

# **THE IMPLEMENTATION OF OPCAT IN AUSTRALIA**

**SUBMISSION BY  
THE AUSTRALIA OPCAT NETWORK**

**TO  
THE SUBCOMMITTEE ON PREVENTION OF TORTURE AND  
OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR  
PUNISHMENT (SPT)**

**AND**

**THE UNITED NATIONS WORKING GROUP ON ARBITRARY  
DETENTION (WGAD)**

**JANUARY 2020**

## **ABOUT THE AUSTRALIA OPCAT NETWORK**

The Australia OPCAT Network was formed in 2015, initially as a group of individuals interested in promoting the ratification by Australia of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). It has grown significantly since, consisting of individuals, non-government organisations and academics, as well as statutory and oversight agencies. The Network's objectives are to share information about OPCAT and the benefits of preventive monitoring more generally, and to promote OPCAT implementation in Australia.

This submission draws extensively on input from Network members but does not purport to represent the views of all its participants.

Because this submission is based on input from a range of members of the Network, it reflects their areas of focus and expertise. The submission does not purport to cover all issues comprehensively, nor does it cover all parts of Australia equally.

## **ACKNOWLEDGEMENTS**

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## EXECUTIVE SUMMARY

This submission is made by the Australian OPCAT Network to the United Nations Subcommittee on Prevention of Torture (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD) in support of their upcoming visits to Australia in 2020.

The submission is not intended to be a comprehensive analysis of the issues faced by people in detention and people deprived of their liberty in Australia. It focuses on key issues to do with Australia's implementation of its obligations under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) which Australia ratified in December 2017. It makes recommendations, not necessarily to propose solutions to problems but, rather, to suggest lines of inquiry for the SPT and WGAD.

In particular, this submission considers the following broad areas.

**The establishment of Australia's National Preventive Mechanism (NPM):** Australia has a federal system. Responsibility for places of detention and other closed environments is spread across central and state governments. Implementation of OPCAT will require negotiation between these different levels of government. Different jurisdictions are adopting different approaches to implementing their obligations – including about whether or not to enact specific legislation and about which monitoring bodies to designate. Partly, this reflects local conditions and experiences, but it also has the potential to produce uneven results.

**The effectiveness of monitoring bodies:** As a result of Australia's federal system, and the range of places of detention covered by OPCAT, a number of agencies and authorities at both the central and state level will together make up Australia's NPM. It is essential that each of these bodies be able to discharge the full range of their roles effectively and independently. However, the signs so far suggest that the powers of these bodies will be uneven and the human and financial resources they are assigned are likely to be inadequate.

Furthermore, it is vital that the Australian Government engages fully and openly with civil society – to draw on their expertise and links with people who are, or have been, in places of detention – both in the design phase of Australia's NPM and also in the actual work of inspection and monitoring. However, the experience of engagement so far has been patchy at best.

**Coverage of Australia's commitments:** The Australian Government has decided that its implementation of OPCAT will focus, at least initially, only on 'primary places of detention'. In light of Australia's record of treatment of people who have been deprived of their liberty, it is crucial that Australia adopt a more expansive approach to meeting its obligations. History has shown that the most vulnerable people are often those who are in non-traditional places of detention, and often in their first few hours in detention. The expansive approach is in keeping with the emerging international consensus over the interpretation of OPCAT and also with the reports and recommendations of the SPT and WGAD.

At the same time, traditional places of detention continue to raise significant challenges. Prisons and other justice facilities experience overcrowding, inadequate services and conditions, and overuse of seclusion, together with the pressure of increasingly complex inmate populations.

**People in immigration detention:** Australia's policy of mandatory detention of asylum seekers, and other non-citizens without valid visas, places some of the most vulnerable people in situations characterised by secrecy and a security culture, inadequate health care and other services, limited legal assistance, isolation from the community, and limited access by media and civil society. It is vital that Australia's NPM be empowered and resourced to properly examine the treatment of people in these places of detention. 'Offshore' places of detention – in Papua New Guinea and Nauru – must also be covered by Australia's NPM given these sites have been established by Australia and are effectively operated and controlled by Australia. These places have a sad history of isolation, oppressive conditions, lack of services, ill-health and self-harm.

**Aged care and people with disability:** Australia's NPM must be empowered and properly resourced to examine and monitor the situation of people with disability and people in aged care who are deprived of their liberty in Australia. We also recommend this be an area of focus of the visits of the SPT and the WGAD. The cruel treatment of these groups in aged care facilities and disability-specific facilities, and the lack of adequate monitoring and oversight, is being exposed in a number of inquiries, as well as Royal Commissions, around Australia. The deprivation of their liberty, and their loss of autonomy, can take many forms. People with disability – including neurological conditions – also form a significant part of Australia's prison population where they receive inadequate treatment and support.

**Australia's Indigenous people:** The over-representation of Aboriginal and Torres Strait Islander people in Australia's prisons and youth justice facilities is shocking – some 15 times more than their overall population would suggest. This over-representation – as well as continuing deaths of Indigenous people in custody – continues despite numerous parliamentary and other inquiries and Royal Commissions. In many cases, the recommendations of these inquiries have not been implemented. Government policies have been haphazard, and policies have been targeted at Indigenous people rather than being designed and implemented with them. Punitive approaches – such as continuing incarceration of people for non-payment of fines – and Australia's very low age of criminal responsibility (10 years), have made the problem worse and created a legacy of inter-generational enmeshment in the criminal justice system.

## CHAPTER 1: THE NATIONAL PREVENTIVE MECHANISM

### Key points

- The Australian Government intends to implement the National Preventive Mechanism (NPM) through an intergovernmental agreement between federal and state levels of government rather than enacting new legislation. Amendments to the Commonwealth Ombudsman's regulations do not comprehensively outline the NPM role or powers and not all states intend to introduce SPT legislation.
- The Australian Government intends to initially limit the scope of the NPM's work to a self-identified list of 'primary places of detention'.
- Australian governments have not undertaken an open and transparent process regarding NPM designation. Civil society views have largely been ignored.
- Adequate and stable funding is required for the NPM to function effectively.
- The NPM should consider formalising its relationship with civil society both in an advisory capacity and through visits to places of detention.

### 1.1 Legislative framework

The obligation to establish a National Preventive Mechanism (NPM) is enshrined in Article 17 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT):

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.<sup>1</sup>

Although OPCAT does not prescribe the structure or model for an NPM, there are numerous principles the NPM must satisfy. An NPM must:

- have functional independence (Article 18(1))
- be adequately resourced (Article 18(3)).

An NPM must have the power to:

- regularly examine the treatment of people deprived of their liberty (Article 19(a))
- make recommendations to the authorities to improve the treatment of people deprived of their liberty (Article 19(b))
- submit proposals and observations concerning existing or draft legislation (Article 19(c))

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<sup>1</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006)

- conduct private interviews with detainees and any person they wish to interview (Article 20(d))
- choose the places they want to visit and the people they want to visit (Article 20(e))
- share information with the Subcommittee on Prevention of Torture (Article 20(f)).

An NPM must have access to:

- all information regarding people in closed environments, including the number of detainees and their location and the number of places of detention and their locations (Article 20(a))
- all information regarding the treatment of people in closed environments and the conditions of their detention (Article 20(b))
- all places of detention and their installations and facilities (Article 20(c)).

Recognising also that preventive work is multifaceted, the Subcommittee on Prevention of Torture (SPT) recommends that the NPM additionally be empowered and able to deliver the ‘preventive package’<sup>1</sup> including:

- examining patterns of practices from which risks of torture may arise
- advocacy, such as commenting on draft legislation
- providing public education
- undertaking capacity building
- actively engaging with State authorities.

This could also include submissions on ‘relevant human rights action plans,’<sup>2</sup> commentary on existing legislation<sup>3</sup>, or providing training to those who are concerned with people deprived of their liberty.<sup>4</sup>

To meet these obligations, the SPT has determined that an NPM must be established by legislation:

While the institutional format of the NPM is left to the State Party’s discretion, it is imperative that the State Party enact NPM legislation which guarantees an NPM in full compliance with OPCAT and the NPM Guidelines. Indeed, the SPT deems the adoption of a separate NPM law as a crucial step to guaranteeing this compliance.<sup>5</sup>

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<sup>1</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Eleventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 63rd sess* (UN Doc CAT/C/63/4 26 March 2018), 54

<sup>2</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Analytical assessment tool for national preventive mechanisms*, (UN Doc CAT/OP/1/Rev.1 25 January 2016), 9c

<sup>3</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism* (UN Doc CAT/OP/HUN/2 08 December 2017), 34

<sup>4</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism* (UN Doc CAT/OP/HUN/2 08 December 2017), 34

<sup>5</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism*:

Contrary to this crucial step, ‘the Australian Government has stated it does not intend to enshrine the NPM model in legislation, nor does it consider it necessary to legislate to enable inspections by the SPT.’<sup>1</sup> Instead it has advised it is actively working towards ‘a proposal to have an intergovernmental agreement between the Commonwealth and the states and territories.’<sup>2</sup>

### 1.1.1 Intergovernmental agreement

The Council of Australian Governments (COAG) is the peak intergovernmental forum in Australia. It comprises representatives of the federal, state and territory, and local governments. Detailed commitments made by COAG may be recorded through intergovernmental agreements. In some but not all instances, agreements have been the precursor to the passage of federal or state and territory legislation. Intergovernmental agreements make clear that the outcomes have head of government support and have greater currency and force than ministerial reports and communiqué text which may not always contain detailed policy and/or operational matters.

An intergovernmental agreement may in some circumstances be able to be enforced as a contract. Usually, however, lack of precision in the terms of the agreement, or the political nature of the undertakings in it, dispel an intention to create binding legal relations and place it beyond the normal authority of courts to enforce.<sup>3</sup>

To date there has been no public consultation or information on the content of the proposed intergovernmental agreement. However, the Chief Psychiatrist of Western Australia has reported in its most recent annual report that it has ‘provided advice’<sup>4</sup> on the agreement.

We are deeply concerned about the absence of an overarching legislative basis for the NPM and the Australian Government’s lack of engagement with civil society organisations in the development of the intergovernmental agreement (in the absence of legislation).

The Australian Human Rights Commission’s Interim Report to the federal Attorney-General demonstrates that many within Australian civil society share the view that the NPM should be established by a dedicated federal statute:

Many attendees at the roundtables expressed concern that the Commonwealth Government does not intend to introduce legislation to enshrine the NPM model. A

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*recommendations and observations addressed to the State party* (UN Doc CAT/OP/NLD/1, November 3 2016), 5-6 para 24-26

<sup>1</sup> Australian Human Rights Commission, [OPCAT in Australia: interim report to the Commonwealth Attorney-General](#) (September 2017), 33 para 70

<sup>2</sup> Commonwealth of Australia, [Senate Legal and Constitutional Affairs Legislation Committee, Estimates](#), May 23 2018, 122 (Michael Johnson)

<sup>3</sup> Cheryl Saunders, Intergovernmental agreements and the executive power (2005) 16(4) *Public Law Review*, 295

<sup>4</sup> Chief Psychiatrist of Western Australia, [Ensuring safe and high quality mental health care: annual report of the Chief Psychiatrist of Western Australia 01 July 2018 – 30 June 2019](#) (September 10 2019), 28

number of stakeholders strongly urged the Australian Government to introduce a dedicated statute to implement OPCAT. This accords with SPT guidance that conclusively states that it is best practice for NPMs to be implemented through legislation.<sup>1</sup>

Affirming this view, the Victorian Ombudsman's 2019 OPCAT investigation found that 'in light of the varied levels of independence, different powers and functions [of existing oversight bodies], significant legislative amendments would be required for a multi-body model to comply with OPCAT.'<sup>2</sup>

The Victorian Ombudsman also recommended that 'to incorporate specialist expertise, legislation should require the NPM to establish an Advisory Group to provide competence, information, advice and input to the NPM's work.'<sup>3</sup> Noting its earlier OPCAT investigation, the Victorian Ombudsman has also suggested 'NPMs and other monitoring bodies should also have legislative authority to share information so they can work collaboratively in the interest of human rights.'<sup>4</sup>

The Australian Capital Territory (ACT) Inspector of Correctional Services is also a supporter of enacting legislation. In its submission to the Australian Human Rights Commission's OPCAT consultations, it said that 'capturing the OPCAT preventive focus in legislation would, for existing entities that are designated NPMs, help avoid the risk that OPCAT work is "business as usual" in cases where they carry out complaints-based or reactive work.'<sup>5</sup>

We note also that, in considering OPCAT implementation in 2010, the current federal Attorney-General, Christian Porter (who was then the Western Australian Minister for Corrective Services), recognised that:

[T]he first and critical step in the process of becoming OPCAT compliant is the drafting of consistent State and Territory legislation to allow for the establishment of National ... [preventive] mechanisms in each jurisdiction.<sup>6</sup>

We strongly endorse the need for a statutory foundation for the Australian NPM and recognise the SPT's experience on this matter, as articulated in response to the UK NPM's self-identified concerns:

The experience of the SPT is that the situation of an NPM remains precarious without its being underpinned by a clear legislative basis. We have seen,

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<sup>1</sup> Australian Human Rights Commission, [OPCAT in Australia: interim report to the Commonwealth Attorney-General](#) (September 2017), 33 para 71

<sup>2</sup> Victorian Ombudsman, [OPCAT in Victoria: a thematic investigation of practices related to solitary confinement of children and young people](#) (September 2019), 56

<sup>3</sup> Victorian Ombudsman, [OPCAT in Victoria: a thematic investigation of practices related to solitary confinement of children and young people](#) (September 2019), 57

<sup>4</sup> Victorian Ombudsman, [Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre](#) (November 2017), 8

<sup>5</sup> ACT Inspector of Correctional Services, [Submission to Stage 2 Consultation on the implementation of the Optional Protocol to the Convention against Torture \(OPCAT\)](#) (September 2018), 3

<sup>6</sup> Western Australia, [Parliamentary Debates, Legislative Assembly](#), 18 May 2010, 2689 (Christian Porter)

unfortunately, too many examples of cases in which states have put pressure on NPMs, directly or indirectly, which they have not been able to challenge for the want of a clear basis on which to do so. Practical effectiveness is dependent on functional independence, and the independence is threatened when the NPM is vulnerable to political pressure or political exigencies.<sup>1</sup>

### 1.1.2 SPT legislation

In considering periodic visits by the SPT to Australia, a National Interest Analysis conducted in 2012 found, with respect to the states and territories that:

[A]mendments to legislation would be required to comply with the Subcommittee obligations due to legislative barriers that would prevent the Subcommittee from obtaining access to information concerning the treatment of persons in detention or obtaining unrestricted access to certain places of detention.<sup>2</sup>

Additionally, the NPM Coordinator, the Commonwealth Ombudsman, has also stated that ‘Governments should consider the extent (if any) to which legislation is required to be introduced to support the visiting and unfettered access functions of the SPT.’<sup>3</sup>

To date, the Australian Capital Territory (ACT) and the Northern Territory (NT) are the only two jurisdictions to introduce legislation to enable compliance with the SPT’s visit requirements:

- [Monitoring of Places of Detention \(Optional Protocol to the Convention Against Torture\) Act 2018](#) (ACT)
- [Monitoring of Places of Detention \(Optional Protocol to the Convention Against Torture\) Act 2018](#) (NT)

We understand that not all jurisdictions intend to enact SPT legislation. As noted by NT Attorney-General and Minister for Justice, Natasha Fyles:

The government understands the enactment of the [SPT] legislation is not critical for OPCAT to operate in the Northern Territory. This is why many of the states and territories are not likely to enact legislation. However, once the Northern Territory legislation has been enacted, it spells out how Northern Territory operational agencies will interact with OPCAT.<sup>4</sup>

Highlighting the practical benefit of enacting SPT legislation, she further acknowledged that the legislation:

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<sup>1</sup> Office of the High Commissioner for Human Rights, [Letter: Advice from the SPT](#) (January 29 2018), 1 para 3

<sup>2</sup> Parliament of Australia, [Joint Standing Committee on Treaties National Interest Analysis \[2012\] ATNIA 6, Attachment on Consultation](#), para 41

<sup>3</sup> Commonwealth Ombudsman, [Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\) Baseline Assessment of Australia’s OPCAT readiness](#) (September 2019), 10-11, para 1.31

<sup>4</sup> Northern Territory, [Parliamentary Debates, Legislative Assembly](#), 23 August 2018, 4422 (Natasha Fyles)

... provides that the local NT legislation operates subject to the lawful exercise of any function of the UN subcommittee. This means that if OPCAT permits the UN committee to do something, it can be done regardless of what a local Territory law might say.<sup>1</sup>

For the most part, both the ACT and NT legislation are compliant with the obligations of the OPCAT. We are however concerned with the ACT legislation.

