detention and will be facilitated by an NPM Coordinator. The previous federal government failed to show much leadership on OPCAT implementation and, in February 2022, confirmed their view that it is not necessary to incorporate provisions of OPCAT into federal legislation.

The absence of stand-alone legislation nationally raises concerns that the NPM does not have the essential powers, resources, independence, uniformity and capabilities necessary to fulfil its obligations and responsibilities in accordance with OPCAT. The federal government has failed to address its responsibility to share the financial costs of establishing the state and territory NPM network, thereby avoiding resourcing constraints and ensuring the effective implementation of OPCAT. This has been compounded by the previous federal government slashing funding for the Commonwealth Ombudsman over the coming years, facing budget cuts in 2022-2023 and until 2025-2026 of about 15%.

No states and territories have implemented completely OPCAT-compliant NPMs. Western Australia was the first jurisdiction to partially implement OPCAT, and Tasmania, Queensland, the Northern Territory, ACT and South Australia have taken steps towards implementing OPCAT and are at different stages of their implementation journeys.

Alarmingly, little progress has been made in establishing and resourcing independent monitoring and oversight of places of detention in New South Wales and Victoria. This is despite the recent Inquiry into Victoria's criminal justice system finding that: "the implementation of OPCAT is… critical to increasing transparency of prison conditions and addressing problematic practices"[63] including "solitary confinement, strip searching and the use of physical restraints [which] can be highly traumatic and can impede the rehabilitation of people in incarceration."[64]

The Department of Justice and Community Safety has reaffirmed the Victorian Government's support for the principles of OPCAT, but said that additional federal government funding is required to implement OPCAT in Victoria. The position is shared in New South Wales, with the Victorian and New South Wales

[63] Parliament of Victoria (Legislative Council: Legal and Social Issues Committee), Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 623-624.
[64] Parliament of Victoria (Legislative Council: Legal and Social Issues Committee), Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 630.

Attorneys-General jointly writing to the federal government on 18 October 2021, explaining that they "would be unable to implement OPCAT in the absence of an accompanying sufficient and ongoing funding commitment from the Commonwealth".

In other Australian jurisdictions, key concerns include the lack of functional independence of the NPM model proposed in the Northern Territory and the lapsed laws in South Australia. These concerns are articulated in more detail in a joint submission recently made to the Subcommittee on the Prevention of Torture, available online here.

In the Northern Territory, the North Australian Aboriginal Justice Agency also has concerns regarding recent amendments to the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 which has failed to address system-focused efforts to challenge disproportionate outcomes and overrepresentation of Aboriginal peoples in settings of "incarceration or under care and protection". The Bill lacks the formal partnership and shared decision-making arrangements reflected in the principles and work of the Northern Territory Aboriginal Justice Agreement and the Close the Gap agreement.

Recommendations

1. The Committee should recommend that the federal government show national leadership on ending torture behind bars through OPCAT implementation, and urgently commit to adequately and jointly fund NPMs with the states and territories.
2. The Committee should recommend that the New South Wales and Victorian governments take urgent action to engage with full and transparent consultations with civil society to implement OPCAT as a matter of priority.
3. The Committee should recommend that all Australian governments enact OPCAT-complaint NPMs, and in particular, that the Northern Territory government address the lack of functional independence of the NPM model proposed there, and that the South Australian government reintroduce laws to effectively implement OPCAT.