Clause 13(4)(b) of the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (ACT) excludes the SPT from accessing the records of a detainee that contains 'personal information' under an ACT privacy law, without the consent of the detainee.

While the revised explanatory statement acknowledges that 'without the required level of access to places of detention and relevant information, the subcommittee would not be able to effectively carry out its role,'<sup>2</sup> limitations have nonetheless been applied. In practical terms 'in the majority of cases, the Minister or detaining authority will need to obtain consent from detainees or other affected individuals to grant the Subcommittee access to relevant personal information.'<sup>3</sup>

We note the NT Government has not applied the same restrictions to its legislation. On the point of access to personal information, the NT Ombudsman stated in its submission to the Social Policy Scrutiny Committee that:

[I]t is important to appreciate that the focus of the Subcommittee is on protection of human rights of individuals. Reporting by the Subcommittee is naturally undertaken at a high level and would not commonly provide detailed information relating to individuals. Nothing in my experience would lead to concern that a United Nations subcommittee of this type would do anything but act with due regard to the welfare and privacy protections of individuals. Given the occasional nature of the Subcommittee visits and the concerns that may flow regarding allowing 'outsiders' access to facilities and information, it is important that there be a clear and undisputed basis for such access.<sup>4</sup>

We are concerned the limitation imposed by the ACT legislation is contrary to the intent of both Article 12 and 14 of the OPCAT and may unnecessarily hinder the activities of the SPT. We nonetheless commend the ACT and NT governments for introducing SPT legislation and

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<sup>1</sup> Northern Territory, [Parliamentary Debates, Legislative Assembly](#), 23 August 2018, 4421 (Natasha Fyles)

<sup>2</sup> Australian Capital Territory, [Legislative Assembly, Revised explanatory statement Monitoring Places of Detention \(Optional Protocol to the Convention against Torture\) Bill 2017](#), February 15 2018 (Shane Rattenbury), 3

<sup>3</sup> Australian Capital Territory, [Legislative Assembly, Revised explanatory statement Monitoring Places of Detention \(Optional Protocol to the Convention against Torture\) Bill 2017](#), February 15 2018 (Shane Rattenbury), 3

<sup>4</sup> Ombudsman NT, [Submission to the Social Policy Scrutiny Committee Monitoring of Places of Detention \(Optional Protocol to the Convention Against Torture\) Bill](#), June 5 2018, 2



recommend other jurisdictions do the same to ensure the SPT is not hindered in any way during its visit.

### **1.1.3 Ombudsman Amendment (National Preventive Mechanism) Regulations 2019**

In 2019, the Australian Government amended the [Ombudsman Regulations 2017](#) (Cth) to establish the functions of the Commonwealth Ombudsman as NPM Coordinator and the NPM for federal places of detention.

The functions of the NPM Coordinator includes the ability to:

- consult on and undertake research on the development of standards and principles
- collect information on oversight arrangements
- propose options and develop resources to facilitate improvements in oversight arrangements, including identifying gaps and levels of duplication
- communicate with the SPT on behalf of the NPM network
- convene meetings and facilitate collaboration between all levels of government and the NPM network
- publicly report on findings
- make recommendations.

The Commonwealth NPM functions include the following:

- undertaking regular inspections of places of detention under the control of the federal government
- giving information to the SPT to facilitate the inspection of places of detention by the SPT
- incidental functions.

We are concerned that these amendments do not articulate in full the responsibilities of the Australian Government nor the Commonwealth Ombudsman as the NPM for federal places of detention. Commenting on the amendments, the Victorian Ombudsman has noted:

Although the Ombudsman Amendment (National Preventive Mechanism) Regulations, together with section 4(2)(a) of the *Ombudsman Act 1976* (Cth), articulate the functions of the Commonwealth Ombudsman, no new powers have been provided, and therefore the NPM mandate would have to be performed under existing powers. It is likely that this could mean that an inspection carried out by the Commonwealth Ombudsman in the performance of its NPM function would, at law, be an investigation within the meaning of the Ombudsman Act (Cth).<sup>1</sup>

We note also the SPT recommendation that:

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<sup>1</sup> Victorian Ombudsman, [OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people](#) (September 2019), 46

The mechanism's legal framework should also provide for outward-facing functions of the NPM, such as submitting proposals and observations on existing and draft legislation, advocacy, awareness raising and capacity building, and require a separate budget line in the State budget for the funding of the NPM, in order to ensure its continuous financial and operational autonomy. Moreover, it should outline privileges and immunities of NPM members and those who contribute to the NPM, including experts and civil society, while guaranteeing protection for persons who provide information to the NPM.<sup>1</sup>

We also acknowledge the SPT's findings elsewhere that, in absence of the above:

[T]he failure to set out in detail the tasks and powers of the NPMs in their respective regulations, in accordance of the OPCAT and the NPM Guidelines, has hindered the NPMs in undertaking the full range of functions that the OPCAT, the NPM guidelines and other relevant instruments require the NPMs to undertake.<sup>2</sup>

We recommend the Australian Government and the Commonwealth Ombudsman review its amendments in line with the above advice of the SPT.

The explanatory statement accompanying the Ombudsman Amendment (National Preventive Mechanism) Regulations notes that only '... the Office of the Commonwealth Ombudsman was consulted on the Regulations throughout the drafting process. The Department of Home Affairs and the Department of Defence were previously consulted on how OPCAT would be implemented in Australia.'<sup>3</sup>

In reviewing its legislative amendments, we recommend that civil society organisations be included in the consultation process. This accords with previous advice from the SPT:

[T]he SPT considers it crucial that the State party ensure the full, effective and meaningful participation of the different political parties represented in Parliament and civil society organisations with relevant expertise on torture prevention throughout the process of drafting the NPM law and reviewing related legislation.<sup>4</sup>

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<sup>1</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Turkey* (UN Doc CAT/OP/TUR/1, December 12 2019), 5 para 22

<sup>2</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Republic of Malta* (UN Doc CAT/OP/MLT/1, February 1 2016), 4 para 10

<sup>3</sup> Commonwealth Attorney-General's Department, [Ombudsman Amendment \(National Preventive Mechanism\) Regulations Explanatory Statement](#) (April 9 2019)

<sup>4</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Turkey* (UN Doc CAT/OP/TUR/1, December 12 2019), 5 para 19-21

## 1.2 Scope of the National Preventive Mechanism

### 1.2.1 Primary places of detention

The OPCAT does not explicitly describe what places of detention are. The SPT in elaborating on this point says:

[T]he preventive approach underpinning the Optional Protocol means that as extensive an interpretation as possible should be made in order to maximize the preventive impact of the work of the national preventive mechanism [and] therefore takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function.<sup>1</sup>

It is imperative for the NPM to be given right of access within what could be termed an ‘expansive definition’ of places of detention. This is particularly relevant given it has been decided by the Australian Government that the NPM will initially focus only on ‘primary places of detention’<sup>2</sup> which includes:

- adult prisons
- juvenile detention facilities (excluding residential secure facilities)
- police lock-up or police station cells (where people are held for equal to, or greater than, 24 hours)
- closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment (where people are held for equal to, or greater than, 24 hours such as a locked ward at a residential institution)
- closed forensic disability facilities or units where people may be involuntarily detained by law for care (where people are held for equal to, or greater than, 24 hours), such as a Disability Forensic Assessment and Treatment Service
- immigration detention centres (note: this does not include all places where non-citizens are deprived of their liberty in an immigration context – see chapter 2)
- military detention facilities.

We acknowledge that for practical reasons the Australian Government has chosen to take an incremental approach to the work of the NPM. However, limiting the NPM’s mandate to the Australian Government’s self-determined ‘primary places of detention’ presents an entirely unprecedented situation.

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<sup>1</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Annex Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms* (UN Doc CAT/C/57/4 March 22 2016), 19 para 1-3

<sup>2</sup> Senator George Brandis, *2017 DFAT-NGO Forum on Human Rights* (Canberra, 9 February 2017) [www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement](http://www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement) (accessed 15 December 2019)

The SPT is very clear that ‘the State should allow the NPM to visit all, including any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction ... [and] should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides.’<sup>1</sup>

Choosing to take an incremental approach in early establishment is not of itself contentious. The SPT has in fact stated, ‘in all situations, the national preventive mechanism should also be mindful of the principle of proportionality when determining its priorities and the focus of its work.’<sup>2</sup> The important point is that it is the NPM itself which should decide based on its own strategy, resources and analysis of the situation and not the Australian Government.

By not adopting an expansive view and corresponding right of access to all places (with the NPM taking due consideration of proportionality), we are deeply concerned that the Australian NPM’s preventive capacity and independence will be compromised by the Australian Government’s directives.

This point has been highlighted previously in the Australian context by Dr Adam Fletcher:

[I]mplementing legislation which creates the NPM (and sets the parameters for SPT visits) may limit the scope to institutions deemed to present the highest risk of ill-treatment, but this should not necessarily exclude the less obvious candidates such as aged care homes. This is inadvisable not only because it interprets the OPCAT too narrowly, but because of the documented human rights abuses occurring across a broad range of closed environments.<sup>3</sup>

It is worth noting that the Australian Government’s list of ‘primary places of detention’ arose from the 2008 work of Professors Richard Harding and Neil Morgan.<sup>4</sup> While Harding and Morgan urged a prioritisation of resources, they also ‘recognise[d] that as Australia moves to OPCAT implementation, there is room for further debate as to whether some of these secondary categories ... should be moved into the primary category in terms of prioritisation.’<sup>5</sup>

This point is pertinent considering Harding and Morgan’s work came before the advent of Australia’s offshore processing centres, and also before systemic abuses were uncovered by the current Royal Commission into Aged Care Quality and Safety, and the Royal Commission

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<sup>1</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms* (UN Doc CAT/OP/12/5, 9 December 2010), 10 para 24-25

<sup>2</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Annex compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms* (UN Doc CAT/C/57/4 March 22 2016), 19 para 1-3

<sup>3</sup> Adam Fletcher, *Australia and the OPCAT* (2012), 37 (4) *Alternative Law Journal*, 236

<sup>4</sup> Richard Harding and Neil Morgan, [\*Implementing the Optional Protocol to the Convention against Torture: options for Australia. A report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan \(Centre for Law and Public Policy, The University of Western Australia\)\*](#) (October 2008)

<sup>5</sup> Richard Harding and Neil Morgan, [\*Implementing the Optional Protocol to the Convention against Torture: options for Australia. A report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan \(Centre for Law and Public Policy, The University of Western Australia\)\*](#) (October 2008), 10 para 3.4

into Violence, Abuse, Neglect and Exploitation of People with Disability (all of which are relevant to institutions outside of the current scope of the NPM).

The current exclusion of facilities where people are held for less than 24 hours (not a recommendation of Harding and Morgan) also raises significant concerns. It is contrary to the well-established fact that the greatest risk of torture and ill-treatment occurs within the first 24 hours and the first days following detention. Safeguards are, therefore, imperative during this time.<sup>1</sup>

In relation to police custody, for example, a 2017 joint statement by UN Special Rapporteur on torture, Nils Melzer, and three former special rapporteurs on torture, Juan Méndez, Manfred Nowak and Theo van Boven, emphasised that:

It is well-known that the risk of torture and other ill-treatment is significantly greater during the first hours of police custody. To prevent torture during this heightened period of risk, safeguards must be put in place and implemented in practice ... We call on every State to invest in safeguards to prevent torture and other forms of ill-treatment.<sup>2</sup>

While the Australian Human Rights Commission's Final Report to the federal Attorney-General has not yet been released, support for commencing with the 'expansive view' of places of detention has been demonstrated through public submissions by civil society organisations and existing oversight bodies, including the Australian Lawyers Alliance, the Law Council of Australia and the ACT Inspector of Correctional Services.

Similar sentiments have been echoed by domestic oversight bodies in the Commonwealth Ombudsman's Baseline Assessment. The Commonwealth Ombudsman found that 'a significant number of stakeholders expressed concern about the proposition that oversight and inspection will be limited to primary places of detention. Concern was most acute in relation to the detention of young people, wherever that detention may take place.'<sup>3</sup>

## **1.3 Designation of the National Preventive Mechanism**

### **1.3.1 Lack of transparency**

The Australian Human Rights Commissioner, Edward Santow, previously commented that '... in this [NPM] design phase, it's vital that input and consultations occur with civil society organisations to determine what people want and need.'<sup>4</sup>

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<sup>1</sup> Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (July 2016), *Liverpool University Press, Liverpool*, 2

<sup>2</sup> Nils Melzer et al, *Invest in Safeguards to Prevent Torture* (26 June 2017) [www.apt.ch/content/files/OpenLetter\\_26June\\_UN\\_SRTs\\_InvestinSafeguardstoPreventTorture\\_EN.pdf](http://www.apt.ch/content/files/OpenLetter_26June_UN_SRTs_InvestinSafeguardstoPreventTorture_EN.pdf)

<sup>3</sup> Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) Baseline Assessment of Australia's OPCAT Readiness* (September 2019), 9 para 1.22

<sup>4</sup> Edward Santow, *Making detention safe and humane: can we grasp a once in a generation opportunity?* *Austin Asche Oration* (19 September 2017)

To date, formal civil society participation in the establishment of the NPM has been restricted to consultations with the Australian Human Rights Commission.<sup>1</sup> It is worth noting that many of the proposals made by the Commission in its Interim Report to the federal Attorney-General, have seemingly not been accepted or adopted by governments.

The Interim Report expressed that ‘a number of stakeholders submitted that there should be further consideration, engagement and consultation on the designation of the co-ordinating body and in relation to the state/territory NPM bodies.’<sup>2</sup> The absence of consultation and transparency around the NPM designation process has been profoundly concerning when we consider the purpose of external monitoring is to ‘... act as the community’s “eyes” into these otherwise closed environments.’<sup>3</sup>

The federal and Western Australian jurisdictions are the only ones to have designated an NPM and, in both jurisdictions, designation occurred in the absence of consultation with civil society organisations. In the case of Western Australia, the Western Australian Government additionally made no public announcement about its NPM designation.

Rebecca Minty, Deputy Inspector for the ACT Inspector of Correctional Services, has argued that ‘... without concerted work by stakeholders to promote civil society engagement in OPCAT implementation there is a risk that the impact of the torture-prevention treaty will be reduced.’<sup>4</sup> Both the SPT and the Association for the Prevention of Torture (APT) support the proposition that the absence of consultation is a disservice to the organisations that have and will be designated.<sup>5,6</sup>

The absence of engagement with civil society has not gone unnoticed even abroad. In its recent concluding observations, the United Nations Committee on the Rights of Persons with Disabilities recommended Australia ‘ensure that organizations of persons with disabilities can effectively engage in the establishment and work of the national preventive mechanism’.<sup>7</sup>

We recommend Australian governments, at both the federal and state and territory levels, including those that have already designated NPMs, meaningfully engage with civil society as a matter of priority to determine Australia’s collective NPM.

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<sup>1</sup> Senator George Brandis, *2017 DFAT-NGO Forum on Human Rights* (Canberra, 9 February 2017) [www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement](http://www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement) (accessed 15 December 2019)

<sup>2</sup> Australian Human Rights Commission, *OPCAT in Australia Interim Report to the Commonwealth Attorney-General* (September 2017), 22 para 34

<sup>3</sup> Bronwyn Naylor, *Protecting Human Rights in Detention: rights, monitoring and OPCAT* (2016), 41(3) *Alternative Law Journal*, 152

<sup>4</sup> Rebecca Minty, *Involving civil society in preventing ill treatment in detention: maximising OPCAT’s opportunity for Australia* (2019), 25 (1) *Australian Journal of Human Rights*, 2

<sup>5</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms* (UN Doc CAT/OP/12/5, 9 December 2010), 2

<sup>6</sup> Association for the Prevention of Torture, *Civil Society and National Preventive Mechanisms under the Optional Protocol to the Convention against Torture* (June 2008)

<sup>7</sup> Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia* (UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019), 8 para 30(c)

### 1.3.2 The Commonwealth Ombudsman

The Office of the Commonwealth Ombudsman was announced as both the NPM Coordinator and as the NPM for federal places of detention at the time the Australian Government announced its intention to ratify OPCAT. The Commonwealth Ombudsman has responsibility for the inspection of immigration detention facilities (excluding the offshore processing centres), military detention facilities and Australian Federal Police custody.

The Commonwealth Ombudsman's designation, particularly as NPM Coordinator is not without contention. In their 2008 report, Professors Richard Harding and Neil Morgan analysed the Commonwealth Ombudsman and the Australian Human Rights Commission as potential NPM Coordinators. They concluded that '... both the Commonwealth Ombudsman and the Commission appear qualified to take on the role of the national coordinating NPM. However, in light of its existing responsibilities, and especially its role as Australia's "flagship" human rights body in the international arena, the Commission appears to be the more appropriate site for the national coordinating NPM.'<sup>1</sup>

This same view is reflected in more than sixteen public submissions to the Australian Human Rights Commission's 'OPCAT in Australia' consultations (including our own). The interim report notes that:

While not critical of the role of the Commonwealth Ombudsman, some stakeholders noted that, given OPCAT is a human rights treaty, human rights commissions at the Commonwealth and state/territory level would be the most appropriate co-ordinating bodies in an NPM network. Other stakeholders noted the importance of the NPM bodies having access to human rights expertise that currently vests in relatively few inspecting bodies across Australia.<sup>2</sup>

We are pleased to see that, acknowledging its own limitations in human rights expertise, the Commonwealth Ombudsman has indicated it is '... paying particular attention to how we ensure that our inspections are undertaken with an appropriate human rights emphasis, and indeed we are working closely with the Australian Human Rights Commission on those aspects.'<sup>3</sup>

While the Commonwealth Ombudsman has not actively engaged with civil society organisations as readily as the Australian Human Rights Commission, it has indicated it is

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<sup>1</sup> Richard Harding and Neil Morgan, [\*Implementing the Optional Protocol to the Convention against Torture: Options for Australia. A report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan \(Centre for Law and Public Policy, The University of Western Australia\)\*](#) (October 2008), 35-39 para 6.43-6.55

<sup>2</sup> Australian Human Rights Commission, [\*OPCAT in Australia Interim Report to the Commonwealth Attorney-General\*](#) (September 2017), 22 para 34

<sup>3</sup> Michael Manthorpe, [\*8th Annual Prisons Conference: presentation by the Commonwealth Ombudsman – implementing OPCAT\*](#) (9 July 2019), 5

‘considering’<sup>1</sup> and ‘planning’<sup>2</sup> to establish a civil society reference group to inform its work. We welcome this initiative.

However, we note with serious concern the recent observations and comments contained in a report by our network member, the Refugee Council of Australia. The report describes current sector perceptions of the Commonwealth Ombudsman as ‘less transparent, approachable and helpful’<sup>3</sup> than its immigration detention oversight counterpart, the Australian Human Rights Commission. An informant has said:

When we’ve asked them about their [immigration detention facility] inspection methodology, the [Ombudsman’s Office] has been very defensive and dismissive of concerns. We have not found them easy to engage with.<sup>4</sup>

We urge the Commonwealth Ombudsman to consider the following words of the APT: ‘... no matter how complete and robust the independence, powers and privileges of an institution may appear in its empowering legislation, it will never be effective as an NPM unless it enjoys credibility in the eyes of ... the general public.’<sup>5</sup>

Enacting its plan to create a civil society reference group should go some way towards alleviating the concerns of civil society organisations, as would the publication of its NPM post-visit reports and methodologies. We note that the Commonwealth Ombudsman has not done so already, and we strongly recommend that this issue be addressed immediately. The SPT has recommended that ‘publication of the NPM’s visit reports should be a matter of course, and that reports should be deemed to be confidential in exceptional cases only.’<sup>6</sup>

Noting the arguments made, we maintain our position that designation of the NPM Coordinator and federal NPM should be guided by genuine and meaningful consultation with civil society.

### **1.3.3 The Office of the Inspector of Custodial Services, Western Australia**

On 17 July 2019, the Western Australian Government advised the Commonwealth Ombudsman that the Western Australian Office of the Inspector of Custodial Services (WA

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<sup>1</sup> Michael Manthorpe, [8th Annual Prisons Conference: presentation by the Commonwealth Ombudsman – implementing OPCAT](#) (9 July 2019), 9

<sup>2</sup> Commonwealth Ombudsman, [Implementation of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\) Baseline Assessment of Australia’s OPCAT Readiness](#) (September 2019), 43, para 3.15

<sup>3</sup> Refugee Council of Australia, [The use of non-judicial accountability mechanisms by the refugee sector in Australia](#), (November 2019), 28

<sup>4</sup> Refugee Council of Australia, [The use of non-judicial accountability mechanisms by the refugee sector in Australia](#), (November 2019), 28

<sup>5</sup> Association for the Prevention of Torture, [National Human Rights Commissions and Ombudspersons’ Offices/Ombudsmen as National Preventive Mechanisms under the Optional Protocol to the Convention against Torture](#) (January 2008), 20

<sup>6</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (UN Doc CAT/OP/ECU/2 16 July 2015), 36



OICS) had been appointed as the NPM for Western Australia's justice-related facilities including police holding cells.

The WA OICS was established in 2000 and has arguably the most developed inspection systems for prisons, juvenile detention centres, prisoner transport, and court security within Australia. The WA OICS also reviews specific aspects of custodial services and the experience of individuals or groups, carries out thematic reviews, and manages an Independent Visitor Service.

The structural independence of the WA OICS is deeply entrenched by having a stand-alone statute, publishing all its reports and inspection standards, maintaining its own budget and staff, and by the Inspector being an officer of Parliament. The legislation underpinning the WA OICS contains strong powers including unfettered access to sites and prisoners, the right to all documentation, the ability to conduct unannounced inspections and protections from reprisal. It is also an offence to hinder the WA OICS.

The WA OICS operates under a continuous inspection methodology with formal inspections of sites at least once every three years, supplemented with regular liaison and Independent Visitor reports, thematic reviews, and through constructive dialogue with the administration.

The WA OICS approaches its relationship with the administration in a non-adversarial manner much in line with the ethos of the OPCAT. Preferring engagement that is positive, proactive, respectful and improvement-focused rather than blame-focused. The WA OICS also regularly identifies areas where the administration is working well.

While it is disappointing that the Western Australian Government did not consult with civil society organisations on the designation of its NPM, we acknowledge that support for the WA OICS as an NPM is widespread.

The Commonwealth Ombudsman's Baseline Assessment acknowledged that:

Of all of the bodies in Australia with an inspection or oversight function, the Office of the Inspector of Custodial Services appears to be the most advanced in terms of OPCAT compliant inspections. It has been considered by other jurisdictions as a regime that could be modelled.<sup>1</sup>

The Australian Human Rights Commission's Interim Report to the federal Attorney-General also noted that:

Some stakeholders noted that certain inspectorate bodies operate near to OPCAT compliance. The Western Australian Office of the Inspector of Custodial Services (WA OICS), for example, was cited by several stakeholders as best practice in Australia, given it is set up by statute and is structurally independent; has a broad

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<sup>1</sup> Commonwealth Ombudsman, [\*Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\) Baseline Assessment of Australia's OPCAT Readiness\*](#) (September 2019), 29 para 2.91

jurisdiction and includes within its scope areas that may not be considered ‘primary’ places of detention, such as prison transport; is preventive in its approach, undertaking regular inspections rather than basing its work on complaints; and tables its reports in parliament that are then made available to the public. Nevertheless, some changes might still be needed to make the WA OICS OPCAT compliant.<sup>1</sup>

We note the WA OICS will need to move to an unannounced inspection model. While it already has the power to do so, on survey of its inspection reports, it seldom does. We also suggest the WA OICS engage more meaningfully with civil society (refer to section 1.5 below: The National Preventive Mechanism and Civil Society Engagement).

### **1.3.4 The Western Australian Ombudsman**

On 17 July 2019, the Western Australian Government advised the Commonwealth Ombudsman that the Western Australian Ombudsman had been appointed as the NPM for Western Australia’s mental health and other secure facilities.

The Ombudsman is an independent officer of Parliament established under the *Parliamentary Commissioner Act 1971 (WA)*. The Ombudsman’s principal functions are:

- receiving, investigating and resolving complaints about State Government agencies, local governments and universities
- undertaking own motion investigations and promoting improvements to public administration
- reviewing certain child deaths and family and domestic fatalities
- undertaking a range of additional functions that fit within the broad category of integrity oversight.

We acknowledge the Western Australian Ombudsman appears to have some level of monitoring experience:

We have most recently expanded our work to include visiting places of out of home care for children, both in government and non-government care and juvenile detention facilities.<sup>2</sup>

Despite this, however, we note with concern that the Western Australian Government did not consult with civil society organisations on the designation of its NPMs. The Western Australian Ombudsman does not present as an obvious choice as an NPM for mental health and other secure facilities. It has not undertaken any own motion reports into these facilities, nor has it yet released any public information on its intended NPM function or visit methodology.

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<sup>1</sup> Australian Human Rights Commission, [OPCAT in Australia Interim Report to the Commonwealth Attorney-General](#) (September 2017), 22 para 36

<sup>2</sup> Chris Field, [The role of the Ombudsman in promoting good governance and protecting human rights](#) (14 August 2018), 4

In its submission to the Australian Human Rights Commission's 'OPCAT in Australia' consultations, the National Mental Health Commission stated that 'in WA the Mental Health Advocacy Service and the Chief Psychiatrist appear to be well suited for this purpose [NPM for mental health].'<sup>1</sup>

We note too that the Chief Psychiatrist remarked his office wanted to be the NPM:

Dr Gibson: ... it is yet to be defined who will be the national preventive mechanisms within WA. We have put our hand up for that, so should we be involved in that, we would have to have more of an inspectorial role.

The CHAIR: So you have put your hand up to be the driver—the lead agency?

Dr Gibson: Yes, the preventive mechanism for mental health in WA. It makes most sense.<sup>2</sup>

Noting the arguments made, we maintain our position that designation of the NPM should remain open to genuine and meaningful consultation with civil society.

## 1.4 Funding the National Preventive Mechanism

In his capacity as UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein remarked that '... many national preventive mechanisms are under-resourced and not empowered to deliver real results.'<sup>3</sup> The Australian NPM is in danger of the same fate should consultations about its resourcing continue to lack transparency and lack input from civil society organisations.

At present, the only public information about resourcing the NPM comes from a 2017 communique produced by the Council of Attorneys-General. In it, they state '... participants supported the ongoing negotiations between jurisdictions in regards to the Inter-governmental Agreement on OPCAT implementation including costs.'<sup>4</sup> It is unclear how far these negotiations have progressed since then.

The only certainty regarding NPM funding is that it has been insufficient thus far. In the 2018–2019 federal Budget '... the Ombudsman was allocated \$1.2 million over four years to fulfil that role – both the dual hat role, the role as the Commonwealth's NPM body, to

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<sup>1</sup> National Mental Health Commission, [Submission by the Mental Health Commissions of Australia on the OPCAT in Australia, Consultation Paper](#) (May 2017), 5

<sup>2</sup> Western Australia, [Joint Standing Committee on the Commissioner for Children and Young People, Inquiry into the monitoring and enforcing of child safe standards, Transcript of evidence, Session Two](#), 8 May 2019, 5 (Nathan Gibson and Sally Talbot)

<sup>3</sup> Zeid Ra'ad Al Hussein, [Is International Human Rights Law Under Threat? Grotius Lecture at the Law Society](#), London (26 June 2017)

<sup>4</sup> Council of Attorneys-Generals, [Communique](#) (1 December 2017), 2

inspect Commonwealth places of detention, and also to perform its role as the coordinator of a national network of bodies within each jurisdiction.<sup>1</sup>

This amount is woefully inadequate when considering the Victorian Ombudsman's estimate that 'an NPM conducting regular inspection of all primary places of detention in Victoria should comprise approximately 12 Full Time Equivalent staff and have an operating budget of approximately \$2.5 million.'<sup>2</sup>

Further, the Commonwealth Ombudsman's Baseline Assessment notes:

When considering resourcing, in the 2017–18 financial year the Office of the Inspector of Custodial Services (Western Australia) employed 20 staff at a cost of \$3.659 million to oversee 17 prisons, five prison work camps, one juvenile detention centre and all court custody centres and police lock-ups that are prescribed court custody centres. The New South Wales Office of the Inspector of Custodial Services has a budget of \$2.824 million, with 13 staff to oversee 40 correctional centres, six transitional centres and residential facilities, six juvenile justice centres, 12 24-hour court cell complexes, 64 court cell locations, 113 escort vehicles and 25 detainee transport vehicles.<sup>3</sup>

In addition, we emphasise that the NPM Coordinator role requires separate funding to the Commonwealth Ombudsman's role as the federal NPM.

On the importance of separately funding the NPM Coordinator role, Professor Richard Harding argues:

[T]he NPM Coordinator must be resourced so that it can play an active leadership role. The tone of the discussion at Government level to this point has suggested that the role is envisaged as not much more than tick-a-box clerical work. The role of NPM Coordinator should be seen as a significant core activity in itself, involving intellectual and policy leadership, and should be resourced accordingly.<sup>4</sup>

We highlight the experience of the UK NPM Coordinator as a precaution for the Australian NPM. In his most recent annual report, he states that 'without government action on increased funding for the NPM Secretariat and much needed legislation, the NPM's future contribution to preventing ill-treatment will not be as significant as I would like it to be.'<sup>5</sup>

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<sup>1</sup> Commonwealth of Australia, [Senate Legal and Constitutional Affairs Legislation Committee, Estimates](#), May 23 2018, 122 (Michael Johnson)

<sup>2</sup> Victorian Ombudsman, [OPCAT in Victoria: a thematic investigation of practices related to solitary confinement of children and young people](#) (September 2019), 30 para 304

<sup>3</sup> Commonwealth Ombudsman, [Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\) Baseline Assessment of Australia's OPCAT Readiness](#) (September 2019), 41 para 3.5

<sup>4</sup> Richard Harding, Australia's circuitous path towards the ratification of OPCAT, 2002–2017: the challenges of implementation (2019), 25(1) *Australian Journal of Human Rights*, 16

<sup>5</sup> United Kingdom National Preventive Mechanism, [Monitoring places of detention: Ninth Annual Report of the United Kingdom's National Preventive Mechanism 1 April 2017 – 31 March 2018](#) (January 2019), 6

This view was also shared by the UN Committee against Torture during its recent periodic review of the UK:

[T]he Committee remains seriously concerned that the resources provided to the NPM, particularly for its secretariat, are clearly inadequate, principally in view of the NPM's complex institutional arrangements.<sup>1</sup>

The significance of the funding issue is well articulated by the Commonwealth Ombudsman itself in its Baseline Assessment:

The journey towards effective OPCAT implementation is not merely a matter of conferring further functions on existing oversight bodies, or renaming existing practices as being in accordance with OPCAT and assuming that these bodies can continue to operate in a business as usual model. In order to have an effective and regular preventive inspection regime, bodies will require new or expanded methods of operation. These will need commensurate increases in resourcing over time in most, if not all, jurisdictions.<sup>2</sup>

We acknowledge that federal–state negotiation will be necessary in considering if the NPM should be funded by the federal government, state and territory governments, or a combination of both. However, we are firmly of the view that the federal government has a responsibility to assist the state and territory governments to meet the resourcing needs of the NPM.

Further, we urge that adequate, ongoing funding be safeguarded through legislation. We note the SPT supported this approach in its report on its visit to Portugal:

The Subcommittee observes that there are no explicit legislative provisions regarding earmarked funding for the national preventive mechanism. In that connection, the Subcommittee emphasizes that the lack of budgetary independence may negatively affect the independent functioning of the mechanism.<sup>3</sup>

## 1.5 The National Preventive Mechanism and civil society engagement

We propose that Australia's NPM bodies should consider formalising their relationships with civil society. The APT has noted this '... is key for the NPM's legitimacy and for enhancing the impact of its preventive work.'<sup>4</sup>

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<sup>1</sup> Committee against Torture, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* (UN DOC: CAT/C/GBR/CO/6 7 June 2019), 4 para 16

<sup>2</sup> Commonwealth Ombudsman, [Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\) Baseline Assessment of Australia's OPCAT Readiness](#) (September 2019), 44 para 3.7

<sup>3</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Portugal undertaken from 1 to 10 May 2018: observations and recommendations addressed to the State party* (UN Doc CAT/OP/PRT/1 3 July 2018), 4 para 14

<sup>4</sup> Association for the Prevention of Torture, [Putting prevention into practice 10 years on: the Optional Protocol to the UN Convention against Torture](#) (2016), 38.

Although OPCAT does not explicitly state the need for NPMs to establish formal partnerships with civil society, there is ongoing recognition from the SPT that this is best practice. In some of its concluding observations to State parties and NPMs over the years, the SPT has noted:

- NPMs should be developed by a public, inclusive and transparent process of establishment, including civil society<sup>1</sup>
- NPMs should explore creative ways of strengthening the human resources at their disposal by, for example, engaging external expertise, setting up internship programs or partnering with universities and civil society<sup>2</sup>
- State authorities should encourage dialogue and better connectivity between the NPM and civil society<sup>3</sup>
- NPMs should take necessary steps to effectively increase their interaction with civil society in the performance of their work.<sup>4</sup>

Unsurprisingly, where an NPM has a formalised partnership with civil society, the SPT has noted this positively. In its report to the NPM of Hungary for example, the SPT welcomed the ‘... cooperation established between the national preventive mechanism and civil society organizations.’<sup>5</sup>

While formal partnerships can take several forms, the two most common have been direct involvement in monitoring of places of detention and participation in a broader advisory capacity. The NPM will of course need to ensure there is ‘clear division and definition of roles and responsibilities’ and ‘special procedures regarding confidentiality and information sharing’ should it establish any such formal arrangements.<sup>6</sup>

The Victorian Ombudsman’s trial OPCAT monitoring of solitary confinement across youth detention settings,<sup>7</sup> has successfully demonstrated that a combination of these two forms of

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<sup>1</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden* (UN Doc CAT/OP/SWE/1, 10 September 2008), 10 para 41(b)

<sup>2</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany. Report to the National Preventive Mechanism* (UN Doc: CAT/OP/DEU/2 29 October 2013), 7 para 29

<sup>3</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand* (UN Doc CAT/OP/NZL/1 28 July 2014), 5 para 17(f)

<sup>4</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Spain undertaken from 15 to 26 October 2017: observations and recommendations addressed to the national preventive mechanism* (UN Doc CAT/OP/ESP/2/Add.1 21 September 2018), 6 para 15

<sup>5</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism* (UN Doc CAT/OP/HUN/R.2 08 December 2017), 6 para 28

<sup>6</sup> Audrey Olivier and Marina Narvaez, [OPCAT challenges and the way forward: The ratification and implementation of the optional protocol to the UN convention against torture](#) (2009), 6(1) *Essex Human Rights Review*, 39-53

<sup>7</sup> Victorian Ombudsman, [OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people](#) (September 2019), 57

formalised partnerships can operate in practice. In her report, she offers the following advice regarding the advisory role:

The Advisory Group should be composed of oversight bodies and civil society members with expertise in mental health, disability, human rights, culturally and linguistically diverse communities and the wellbeing and interests of First Nations peoples, and children and young people. Members of the Advisory Group could be further involved in the NPM's work through participation on inspections, developing inspection tools and materials, choosing themes and locations, and other preventative work, as determined by the NPM.<sup>1</sup>

To this list, we would also add 'experts by experience', particularly within the context of visits. On the value of including 'experts by experience' Jacki Jones, Chief Inspector for the New Zealand Ombudsman, argues:

[A]s Inspectors, we can see how things look; the Experts by Experience can tell us how things feel ... An example is the impact of noise levels. The background sound of jangling keys and shutting doors might seem subtle to us, but to a person with high sensory awareness they can be very distressing.<sup>2</sup>

The New Zealand experience is not an isolated one; the UK NPM body the Care Quality Commission also suggests:

We have found many people find it easier to talk to an Expert by Experience rather than an inspector. This is just one of the benefits of including an Expert by Experience in our visiting and inspection programme.<sup>3</sup>

The Australian NPM should consider the experience of NPMs elsewhere that have included civil society in their inspection role and take up the challenge, as described by Professor Richard Harding:

NPMs need to find means of utilising the insights and skills of civil society in the inspections themselves. Of course, this would entail some kind of initial training, and would make the inspection process more difficult to manage on the ground than simply utilising the designated NPM staff members. But it would seem that this challenge should henceforth be taken on. The additional perspectives that civil society would bring to inspections is potentially an important part of the NPM process.<sup>4</sup>

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<sup>1</sup> Victorian Ombudsman, [\*OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people\*](#) (September 2019), 17 24-25

<sup>2</sup> Office of the Ombudsman New Zealand, [\*Ombudsman Quarterly Review\*](#), 21, (2017), 9

<sup>3</sup> Care Quality Commission, *Monitoring the Mental Health Act in 2016/17, Appendix A: Involving People* (2018), 46

<sup>4</sup> Richard Harding, Australia's circuitous path towards the ratification of OPCAT, 2002–2017: the challenges of implementation (2019), 25(1) *Australian Journal of Human Rights*, 14

## 1.6 Recommendations

During its visit to Australia, we recommend that the SPT and the Working Group on Arbitrary Detention (WGAD) consider:

- affirming that Australia should ensure that the NPM at both the state and federal level rests on a solid legal basis that gives it both the powers and independence required by the OPCAT and the NPM Guidelines
- affirming that if legislation is not enacted, Australia should ensure that civil society be engaged during the process of negotiating the proposed intergovernmental agreement, including by significantly increasing transparency around the process and by providing opportunities for civil society engagement
- affirming that Australia's intention to focus on 'primary places of detention' has no legal effect on the scope of its obligations under OPCAT, which does not allow reservations to be made to the definition of a place of deprivation of liberty, to the scope of the SPT and NPM mandates, or to any other provision
- affirming that Australia should ensure the NPM has full and unrestricted access to all places of deprivation of liberty in accordance with the OPCAT, including those that fall outside of the current list of 'primary places of detention'
- recommending that the ACT Government should ensure that its Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act fully comply with the requirements of the OPCAT, in particular Articles 12 and 14 relating to access to information
- affirming that the Australian Government should ensure that the Commonwealth Ombudsman has both the powers in law that are required by the OPCAT and NPM Guidelines as well as the resources necessary to carry out all aspects of the mandate – including both preventive visits to places of deprivation of liberty and coordination of the Australian NPM
- recommending that Australia should ensure the NPM at all levels receives significant additional and secure funding to carry out the NPM mandate, in line with the estimates published by the Victorian Ombudsman
- affirming that Australia should ensure that NPM designation at all levels of government is an open and transparent process involving, among others, both existing oversight bodies and civil society
- recommending that the Australian Government should consider giving a formal role to the Australian Human Rights Commission as part of the NPM system, given its role as the peak human rights body and its established links with the international system
- recommending that the NPM should consider formalising its relationship with civil society, including through the creation, for example, of an advisory council.

## 1.7 Other useful resources

- Andreea Lachs, [2018 Churchill Fellowship to Investigate Overseas Practices of Monitoring Places of Detention, Winston Churchill Trust](#) (28 November 2019)
- Ben Buckland and Audrey Olivier-Muralt, OPCAT in federal states: towards a better understanding of NPM models and challenges (2019), 25(1) *Australian Journal of Human Rights*



- Rebecca Minty, Involving civil society in preventing ill treatment in detention: maximising OPCAT's opportunity for Australia (2019), 25(1) *Australian Journal of Human Rights*
- Steven Caruana, [Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention Against Torture focus, Report to the Winston Churchill Memorial Trust of Australia – Showcasing learning from Greece, Switzerland, Norway, Denmark, UK, Malta and New Zealand](#), Winston Churchill Trust (9 July 2018)

## CHAPTER 2: IMMIGRATION DETENTION

### Key points

- This chapter highlights key concerns about immigration detention in Australia, Nauru and Papua New Guinea (PNG) that have been documented in public reports, received from people who are or have been detained, and communicated by agencies and individuals including detention visitors, service providers, legal representatives, academics and peak bodies.
- It details general concerns about cruelty and arbitrariness in the immigration detention system, as well as specific concerns relating to the detention of children, suffering and mental illness, inadequate provision of health care, the impact of indefinite detention, and examples of cruel and arbitrary treatment.
- It provides an overview of the absence of effective scrutiny and transparency of immigration detention, including as a result of limits on visits to places of detention and restrictions on oversight, including by media.
- It details serious gaps in the provision of procedural fairness – evidenced by, for example, limits on judicial review and the lack of access to legal advice.
- It shows that while immigration detention has been defined by the Australian Government as being ‘administrative’ rather than punitive, the design, staffing and procedures of many places where non-citizens are deprived of their liberty follow a ‘correctional services’ model. Detainees persistently describe the experience of detention as akin to being punished.

## 2.1 Identifying the places of immigration detention

### 2.1.1 Deprivation of liberty (on land) in Australia

Non-citizens may be deprived of liberty in various places in Australian territory, including:

- Immigration Detention Centres (IDCs)
- Immigration Transit Accommodation facilities (ITAs)  
These were originally introduced as low security ‘transit’ detention facilities where non-citizens were held pending removal. However, they have moved away from their initial purpose and may now also be used to accommodate vulnerable groups (such as families, unaccompanied children and adults with significant health issues) and/or adults deemed to present a ‘high risk’ in high security compounds.<sup>1</sup>
- Alternative Places of Detention (APODs)  
These are ‘closed detention facilities designed for people whose needs cannot be adequately met in other facilities’.<sup>2</sup> Some are purpose-built facilities, while others are general facilities (such as correctional facilities, hospitals and hotels) that have been temporarily designated as places of detention for the purposes of the *Migration Act 1958* (Cth) (the Migration Act).<sup>3</sup>

<sup>1</sup> Australian Human Rights Commission (AHRC), [Risk management in immigration detention](#) (2019), 17-18

<sup>2</sup> Ibid, 18

<sup>3</sup> Ibid. Concerns about the use of APODs are outlined in section 2.5.5.

- places of detention during transport, including in circumstances where people are being transferred between immigration detention facilities, moved between immigration detention facilities and other locations, and immediately prior to and during removal from Australia (whether to countries of origin, a ‘regional processing country’, or elsewhere)
- during medical appointments, court and tribunal appearances and religious ceremonies (for people otherwise subject to immigration detention)
- in transit or ‘international’ zones at the points of entry into Australian territory, including at airports and seaports, and including in situations where people are not immigration cleared<sup>1</sup>
- in the offices of the Department of Home Affairs (the Department), for example when attending to discuss visa matters.

### 2.1.2 Deprivation of liberty at sea

Non-citizens may also be deprived of liberty at sea, both within and outside Australian territorial waters. In particular, asylum seekers may be intercepted and detained in the context of maritime interception operations under Operation Sovereign Borders – Australia’s military-led border security operation. The Australian Government provides very limited information about what it calls ‘on water matters’, including the interception of asylum seeker vessels and detention of people at sea. However, to the extent that detention at sea takes place, such detention should comply with Australia’s international human rights obligations and any place where it does or may occur should be subject to oversight. The SPT and the WGAD are strongly urged to discuss the policy and practice of maritime interception and detention at sea with the Australian Government.

### 2.1.3 Deprivation of liberty in the context of ‘offshore processing’

The Australian Government has indicated that it does not see places of immigration detention in Nauru and PNG as falling within the scope of its obligations under OPCAT,<sup>2</sup> despite the possibility that they may.

Under domestic law, Australian officers have broad powers to exercise authority and control over ‘unauthorised maritime arrivals’ for the purpose of removing them from Australia to Nauru or PNG, including powers to restrain and move people both within and outside Australia using such force as is ‘necessary and reasonable’.<sup>3</sup> Australia’s international obligations should extend at least as far as people are or may be deprived of liberty pursuant to these powers, regardless of whether they are in Australian territory or not.

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<sup>1</sup> For more information, see: Regina Jefferies, [Data quality and the law of refugee protection in Australia](#) (2019) 13 *Court of Conscience* 63; Regina Jefferies, Daniel Ghezelbash, and Asher Hirsch, Assessing protection claims at airports: developing procedures to meet international and domestic obligations (Policy Brief No 9, Kaldor Centre for International Refugee Law) [forthcoming]; Regina Jefferies, Daniel Ghezelbash, and Asher Hirsch, Assessing refugee protection claims at Australian airports: the gap between law, policy, and practice (2020) 44(1) *Melbourne University Law Review* [forthcoming].

<sup>2</sup> Julie Bishop and Senator George Brandis, *Joint doorstep interview* (Canberra, 9 February 2017) [webarchive.nla.gov.au/awa/20170215201101/foreignminister.gov.au/transcripts/Pages/2017/jb\\_tr\\_170209.aspx](http://webarchive.nla.gov.au/awa/20170215201101/foreignminister.gov.au/transcripts/Pages/2017/jb_tr_170209.aspx) <accessed 13 January 2020>

<sup>3</sup> [Migration Act 1958](#) (Cth), section 198AD(3)

Whether Australia's obligations continue after asylum seekers have been transferred to Nauru or PNG is more contentious.<sup>1</sup> As a preliminary point, it is important to note that the situation on the ground in those countries is continuously evolving, and while many people have progressively been released from detention, others remain detained (for example, in the Bomana Immigration Centre in Port Moresby). Further, to the extent that people are still deprived of liberty, Australia cannot dismiss the possibility that its obligations continue merely because detention occurs outside Australia. Despite successive Australian governments purporting that detention in those countries is wholly a matter for them, and that Australia plays only a 'supporting' role, there is ample evidence of significant Australian involvement in offshore detention. In this regard, we note that Australian organs, agents and private contractors have been, and continue to be, closely involved in the detention of asylum seekers in Nauru and PNG. For example, detention facilities have been constructed, financed and maintained by Australia; facilities have been run by private companies pursuant to contracts with the Australian Government; and Australian government officers have had a presence in, and played various roles within, those facilities.<sup>2</sup>

## 2.2 Legal and policy frameworks for immigration detention

### 2.2.1 General law and policy framework

Australia has had a policy of mandatory and automatic immigration detention of all 'unlawful non-citizens' since 1992.<sup>3</sup> This policy affects various groups, including people arriving in Australia without visas (such as asylum seekers) and people already in Australia who have their visas cancelled (for example, for character reasons or some other compliance issue). For these and other groups, detention is, by operation of law, mandatory and not discretionary. As the Chief Justice of the High Court of Australia stated in the case of *Al-Kateb*:

One of the features of a system of mandatory, as distinct from discretionary detention is that circumstances personal to a detainee may be irrelevant to the operation of the system. A person in the position of the appellant might be young or old, dangerous or harmless, likely or unlikely to abscond, recently in detention or someone who has been there for years, healthy or unhealthy, badly affected by incarceration or relatively unaffected. The considerations that might bear upon the reasonableness of a discretionary decision to detain such a person do not operate.<sup>4</sup>

Thus, Australian law does not require any form of individual assessment or exemption from detention. All unlawful non-citizens must be detained and may only be released if they are granted a visa or removed from Australia.<sup>5</sup> Accordingly, release from detention is often a

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<sup>1</sup> Nauru is a State party to OPCAT, PNG is not

<sup>2</sup> For more information, see: Madeline Gleeson, [Protection Deficit: The Failure of Australia's Offshore Processing Arrangements to Guarantee 'Protection Elsewhere' in the Pacific](#) (2019) *International Journal of Refugee Law* [advance edition available online]

<sup>3</sup> An 'unlawful non-citizen' is defined as a person who is not a 'lawful non-citizen'. A 'lawful non-citizen' is defined as a person who 'holds a visa that is in effect': Migration Act, ss 13-14

<sup>4</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*'), 574

<sup>5</sup> Migration Act, ss 189(1), 196(1)

matter of departmental or ministerial discretion. The High Court affirmed in *Al-Kateb* that a person can be held in immigration detention indefinitely.

No procedures are established under Australian law for particularly vulnerable groups – such as children (unaccompanied or otherwise), survivors of torture and trauma, trafficked persons, or people with disabilities – to be screened and identified prior to being placed in detention, and to be provided with alternative accommodation appropriate to their needs. Section 4AA(1) of the Migration Act states that ‘the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort’. However, this affirmation does not translate in practice to all possible alternative accommodation being explored prior to children being detained. Children have routinely been detained in various immigration detention facilities and are released only on the discretion of the Minister (see section 2.5.4).

This policy of mandatory immigration detention particularly affects asylum seekers arriving in Australia by sea without a valid visa (‘unauthorised maritime arrivals’) – and their children, including non-citizen children born in Australia – who are statutorily barred from making a valid visa application unless the relevant Minister exercises his or her non-compellable, non-reviewable discretion to determine that it is in the public interest to ‘lift the bar’ and allow them to do so.<sup>1</sup>

Conditions of confinement in Australian immigration detention centres are not regulated in legislation and have been described by the Australian Federal Court as being subject to a ‘legislative vacuum’.<sup>2</sup>

### **2.2.2 Lack of review of the decision to detain**

Australia’s mandatory immigration detention system is ‘arbitrary’ in the senses described by the WGAD and other international human rights bodies.<sup>3</sup> The relevant and necessary safeguards – including judicial, automatic and regular reviews, to ensure detention remains necessary, proportional, lawful and non-arbitrary – are not enshrined in Australian law or provided in practice. The Migration Act contains no provisions allowing for the Executive’s decision to detain to be reviewed independently by a court or other review body. Indeed, the Migration Act limits the scope of grounds for judicial review of detention, and expressly prevents the release, even by a court, of an unlawful non-citizen from detention, otherwise than in accordance with the terms of the Act.<sup>4</sup>

The Executive’s power to detain has been extensively litigated in Australian courts. The High Court of Australia has repeatedly found the relevant provisions to be constitutionally sound and lawfully<sup>5</sup> applied to detained persons who have challenged their detention. For example, the High Court has found that the Commonwealth Parliament has the power to

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<sup>1</sup> Migration Act, ss 5AA, 46A

<sup>2</sup> For more information, see: Public Interest Advocacy Centre (PIAC), [In poor health: health care in Australian immigration detention](#) (2018), 20

<sup>3</sup> For more information, see: UN Working Group on Arbitrary Detention, [Revised Deliberation No. 5 on deprivation of liberty of migrants](#) (7 February 2018), para 13

<sup>4</sup> Migration Act, s 196(3)

<sup>5</sup> As a matter of Australian, not international, law

detain unlawful non-citizens until they are granted a visa or removed from Australia; that the mandatory detention of unlawful non-citizens is administrative rather than punitive; and that detention does not become unlawful owing to it being protracted, provided there is a legitimating purpose on foot.<sup>1</sup> Decisions by Australian courts have also found that it is not unlawful to detain a visa applicant for the duration of the time taken to resolve their application, even when that takes months or years; nor is it unlawful to detain an individual when their removal cannot be effected within a reasonable period.<sup>2</sup> Mandatory immigration detention has also been found to be lawful regardless of whether conditions are harsh and inhumane.<sup>3</sup>

At present, the Commonwealth Ombudsman serves as an independent review mechanism available to people who have been detained for extended periods. For years, the Ombudsman has prepared detailed reports taking into account the mental and physical health and wellbeing of detained individuals. Many such reports have recommended that people be released from immigration detention; however, there is nothing to compel the Minister to act on these recommendations and in practice they have often been ignored. In addition, the Ombudsman has no authority to inquire into and report on a person's detention until they have been detained for a period of more than two years.<sup>4</sup>

In relation to detention at sea, the possibility of independent judicial review is further limited by the lack of access to people at sea and to information about their detention. In relation to detention in Nauru and PNG, the High Court has ruled that Australian involvement in such detention is not unlawful.<sup>5</sup>

### **2.2.3 Indefinite detention of certain categories of unlawful non-citizens**

The policy of mandatory detention disproportionately impacts certain categories of unlawful non-citizens, including the following:

- (i) Non-refugees who cannot be returned to their countries of origin

There are a number of individuals in detention who have been determined not to be refugees (and have exhausted all avenues of appeal for their asylum claims), but for whom return to their country of origin is not possible, either because it will not recognise their citizenship, or because it is otherwise unable or unwilling to accept their return.

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<sup>1</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; *Plaintiff M96A/2016 v Commonwealth* (2016) 261 CLR 582

<sup>2</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562; *Plaintiff M76/2013 v Minister for Immigration Multicultural Affairs and Citizenship* [2013] HCA 53

<sup>3</sup> *Behrooz v Secretary of the Department of Immigration and Multicultural Affairs* [2003] HCA 299

<sup>4</sup> Migration Act, ss 486L-486N

<sup>5</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1 – A case note summarising the relevant arguments and findings is available at

[www.kaldorcentre.unsw.edu.au/publication/plaintiff-m682015-v-minister-immigration-and-border-protection-ors-2016-hca-1](http://www.kaldorcentre.unsw.edu.au/publication/plaintiff-m682015-v-minister-immigration-and-border-protection-ors-2016-hca-1)

(ii) Refugees who have had their visas refused or cancelled on character grounds

In order to be granted a visa, all individuals must meet the character requirements under section 501 of the Migration Act. A person may fail the character test on a number of grounds including, but not limited to, where a person has a 'substantial criminal record',<sup>1</sup> and where there is a risk that the person would engage in conduct that would pose a threat to the safety of the community.<sup>2</sup>

When a decision is made as to whether it is appropriate to refuse or cancel a visa, all relevant information and circumstances relating to the case, including the impact on the individual, should be taken into account. However, the safety of the Australian public is a primary consideration and a decision to refuse or cancel a visa may be made even where there are other countervailing factors.<sup>3</sup>

Asylum seekers and refugees who have been granted visas may have those visas cancelled under section 501. Subsequent to legislative changes in December 2014, there have been increasing numbers of asylum seekers and refugees who have had their visas cancelled on character grounds due to criminal charges, convictions, or association with criminal gangs. The Ministerial Guidelines issued to decision-makers direct that international *non-refoulement* obligations be taken into account in applying section 501, but also expressly provide that these obligations do not prevent the cancellation or refusal of a visa.<sup>4</sup>

*Case study: Ahmad Shalikhhan*<sup>5</sup>

Ahmad Shalikhhan arrived in Australia by boat with his mother in August 2013 when he was 16 years old. Both were detained on arrival and applied for protection, and were found to be refugees in July 2016. His mother was released from detention in August and granted a 5-year Safe Haven Enterprise Visa in December 2016. Mr Shalikhhan, however, was kept in detention and not granted a visa due to the fact that his case had been referred for possible refusal on character grounds, due to his aggressive behaviour while in detention and a conviction in the Children's Court while he was a minor (for which he had received no formal punishment).

Mr Shalikhhan has suffered significant mental health problems since a young age, which have been exacerbated by his lengthy time in detention as a child and a young adult. The WGAD considered that his ongoing detention constituted a breach of articles 2, 9, 16 and 26 of the ICCPR and was arbitrary.

<sup>1</sup> A person with a 'substantial criminal record' includes a person who has a sentence of a term of imprisonment of 12 months or more: Migration Act, s 501(7)

<sup>2</sup> Migration Act, s 501(6)(d)

<sup>3</sup> Department of Home Affairs, *Direction No. 79 - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*

<sup>4</sup> Ibid

<sup>5</sup> UN Human Rights Council, [Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018: Opinion No. 74/2018 concerning Ahmad Shalikhhan \(Australia\)](#) (UN Doc A/HRC/WGAD/2018/74, 10 January 2018)

Applications to review decisions to refuse or cancel a visa under the character provisions may take several years. During that time, it is departmental policy that non-citizens will not be eligible to be granted a bridging visa and released into the community.

(iii) Individuals with adverse security assessments

Individuals who have been found to be refugees but who have had adverse security assessments (ASAs) by the Australian Security Intelligence Organisation (ASIO) are not eligible to be released from detention without a visa. Yet, Australia also cannot return these individuals to their countries of origin due to its *non-refoulement* obligations. Accordingly, current policy dictates that they be held in immigration detention indefinitely.

In mid-2013, more than 50 individuals were recognised as refugees but remained in detention due to an ASA. They were detained in closed facilities as a matter of government policy – *not* because ASIO assessed that this was necessary to manage any risk the individuals might constitute. ASIO assessments are concerned solely with considerations relating to the grant of visas (if there is an ASA, a visa will be refused); they have nothing to do with the particular risk of the individual.

Due to secrecy surrounding ASAs, refugees who are adversely assessed by ASIO have no right to know of, or respond to, any evidence or allegations against them. They have no right to legal representation if interviewed by ASIO. They have no entitlement to administrative review of these decisions. Judicial review of such decisions is of limited use since the courts will not release the information upon which decisions are based.

Cases involving refugees detained in these situations have been the subject of complaints to the UN Human Rights Committee, which ruled such detention was arbitrary and contrary to Art 9(1) of the ICCPR.<sup>1</sup> The Committee noted that these individuals had been detained for over five years and was not satisfied that Australia had demonstrated that their continuous detention was justified on the basis of their individual risk. Further, the individuals were detained in circumstances where they were unable to know the basis of the specific risk they allegedly posed. The policy and legal framework did not allow them to challenge effectively the basis of their detention.<sup>2</sup>

In 2012, the Australian Government established an Independent Reviewer of Adverse Security Assessments.<sup>3</sup> The Reviewer reviews ASAs made in relation to persons who have been found to be owed protection obligations under international law but who remain in immigration detention because the assessment means they are not entitled to a visa. The Reviewer then advises the Director-General of Security whether they consider the granting

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<sup>1</sup> UN Human Rights Committee, *F.J. et al v Australia* (Communication No 2233/2013, 116<sup>th</sup> sess, UN Doc CCPR/C/116/D/2233/2013, 2 May 2016)

<sup>2</sup> UN Human Rights Committee, *FKAG v Australia* (Communication No 2094/2011, 108<sup>th</sup> sess, UN Doc CCPR/C/108/D/2094/2011, 28 October 2013); Human Rights Committee, *MMM v Australia* (Communication No 2136/2012, 108<sup>th</sup> sess, UN Doc CCPR/C/108/D/2136/2012, 28 October 2013)

<sup>3</sup> The current Independent Reviewer of ASAs is Mr Robert Cornell AO (more information is available at [www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx](http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx))



of the ASA was appropriate, and provides an opinion and recommendations. The Reviewer does not have authority to decide whether a person should be granted a visa or released from detention. The Director-General of Security decides how to respond to the Reviewer's opinion and recommendations, and these decisions are not published.

## **2.2.4 Visa cancellations and subsequent detention (or 're-detention')**

### ***Code of behaviour***

'Unauthorised maritime arrivals' who are released from detention at the Minister's discretion on temporary bridging visas are subject to a Code of Behaviour.<sup>1</sup> Introduced in 2013, the Code must be signed as a precondition for release from detention. The consequences of breaching the Code include visa cancellation and 're-detention', or the suspension or reduction of an asylum seeker's income support payments. The Code allows for visa cancellation on grounds that significantly exceed the grounds for visa cancellation applicable to non-asylum seeker, temporary visa holders.

The Code's expectations range from a requirement to obey the law, to not engaging in 'anti-social or disruptive' activities, which are defined as including spreading rumours, swearing in public, bullying or persistently irritating anyone. All alleged breaches are determined in the first instance by an officer of the Department and the onus of proof is on the asylum seeker to show the breach did not occur.<sup>2</sup> Any person may make an allegation that an asylum seeker has breached the Code. People whose visas are cancelled for a breach of the Code cannot make further applications for bridging visas,<sup>3</sup> meaning their detention after cancellation can be prolonged.

### ***Further visa cancellation powers under the Migration Act***

The Code operates alongside further visa cancellation powers. A visa may be cancelled if the holder is found not to meet the character provisions in section 501 of the Migration Act. Additionally, under section 116 of the Migration Act, the Minister may cancel a visa where 'its holder has not complied with a condition of the visa'<sup>4</sup> or where 'a prescribed ground for cancelling a visa applies to the holder',<sup>5</sup> including the Minister being satisfied that the holder has been convicted of, or *merely charged with*, an offence against a federal, state or territory law, or the law of another country.<sup>6</sup> When a visa is cancelled, the person becomes an unlawful non-citizen and therefore subject to mandatory detention under section 189 of the Migration Act. As with cancellation for breach of the Code, people whose visas are cancelled

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<sup>1</sup> The Code of Behaviour for Subclass 050 Bridging (General) visa holders can be accessed at: [immi.homeaffairs.gov.au/form-listing/forms/1444i.pdf](https://immi.homeaffairs.gov.au/form-listing/forms/1444i.pdf)

<sup>2</sup> Anthea Vogl and Elyse Methven, [We will decide who comes to this country, and how they behave: a critical reading of the asylum seeker Code of Behaviour](#) (2015) 40(3) *Alternative Law Journal* 175

<sup>3</sup> Having signed the Code of Behaviour, asylum seekers are subject to condition 8566 in Schedule 8 of the Migration Regulations, which states: 'If the person to whom the visa is granted has signed a code of behaviour that is in effect for the visa, the holder must not breach the code.' According to item 1305(3)(f) in Schedule 1 of the Migration Regulations, asylum seekers cannot apply for another bridging visa if they previously held one and it was cancelled by reason of a failure to comply with condition 8566.

<sup>4</sup> Migration Act, s 116(b)

<sup>5</sup> Migration Act, s 116(g)

<sup>6</sup> [Migration Regulations 1994](#) (Cth), reg 2.43(1)(p)

on the basis of a criminal charge or conviction cannot make further applications for bridging visas,<sup>1</sup> meaning their detention after cancellation can be prolonged.

Between June 2014 and July 2016, of 499 asylum seekers who allegedly breached the criminal law or Code of Behaviour, at least 159 allegations of a possible breach resulted in asylum seekers having their bridging visas cancelled or not-renewed under 'non-Code' powers, including specifically under section 116(g).<sup>2</sup>

Cancellation of a bridging visa on the basis of a criminal charge or conviction can occur regardless of the seriousness of the offence (which is the third of five secondary considerations to be taken into account).<sup>3</sup> Individuals must respond to a notification of intention to cancel under this power within five days.<sup>4</sup> If the Department decides to cancel the visa, the person is notified and immediately taken into immigration detention. They have only two working days to lodge an application for review to the Administrative Appeals Tribunal (AAT).<sup>5</sup> While a person is provided with information about their right of review, detainees may fail to lodge their application in time, and there is no ability to apply for an extension. This two-day timeframe is unworkable for many individuals given the shock of being re-detained and difficulties getting appropriate advice within this period. Cancellation on the basis of a criminal charge alone also amounts to a clear denial of procedural fairness.

An investigation by the Commonwealth Ombudsman in 2016 revealed that some asylum seekers had remained in detention even after the criminal charges against them were dropped or resolved, including 'instances where the charges against the person were withdrawn, where the person was acquitted of committing any criminal offence, or where a person was convicted and given a good behaviour bond or fine'.<sup>6</sup> In other cases, cancellation decisions were set aside following administrative (merits) review, but the Minister did not grant new bridging visas, resulting in asylum seekers remaining in detention and rendering administrative review ineffectual.<sup>7</sup>

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<sup>1</sup> Item 1305(3)(g) in Schedule 1 of the Migration Regulations

<sup>2</sup> Anthea Vogl, [Crimmigration and refugees: bridging visas, criminal cancellations and "living in the community" as punishment and deterrence](#) in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019), 130

<sup>3</sup> Direction No. 79 – Bridging E visas – Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q), available at: Commonwealth Ombudsman, [Department of Immigration and Border Protection: the administration of people who have had their bridging visa cancelled due to criminal charges or conviction and are held in immigration detention](#) (December 2016), 23-27. See also: [ACH15 v Minister for Immigration & Anor](#) [2015] FCCA 1250 (14 May 2015).

<sup>4</sup> Migration Act, s 121(2); Migration Regulations, reg 2.44

<sup>5</sup> Migration Act, s 338(4)(b); Migration Regulations, reg 4.10(2)(a)

<sup>6</sup> Commonwealth Ombudsman, [Department of Immigration and Border Protection: the administration of people who have had their bridging visa cancelled due to criminal charges or conviction and are held in immigration detention](#) (December 2016), 4-5

<sup>7</sup> *Ibid*, 12-13

## 2.2.5 Lack of access to legal assistance and procedural fairness

### **Legal assistance**

Funded legal assistance for immigration advice to people in detention is minimal. The Australian Government provides some funded support through the Immigration Application Advice and Assistance Scheme (IAAAS). In order to be eligible for assistance to apply for a protection visa, a person must have arrived in Australia lawfully and be 'exceptionally vulnerable as a result of intellectual or cognitive disability, mental illness or other incapacitating health conditions'.<sup>1</sup> However, this assistance is only provided for the purpose of visa applications. If an application is refused, there is no funding to assist with merits review or judicial review.

There is currently no Australian Government-funded legal assistance for people who do not arrive lawfully. Similarly, there is no funding available to assist people who have had their visas cancelled for character reasons to respond to notices from the Department or to seek review in the AAT. Pro bono assistance is offered across the country through community legal centres, not-for-profit organisations and lawyers. However, they are struggling to meet the demand upon their services, especially when this reduction to funding is combined with cuts made nationally to the budgets of legal aid and community legal centres.

Previously, those who arrived by boat without a visa between August 2012 and December 2014 and were in detention could access limited funded legal assistance to lodge applications through the Primary Application and Information Scheme.<sup>2</sup> Again, that support did not extend to assistance with reviews or court applications. In referring to the withdrawal of funded legal assistance, the former Minister for Immigration and Border Protection (now Prime Minister) said: 'Australia's protection obligations do not extend to providing free immigration advice and assistance to those who arrived in Australia illegally'.<sup>3</sup>

Recent changes to the assessment of refugee claims, combined with a reduction in funding for legal assistance, create significant hurdles for asylum seekers and compound existing stress and emotional trauma, leading to detrimental mental health outcomes.<sup>4</sup>

### **Procedural Fairness**

The principles of natural justice do not automatically extend to procedural fairness<sup>5</sup> in the communication of government documents. In the case of *EFX17*, the appellant, a man of Hazara ethnicity from Afghanistan who was detained due to cancellation of his visa on criminal grounds, was delivered documents by the Queensland Department of Corrective

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<sup>1</sup> Department of Home Affairs, *Getting help from the Immigration Advice and Application Assistance Scheme (IAAAS)* (28 February 2019) [immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/protection-866/iaaas](https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/protection-866/iaaas) <accessed 13 January 2020>

<sup>2</sup> Kenny M.A., Procter N. and Grech C. [Mental health and legal representation for asylum seekers in the 'legacy caseload'](#) *Cosmopolitan Civil Societies: An Interdisciplinary Journal*, (2016) 8(2), 84-103

<sup>3</sup> Scott Morrison, [End of taxpayer funded immigration advice to illegal boat arrivals saves \\$100 million](#) (media release, 31 March 2014)

<sup>4</sup> Kenny M.A., Procter N. and Grech C. [Mental health and legal representation for asylum seekers in the 'legacy caseload'](#) *Cosmopolitan Civil Societies: An Interdisciplinary Journal*, (2016) 8(2), 84-103

<sup>5</sup> The principles of procedural fairness are taken to include meaningful access to legal advice, the proper discharge of legal obligations, access to legal proceedings and freedom from arbitrary detention.

Services from the Minister for Immigration and Border Protection explaining the consequences of the cancellation of his visa. However, the appellant was illiterate with ‘extremely limited English-speaking capabilities’. The court found that, although the appellant was unable to read and understand the documents, there was no obligation resting with the Minister to determine, prior to the issue of those documents, that the person served them could understand the materials. Accordingly, the court did not make a finding that procedural fairness had been breached. Such a finding would only have been made if the Minister had determined whether or not someone might be illiterate prior to taking the action.<sup>1</sup>

Applicants who are subjected to the ‘fast track’ review process for protection visas<sup>2</sup> generally have limited access to review of their decisions. The Law Council of Australia has expressed concerns about the priority accorded to administrative efficiency over procedural fairness, and the Refugee Council of Australia has expressed concerns about the potential it creates for hasty, incorrect decision-making.<sup>3</sup>

Where the Minister decides to cancel a visa personally the principles of natural justice do not apply under the terms of the Migration Act. Sections 501(3) and 501(5), relating to the ‘Refusal or cancellation of visa on character grounds’, prevent such decisions from being subject to administrative review.

## 2.2.6 Detention of transitory persons

Asylum seekers and refugees who are forcibly transferred to Nauru and PNG for ‘offshore processing’, and their non-citizen children, become ‘transitory persons’ under the Migration Act.<sup>4</sup> Transitory persons can be brought back to Australia for a ‘temporary purpose’, such as to receive – or accompany someone receiving – medical or psychiatric assessment or treatment in Australia.<sup>5</sup> Australian officers may restrain transitory persons using such force as is necessary and reasonable in order to bring them to Australia, and they are subject to mandatory immigration detention once they are in Australia.<sup>6</sup> Like ‘unauthorised maritime arrivals’, transitory persons are statutorily barred from making a valid visa application unless the relevant Minister exercises his or her non-compellable, non-reviewable discretion to determine that it is in the public interest to ‘lift the bar’ and allow them to do so.<sup>7</sup>

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<sup>1</sup> [EFX17 v Minister for Immigration and Border Protection](#) [2019] FCAFC 230

<sup>2</sup> Migration Act, Part 7AA (‘Fast track review process in relation to certain protection visa decisions’).

<sup>3</sup> Australian Law Reform Commission, [Traditional Rights and Freedoms - Encroachments by Commonwealth Laws: Procedural Fairness](#) (ALRC Report 129, 2016), 406-409; RCOA, [Migration and Maritime Powers Legislation Amendments \(Resolving The Asylum Legacy Caseload\) Act 2014: What It Means for Asylum Seekers](#) (2015).

<sup>4</sup> Migration Act, s 5

<sup>5</sup> Migration Act, s 198B

<sup>6</sup> Migration Act, ss 189(1), 196(1), 198B(2). In [Plaintiff M96A/2016 v Commonwealth of Australia](#) (2016) 261 CLR 582, the High Court of Australia rejected a challenge to the detention of transitory persons in Australia.

<sup>7</sup> Migration Act, s 46B

## 2.2.7 Detention at sea and offshore

Under the *Maritime Powers Act 2013* (Cth) (the Maritime Powers Act), Australian officers have broad powers to detain and exercise control over persons and vessels, including the power to detain people and take them to any place, in or outside Australia, so long as the relevant officer 'is satisfied, on reasonable grounds, that it is safe for the person to be in that place'.<sup>1</sup> Any restraint on the liberty of a person that results from the exercise of these powers is 'not unlawful', and judicial oversight of this restraint is statutorily excluded in all but very limited circumstances.<sup>2</sup>

## 2.3 Historical snapshot of immigration detention<sup>3</sup>

Over the past six years, the overall number of people in immigration detention has reduced, but the average length of time in detention has significantly increased. The demography has also changed: from a population that was predominantly asylum seekers to one that includes more people who have had their visas cancelled on character grounds. Several detention facilities closed, but those that remain operational have become more secure. The increased use of hotels, hospitals and other facilities as APODs is a cause for concern.

Studies into the mental health impact of detention have identified a consistent nexus between prolonged detention and anxiety, depression and suicidal ideation. This nexus has been documented by health researchers over two decades, with detention conditions, uncertainty and isolation conclusively demonstrated as contributing to high rates of mental illness, far in excess of any comparative statistics in the Australian community.<sup>4</sup>

### 2.3.1 Number of people in detention

As at 30 November 2019, 1,449 people were detained in immigration detention facilities in Australia, of which 615 (42 per cent) had been detained following a visa cancellation, 502 (35 per cent) were asylum seekers who arrived by boat, and 332 (23 per cent) had been detained for other reasons (such as overstaying their visa).<sup>5</sup>

As Figure 1 shows, the number of people in immigration detention decreased by more than half in the two years to September 2016, and has remained almost steady at around 1,350 people since then.

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<sup>1</sup> [Maritime Powers Act 2013](#) (Cth) ('Maritime Powers Act'), Part 3, Divisions 7, 8 and 8A

<sup>2</sup> *Ibid*, s 75

<sup>3</sup> All data analysed in this section are obtained from the Department of Home Affairs' Immigration Detention Statistics page, available at: [www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention](http://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention). Detention in Nauru and PNG is dealt with separately in section 2.5.6.

<sup>4</sup> Zachary Steel and Derek Silove, [The mental health implications of detaining asylum seekers](#) (2001) 175 (11-12) *Medical Journal of Australia* 596; Steel et al., [Two year psychosocial and mental health outcomes for refugees subjected to restrictive or supportive immigration policies](#) (2011) 72(7) *Social Science and Medicine* 1149; Louise Newman, [Seeking asylum – trauma, mental health, and human rights: an Australian perspective](#) (2013) 14(2) *Journal of Trauma and Dissociation* 213

<sup>5</sup> Department of Home Affairs, [Immigration Detention and Community Statistics Summary](#) (30 November 2019). These are the most current statistics available as at January 2020. While they capture people detained in IDCs, ITAs and (some) APODs, they do not capture people who may be detained elsewhere (such as at airports, in Department offices, in some APODs, at sea, or in Nauru and PNG).

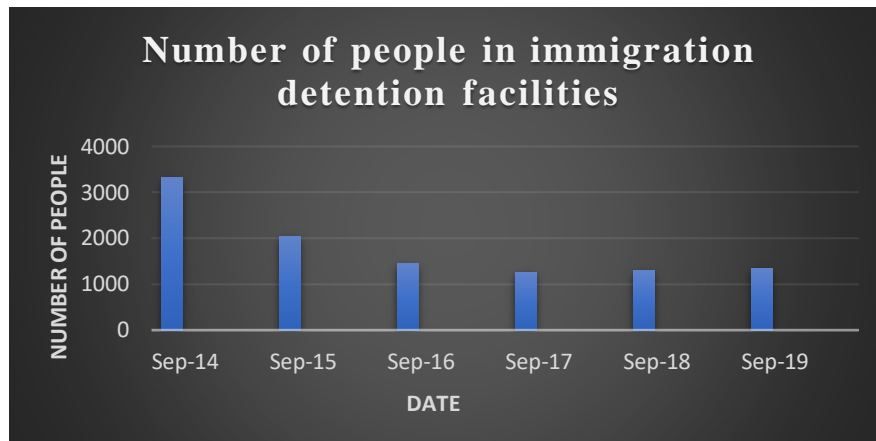


Figure 1: Number of people in immigration detention facilities (September 2014 – September 2019)<sup>1</sup>

### 2.3.2 Average length of time in immigration detention

As Figure 2 shows, the average length of time spent in immigration detention has increased over the past six years. The proportion of people who have spent greater than 730 days in detention increased from 5.8 per cent of the detention population in September 2014, to 22.3 per cent in September 2019. For reporting purposes, the Australian Government groups together all people who have been detained for two years or more. The most recent breakdown of the length of detention beyond two years that is available publicly was published by the Commonwealth Ombudsman in August 2017. The Ombudsman reported that in 2016–17, 122 people had been detained for more than five years, and 24 people had been detained for six years or more.<sup>2</sup> In some cases, people have been detained for more than nine years.

<sup>1</sup> When the graphs and charts in this section were prepared in early December 2019, the latest available statistics on the number of people in immigration detention facilities were from 30 September 2019. Accordingly, in order to provide a proper comparison, these graphs and charts show the number of people in immigration detention facilities in September of each year for the past six years.

<sup>2</sup> Commonwealth Ombudsman, [An analysis of assessments by the Ombudsman under s 486O of the Migration Act 1958 sent to the Minister for Immigration and Border Protection in 2016-17](#) (2017)

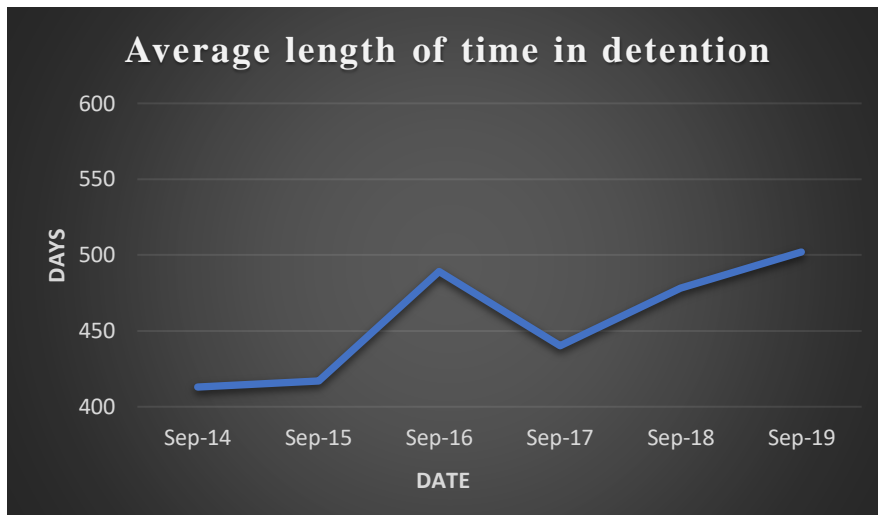


Figure 2: Average length of time in detention (September 2014 – September 2019)

#### Case study: John Basikbasik

In June 2014, the Australian Human Rights Commission (AHRC) published a report about John Basikbasik, who had been in immigration detention since June 2007. The AHRC found the Minister’s failure to place Mr Basikbasik into community detention or another less restrictive form of detention was inconsistent with the prohibition on arbitrary detention in Art 9(1) of the International Covenant on Civil and Political Rights (ICCPR). It recommended he be released and provided with compensation.<sup>1</sup> However, as of January 2020, more than 12 years after he was first detained, Mr Basikbasik remains in detention.

### 2.3.3 Demography and reasons for detention

As at 30 November 2019, 95 per cent of the detention population were adult males. The main countries of nationality were Iran (14 per cent of the population), New Zealand (11 per cent of the population) and Sri Lanka (6 per cent of the population).<sup>2</sup>

In December 2014, following amendments to section 501 of the Migration Act, it became easier for the Department to cancel a person’s visa on character grounds.<sup>3</sup> As a result, between the 2013–14 and 2016–17 financial years, the number of visa cancellations on character grounds increased by over 1,100 per cent.<sup>4</sup> This increase considerably changed the detention population. Whereas in September 2014, 84 per cent of the detention population consisted of asylum seekers who had arrived by boat and only 3 per cent were detained as a result of visa cancellation, by September 2019 these figures changed to 32 and 53 per cent respectively (see Figure 3)

<sup>1</sup> Australian Human Rights Commission, *Basikbasik v Commonwealth of Australia (DIBP)* [2014] AusHRC 77

<sup>2</sup> Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (30 November 2019), 8

<sup>3</sup> *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth)

<sup>4</sup> Department of Home Affairs, *Visa statistics: visa cancellation* (14 October 2019)

[www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation](http://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation) <accessed 13 January 2020>

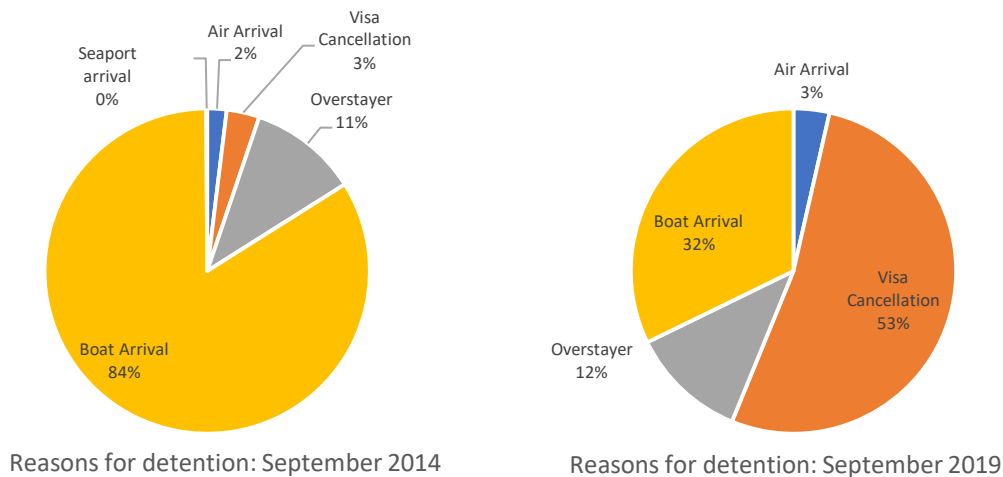


Figure 3: Reason for detention (2014 vs 2019)

### 2.3.4 Immigration detention facilities

In September 2014, 12 immigration detention facilities were operational in Australia. This number reduced to seven facilities by January 2020: four IDCs and three ITAs.<sup>1</sup> The Australian Border Force (ABF) currently lists only one mainland APOD on its website,<sup>2</sup> but others do exist throughout the country (see section 2.5.5).



Figure 4 : Map of operational immigration detention facilities (December 2019)

<sup>1</sup> The detention facilities that closed since September 2014 were: Curtin IDC, located in a remote part of Western Australia and closed in August/September 2014; Sydney Immigration Residential Housing (IRH) in Sydney, closed in April 2016; Wickham Point IDC in Darwin, closed in July 2016; Perth IRH in Perth, closed in December 2016; and Maribyrnong IDC in Melbourne, closed in January 2019.

<sup>2</sup> Northern APOD, at the same address as the Mercure Darwin Airport hotel adjacent to Darwin International Airport in the Northern Territory: ABF, *Immigration Detention in Australia: Detention Facilities* (undated) [www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/detention-facilities](http://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/detention-facilities) <accessed 13 January 2020>



IDCs have a higher percentage of people who have had their visas cancelled on character grounds than other types of detainees (for example, in the Villawood IDC in November 2019, 55 per cent were detained due to their visa being cancelled on character grounds and 17 per cent were asylum seekers who arrived by boat). By contrast, ITAs tend to hold more asylum seekers who arrived by boat (for example, in the Melbourne ITA in November 2019, 50 per cent were asylum seekers who arrived by boat and 26 per cent were detained due to their visa being cancelled on character grounds).<sup>1</sup> However, it is no longer possible to consider ITAs as low or medium security facilities. With major redevelopment and the addition of high security compounds, high fences and restrictions placed on people in detention and their visitors, ITAs have become more securitised and similar to IDCs.

As at January 2020, the Australian Border Force (ABF) only listed one mainland APOD on its website,<sup>2</sup> but others do exist throughout the country (see section 2.5.5).

No.	Facility	Location	Detainees <sup>3</sup>
<b>IDCs</b>			
1.	Villawood	Sydney, NSW	486
2.	Yongah Hill	The small town of Northam, WA	369
3.	Perth	Perth, WA	24
4.	Christmas Island <sup>4</sup>	Christmas Island, Australian territory in the Indian Ocean south of Java, Indonesia	0
<b>ITAs</b>			
5.	Melbourne (MITA)	Melbourne, VIC	303
6.	Brisbane (BITA)	Brisbane, QLD	232
7.	Adelaide	Adelaide, SA	25
<b>APODs</b>			
8.	'Mainland APODs'	Unknown	6
9.	Christmas Island	Christmas Island	4
<b>Total</b>			<b>1449</b>

### 2.3.5 Lack of transparency in providing detention statistics

The monthly immigration detention statistics provided by the Department of Home Affairs are often published with delay and are increasingly insufficient or misleading. For example:

<sup>1</sup> Department of Home Affairs, [Immigration Detention and Community Statistics Summary](#) (31 October 2019), 7

<sup>2</sup> Northern APOD, at the same address as the Mercure Darwin Airport hotel adjacent to Darwin International Airport in the Northern Territory: ABF, *Immigration Detention in Australia: Detention Facilities* (undated) [www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/detention-facilities](http://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/detention-facilities) <accessed 13 January 2020>

<sup>3</sup> Department of Home Affairs, [Immigration Detention and Community Statistics Summary](#) (30 November 2019)

<sup>4</sup> The Christmas Island detention facility closed in October 2018. However, after the passage of 'medevac' legislation in February 2019, the Australian government reopened the facility, claiming it was a necessary step to prevent an increase in boat arrivals. As at January 2020, only a family of four (including two young children) is housed in this facility (see section 2.5.4 for more information). They are housed in the APOD section of the Christmas Island facility (not the IDC section, which remains operational but unoccupied).

- Some of the children in detention are classified as ‘guests’ and excluded from these statistics (see section 2.5.4).
- The Department reports that there are no people detained in the Regional Processing Centres (RPCs) on Nauru and Manus Island in PNG, as both of these former facilities are now closed. At the same time, it does not provide the number of people who remain in Nauru and PNG in other types of accommodation, including in detention. For example, in August 2019, when 53 men were detained in the Bomana Immigration Centre in Port Moresby, the Department continued to report the number of people detained in offshore facilities as zero.
- The Department does not publicly disclose the location, number, type, capacity or current detainee population of all APODs.
- The monthly statistics do not include people detained other than in IDCs, ITAs and the two APODs noted above, such as at airports, at sea, or in Department offices.

## 2.4 The NPM responsible for places of immigration detention

The Commonwealth Ombudsman has been designated as the NPM responsible for places of immigration detention. The Ombudsman has an established history of visiting (since 2004–05) and inspecting (since 2010–11) immigration detention facilities as the Immigration Ombudsman, and has a specific mandate to review the appropriateness of detention for every person detained for more than two years.<sup>1</sup> In assuming its new role as NPM, the Ombudsman has demonstrated a commendable commitment to assessing its level of OPCAT compliance and readiness.<sup>2</sup> However, some concerns about its capacity to fulfil this role in a fully OPCAT-compliant manner remain. In addition to general concerns covered elsewhere in this report (see chapter 1), some additional concerns in the context of immigration detention include:

- whether the Ombudsman’s NPM functions will be limited to ‘primary’ places of detention, which may not include all places where non-citizens are deprived of their liberty in an immigration context
- whether the Ombudsman’s NPM functions will be carried out separately and independently from its existing immigration detention monitoring work
- how the Ombudsman will engage with civil society in its new role, as distinct from its existing relationship with civil society, in light of some detention visitors raising concerns that the Ombudsman is ‘non-responsive’, and that making complaints to it about individual cases or systemic issues ‘never yields anything’
- whether the Ombudsman will be provided with adequate human and financial resources to fulfil its NPM mandate with respect to places of immigration detention, as distinct from its existing inspection functions and its role as the NPM Coordinator – particularly given the number, range, location and distance between places where non-citizens are or may be deprived of their liberty, and the complexity of the task of

<sup>1</sup> Migration Act, s 486O. For more information about the current role of the Ombudsman in monitoring places of immigration detention, see: Madeline Gleeson, [Monitoring places of immigration detention in Australia under OPCAT](#) (2019) 25(1) *Australian Journal of Human Rights* 150

<sup>2</sup> See, for example: Commonwealth Ombudsman, [Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\): Baseline Assessment of Australia’s OPCAT Readiness](#) (September 2019), 20-21, 63-66

establishing an effective and regular preventive inspection regime in these places. There is particular concern that the Ombudsman already has limited capacity to fulfil its mandate with respect to people detained for two years or longer in immigration detention,<sup>1</sup> and that any additional stretching of existing resources may result in both the existing and the NPM functions being negatively impacted.

Additional concerns about the willingness of the Australian Government to cooperate with and respond meaningfully to concerns raised by the Ombudsman are set out in section 2.5.8.

## **2.5 Key issues of concern in relation to immigration detention**

### **2.5.1 Treatment of people in immigration detention**

#### ***General concerns about cruelty, arbitrariness and uncertainty***

People subject to immigration detention in Australia frequently identify cruelty and arbitrariness in the detention system – both in individual cases, and at a systemic level in the policies, practices and underlying culture of immigration detention. Key concerns relate to the use of restraints, limits on contact with family and other support networks, lack of access to meaningful activities, transfers between detention facilities, lack of access to adequate and nutritious food, and frequent roll calls, room checks and pat downs. Some of these concerns are explored in greater detail in the sections below.

People subject to immigration detention also comment on the failure of authorities to provide information and explanations about key circumstances that affect their wellbeing, including:

- why they have been detained
- what (if any) procedures are in place to determine the duration of their detention, and the reasons for ongoing detention
- notice of and reasons for transfers between facilities
- why they feel like they are being treated like criminals and ‘punished’ when they have not committed a crime (for asylum seekers and others detained for reasons other than criminal grounds)
- why they have been deemed to pose a security risk justifying differential treatment (such as the use of restraints)
- how concerns they have raised are being considered, and the outcomes of concerns they have expressed
- access to (or denial of) adequate health care.

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<sup>1</sup> The Refugee Council of Australia (RCOA) has noted that, in fulfilling its statutory mandate to report on people detained for two years or longer in immigration detention, the Ombudsman used to table in Parliament and then make available de-identified and detailed reports of each individual’s circumstances. However, the Ombudsman no longer provides these reports, instead sending the Minister a letter raising any broad concerns, a schedule of the individuals who have been assessed, and any recommendations regarding their detention that it deems appropriate. RCOA notes its concern that ‘if the NPM is not provided with additional resources, transparency will be sacrificed’: RCOA, [Submission on the Implementation of OPCAT in Australia: Second Stage of Consultations](#) (2018), paras 5.7 and 5.8.

Uncertainty can be a significant source of anxiety, particularly for people deprived of their liberty. For example, people in detention have said that the monthly report written for each detainee by Serco officers<sup>1</sup> can add to their anxiety and distress, because they do not know what is written, and worry about possible negative consequences for their legal cases or asylum claims. One mental health agency assisting people detained under these circumstances commented that: 'Clients are struggling to make sense of their experiences and their mental health is adversely affected'. Another observed: 'Clients who are already vulnerable as a result of pre-arrival trauma are becoming even more vulnerable in detention'.

### ***Insecurity***

Immigration detention facilities accommodate mixed cohorts of people – asylum seekers, refugees and other non-citizens detained for non-criminal reasons (or for minor criminal infractions), together with non-citizens with serious criminal histories, including those who have been convicted of violent criminal offences. Co-location of these groups creates tensions inside detention facilities, exacerbates the perception among asylum seekers that their detention is punitive rather than administrative, and encourages correctional-style procedures and practices (often by staff recruited from the criminal justice system).

Organisations assisting asylum seekers in detention advise that their clients have been threatened, bullied and assaulted by detainees with significant criminal histories, and that they limit their movement by staying inside their rooms to avoid conflict. One detention visitor said that they had seen 'major changes' at a certain detention facility since it began to accommodate a higher number of people detained on character or criminal grounds: 'It has become a very violent place with many of the detainees hiding in their rooms for fear of being attacked. I have also seen the bruises and cuts from these attacks.'

### ***Securitisation of immigration detention: 'hardening' of facilities***

People in immigration detention, especially those who have been in long-term detention and remember how facilities used to be run, complain of the introduction of a 'jail' culture inside immigration detention. This 'jail' culture is evidenced by:

- the use of force and restraints (see below)
- the use of 'controlled movement' policies limiting free movement within facilities
- the use of solitary confinement and isolation rooms, which may formally be referred to as 'high care' rooms, or 'behavioural management' facilities<sup>2</sup>
- frequent body and room searches, without warning or explanation<sup>3</sup>
- the tendency for Serco to employ guards with histories in correctional services or the military, and deploy them in a securitised workplace environment governed by correctional-style policies and procedures.

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<sup>1</sup> Serco is the private company contracted by the Australian Government to operate its onshore immigration detention facilities.

<sup>2</sup> Detention visitors have advised that it is important to visit these areas, and also to examine the logs to see how often, and for how long, people are detained there.

<sup>3</sup> According to one detention visitor: 'This denial of any bodily autonomy causes feelings of shame. The men in particular find it difficult to speak about and will not readily divulge to those they do not know or with whom they have not time to develop trust. The humiliation of this handling of their bodies is spirit breaking.'

The ‘hardening’ of facilities is attributed in part to significant changes in the profile of immigration detainees since legislative changes in December 2014, which have led to a growing proportion of the detention population being classified as medium or high-risk. This shifting demography, together with the practice of co-locating mixed cohorts, has presented challenges for the ABF. Three facilities have been ‘hardened’ to manage the increasing numbers of higher risk detainees (the Melbourne ITA, Yongah Hill IDC, and Villawood IDC). Overall, however, the challenge of managing risks in the detention network does not appear to be met in a proportionate way that is appropriate for asylum seekers and other non-citizens without criminal histories.

### ***Risk assessments and placements***

One major concern associated with the securitisation of detention and hardening of facilities is the practice of risk assessments and placements. With the change in detention demographics to include a larger number of people whose visas have been cancelled on character grounds, the way the Australian Government and its detention service providers assess and manage risk also changed. People in detention undergo a risk assessment process and are assigned risk ratings, which can determine where they are placed within both the broader detention network and each facility, as well as the level of restrictions to which they are subjected.<sup>1</sup> People are generally not told their risk rating.

The Australian Human Rights Commission (AHRC) has concluded that current risk management practices ‘can limit the enjoyment of human rights, in a manner that is not necessary, reasonable and proportionate’.<sup>2</sup> It has expressed concern about a number of issues related to risk management, including: inaccurate risk assessments; a lack of sufficient nuance in the risk rating system; routine use of restraints during escorts; the impacts of ‘controlled movement’ policies; the highly restrictive and prison-like conditions of high security compounds; and blanket restrictions on excursions and external visits.

Inaccurate assessments are particularly problematic for people with pre-existing trauma linked to past detention, who may be triggered and have their mental health issues exacerbated by transfers to highly secure, isolated and prison-like facilities or compounds.

### ***Use of force***

In May 2019, the AHRC published the findings of an inquiry into the use of force in immigration detention and during transfers to and from detention facilities.<sup>3</sup> The inquiry identified a number of systemic issues that are consistent with reports received from people currently and formerly in detention and their supporters (including legal representatives). The SPT and WGAD are encouraged to review this report – particularly its findings on the ‘Wickham Point extraction’ complaints, relating to an incident in April 2015 when the Department moved 19 people, mainly family groups and some with young children, from the Wickham Point detention facility to detention facilities in Melbourne.<sup>4</sup>

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<sup>1</sup> While the ABF has stated that it considers a range of factors when determining a person’s placement within the detention network (such as medical needs, family and community links of detainees, and the capacity of the network), risk ratings are the main factor taken into account.

<sup>2</sup> AHRC, [Risk Management in Immigration Detention](#) (2019), 6

<sup>3</sup> AHRC, [Use of Force in Immigration Detention](#) (2019)

<sup>4</sup> Ibid, Ch 11 and 12

In March 2019, the *Guardian* newspaper published secret recordings revealing allegations of excessive force and harassment inside Australian immigration detention facilities, as part of an investigation that uncovered ‘serious concerns about transparency and accountability, as well as allegations of assaults, arbitrary transfers and cover-ups’.<sup>1</sup>

### ***Use of restraints***

Restraints are commonly applied when people are escorted outside detention facilities, for example to attend medical appointments. One source reported: ‘I know of people being handcuffed when being taken to medical appointments and being required to keep the handcuffs on during the consultation.’

Restraints are even applied in cases where there is no apparent reason to consider that an individual poses a risk of absconding or harming anyone, and the authorities do not explain why restraints are considered necessary and reasonable. The use of restraints in these circumstances is humiliating and stigmatising. As reported by a mental health agency working with people who are detained: ‘Handcuffs can be a trigger to someone who has a history of torture and trauma. Clients report experiencing intense physiological responses when triggered.’

Several sources report that people in detention decline to attend external health appointments because the use of restraints is so stressful. For example, one said: ‘Detainees in [facility] are handcuffed when going to dentist appointments – they found this so degrading that they have said they will put up with toothache in future.’ According to another:

If they are taken out for medical appointments, they are handcuffed and subject to the EEP (Enhanced Escort Position) where two guards hold their arms to their backs and one guard may hold their trousers at the waist and walk behind them. The men are taken in this way to public places, outpatients, airports etc. It is disrespectful and debilitating and the people feel shamed, “as though we are criminals”. People refuse medical appointments because of this.

### ***Lack of educational and recreational activities***

Opportunities to participate in education and recreation activities (such as English language classes, gardening, and attending places of worship), both within and outside of detention facilities, are crucial to mitigating detention fatigue and alleviating the stress of detention, particularly when it is prolonged and indefinite.

- (i) Excursions and activities outside of detention

Mental health experts confirm the positive impacts of excursions on their clients. As one agency reported: ‘Clients find going outside of detention regularly helpful for their mental

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<sup>1</sup> Helen Davidson, Secret recordings allege excessive force by guards in Australia's detention centres, *The Guardian* (25 March 2019) [www.theguardian.com/australia-news/2019/mar/25/secret-recordings-allege-excessive-force-by-guards-in-australias-detention-centres](http://www.theguardian.com/australia-news/2019/mar/25/secret-recordings-allege-excessive-force-by-guards-in-australias-detention-centres)

health.’ Visits to places of worship in particular have been described as ‘a source of great comfort’, and essential to ensuring people in detention can freely practice their religion. However, there are reports that excursions (including to places of worship) have ceased entirely since late 2017. The Department and Serco have stated that this change was implemented to manage risks, including the risk of absconding. However, the blanket restriction – applied to all people in detention irrespective of risk – is not a reasonable or proportionate policy response. It is particularly difficult to accept for people who have spent a long time in detention and remember the positive impacts of excursions when they were available. Some people in detention report that they have not been able to go on excursions for ‘years’.

One example of past good practice was the Directed Persons Program, through which certain trusted individuals and organisations were approved to take detainees out for activities and excursions. This program benefited the mental health and wellbeing of detainees, but was unfortunately suspended.

(ii) Activities in detention

The programs and activities currently offered in immigration detention are not sufficiently meaningful. The AHRC has recently raised concerns about this issue, noting it is a source of frustration for detainees and that the associated boredom is a contributing factor to heightened tensions in detention facilities.<sup>1</sup> People in immigration detention who previously spent time in prison express frustration that at least in prison they had opportunities to study and work. As detention service providers are not contractually obligated to deliver activities on weekends, there are even fewer activities available during those days.

People in detention also express frustration that the few activities that are provided are not interesting or mentally stimulating. Some of the men transferred to Australia from PNG survived the long period in detention offshore by relying on visual arts and music. It has been reported that they had to hand in their musical instruments to be kept in property in Australia, have not been given proper art supplies, and are expected to attend art classes that mainly consist of colouring-in.

***Treatment of LGBTIQ-identifying detainees***

Some concerns have been raised about the detention experience for LGBTIQ-identifying individuals, who may be particularly vulnerable in an immigration detention environment and exposed to greater risks of violence, ill-treatment, sexual abuse, harassment and bullying. Current measures to accommodate transgender detainees, respect the rights of same-sex couples to privacy and family life, and protect LGBTIQ-identifying people from mistreatment, are reported to be inadequate. Australia could benefit from advice from the SPT and WGAD on these matters, and the sharing of international best practices.

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<sup>1</sup> AHRC, [Risk Management in Immigration Detention](#) (2019), 64-65

## 2.5.2 Inadequate provision of health care

### ***‘Legislative vacuum’ around provision of health care to people in detention***

The Migration Act and Migration Regulations do not include any provisions requiring that reasonable health care be provided in immigration detention, nor a guaranteed right to reasonable medical treatment. While Regulation 5.35 of the Migration Regulations refers to medical treatment of people in detention, it does so in the context of the Secretary’s power when there is serious risk to a person’s life or health. There is no regulation about the standard of medical care more generally. This is in contrast to the laws that ensure people in prisons have a right to reasonable health care.<sup>1</sup>

### ***Physical and mental health care in detention facilities in Australia***

The Department is responsible for the health care of people in immigration detention in Australia. It has contracted International Health and Medical Services (IHMS), a subsidiary of International SOS, to provide primary health care at clinics inside detention facilities. To see a doctor or a nurse at the IHMS clinic, people in detention need to submit a written request. Often there are significant delays between submitting a request and an appointment.

Some specialist appointments are provided inside detention facilities. When access to an external specialist is required, IHMS makes a referral. Civil society has raised serious concerns about the length of time people are forced to wait for external specialist care, without being notified of the reasons for delay or a likely timeframe. One source reported that these delays contributed to ‘a frequently-said statement by detainees that “no one cares in here”’. Another source stated: ‘Clients generally report that their medical issues are not adequately addressed, and they are only provided Panadol.’<sup>2</sup>

The provision of health care in immigration detention has been the subject of many reports over the years,<sup>3</sup> which identify common systemic issues, including:

- inadequate oversight of IHMS by the Department
- serious deficiencies in the delivery of care to people at risk of self-harm (see below)
- cost-cutting at the expense of quality of care
- other issues indicative of broader failings in the provision of health care in the immigration detention network, such as the ‘routine denial of antiviral therapy for detainees living with hepatitis C’.<sup>4</sup>

Another significant issue is the inadequate record sharing between medical providers when someone is transferred from Nauru or PNG to Australia (especially from PNG, as the health care provider in that country is no longer IHMS), or when someone is transferred from prison to immigration detention. These inadequacies result in significant and unnecessary delays and disruptions to continuity of care. In some cases, people have not received vital medication, and other important treatments have been disrupted. As stated by one source:

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<sup>1</sup> PIAC, [In poor health: health care in Australian immigration detention](#) (2018)

<sup>2</sup> A low strength analgesic that can be purchased without prescription in retail shops.

<sup>3</sup> See, for example: PIAC, [In poor health: health care in Australian immigration detention](#) (2018); Australian National Audit Office, [Delivery of health services in onshore immigration detention](#) (2016)

<sup>4</sup> Ibid



When transferred, medical records do not follow the detainee. This delays medical treatment for up to several days in some cases. Clients with mental health issues are being refused their prescribed medications. They are required to see a new doctor to be prescribed a medication that they were receiving at the other detention centre.

Finally, as noted above, the use of mechanical restraints on the way to and from, and during, medical appointments, has led some people to decline treatment as they do not want to be seen in public with handcuffs. There are also reports that people are not afforded adequate privacy during medical appointments because of the presence of security guards during consultations or within hearing distance.

### ***Additional concerns relevant to the management of mental health***

The impacts of Australia's immigration detention policies on the mental health of people in detention are profound. While select issues are highlighted below, the SPT and WGAD are encouraged to meet with mental health experts in Australia to discuss their concerns in full.

#### (i) Food and fluid refusal

Hunger strikes are a common occurrence in immigration detention centres.<sup>1</sup> Under the Migration Regulations, the Secretary of the Department can direct that non-consensual medical treatment be used on a person in immigration detention.<sup>2</sup> According to departmental policy, this authorisation is only invoked: if the detainee fails to give, refuses to give, or is not reasonably capable of giving, consent to medical treatment; and when there will be a serious risk to the detainee's life or health.<sup>3</sup>

While the Department has developed some good guidelines and policy with respect to the management of food and/or fluid refusal, there have been cases where directions have been given to enforce medical treatment. Such a forced treatment interferes with an individual's rights of autonomy and self-determination and is inconsistent with the Declaration of Tokyo and Declaration of Malta, both of which prohibit the use of non-consensual force-feeding of a person undertaking food/fluid refusal while that person is mentally competent.<sup>4</sup>

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<sup>1</sup> For example, in January 2019, detainees across the Australian detention network conducted a hunger strike to protest conditions in detention: 'Hundreds go on hunger strike at Melbourne detention centre', *SBS News* (9 January 2019) [www.sbs.com.au/news/hundreds-go-on-hunger-strike-at-melbourne-detention-centre](http://www.sbs.com.au/news/hundreds-go-on-hunger-strike-at-melbourne-detention-centre); Rebekah Holt, 'Melbourne and Sydney immigration detention centres join hunger strike', *Crikey* (22 January 2019) [www.crikey.com.au/2019/01/22/detention-centres-hunger-strike](http://www.crikey.com.au/2019/01/22/detention-centres-hunger-strike)

<sup>2</sup> Migration Regulations, reg 5.35

<sup>3</sup> Department of Home Affairs, *19/12/2019 – Policy – Migration Act – Detention health* (policy document, not publicly available).

<sup>4</sup> [Guidelines for physicians concerning torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment](#) (Declaration of Tokyo); [World Medical Association Declaration of Malta on Hunger Strikers](#). For more information, see: Mary Anne Kenny, Derrick Silove and Zachary Steel, [Legal and ethical implications of medically enforced feeding of detained asylum seekers on hunger strike](#) (2004) 180(5) *Medical Journal of Australia*, 237

(ii) Women

Concerns have been raised about the case management of women in detention with mental health concerns, including those on ‘high watch’ or suicide watch. Detention visitors have expressed concern that these women may be monitored at close-range by male guards, which can be particularly triggering for those who have experienced sexual assault.

(iii) Self-harm and suicides in detention

A study of the 12-month period from 1 August 2014 to 31 July 2015 showed that 949 episodes of self-harm were recorded as occurring across the Australian asylum seeker population in that period alone, with rates highest among asylum seekers in offshore and onshore detention facilities, and lowest among asylum seekers in community-based arrangements.<sup>1</sup> In detention, various concerns have been raised about mismanagement or inappropriate responses to mental health issues, including a ‘failure to properly physically and psychologically treat suicidal asylum seekers following unsuccessful attempts at life, after which new injuries are sustained’.<sup>2</sup>

According to the Australian Border Deaths Database, there were eleven deaths in immigration detention<sup>3</sup> in Australia in the six-year period from 2014 to 2019, of which six are recorded as suicides or suspected suicides, and a further two are described as ‘not suspicious’ or do not list a cause of death, and may include suicides.<sup>4</sup> A further seventeen asylum seekers and refugees living in the community also died in this period from apparent or suspected suicide, with previous detention suggested as a factor in some of their deaths.

***Physical and mental health care in detention facilities in Nauru and PNG***

Historically, the medical care in offshore detention sites has been inadequate to meet the needs of seriously ill asylum seekers and refugees, many of whom have been detained for lengthy periods.

IHMS provides health care services on Nauru. It also provided health care services on Manus Island (PNG) until 2017, when this service was transferred to Pacific International Hospital (a local provider) and torture and trauma counselling ceased. The provision of health care in Nauru and PNG has been scrutinised in several reports by national and international human rights organisations, and has been the subject of a series of parliamentary inquiries.<sup>5</sup> The consistent findings are that the prolonged detention, conditions of detention and

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<sup>1</sup> Kyli Hedrick, Gregory Armstrong, Guy Coffey and Rohan Borschmann, [Self-harm among asylum seekers in Australian immigration detention](#) (2019) 8 *SSM Population Health* 100452

<sup>2</sup> PIAC, [In poor health: health care in Australian immigration detention](#) (2018), 24

<sup>3</sup> This number includes people who died in hospital after attempting suicide in immigration detention, and one man with a history of attempting suicide who died after escaping from the Christmas Island IDC. It does not include people who died in Australian hospitals following transfer from Nauru or PNG.

<sup>4</sup> The [Australian Border Deaths Database](#) maintains a record of all known deaths associated with Australia’s borders since 1 January 2000. As at January 2020, the database contains summary details of 2,026 deaths.

<sup>5</sup> See, for example: RCOA and Amnesty International, [Until when: the forgotten men on Manus Island](#) (2018), 22-35 (in relation to PNG); and RCOA and Asylum Seeker Resource Centre, [Australia’s man-made crisis on Nauru: six years on](#) (2018), 4-13 (in relation to Nauru).

substandard health care all contributed to the significant decline in mental and physical health of this group.

The climatic and environmental conditions in Nauru and PNG also create particular vulnerabilities for refugees who are unaccustomed to the heat and humidity, including skin conditions such as boils which require ongoing treatment that refugees are often unable to access. Those detained offshore are susceptible to tropical illnesses such as malaria,<sup>1</sup> as well as to gastro-intestinal disorders due to contaminated food and water and poor tolerance to microbial presence in food and water. In 2014, reports emerged of an outbreak of dengue fever in Nauru,<sup>2</sup> and in April 2019, there were reports of an outbreak of typhoid amongst refugees on Manus Island.<sup>3</sup> Many refugees have compromised immune systems as a result of prolonged detention and their journeys to Australia.

In addition to the general and systemic concerns about the lack of adequate health care identified above, there have been acute concerns for the safety and wellbeing of specific individuals. Before February 2019, decisions about whether to approve medical evacuations of these people to Australia (or elsewhere) were made by public officials with no medical expertise. Delays in this decision-making process and resistance to approving evacuations to Australia resulted in deteriorating conditions and even death.<sup>4</sup> Accordingly, since 2016, legal representatives began to resort to using the courts to secure injunctions forcing the government to evacuate to Australia people in urgent need of medical or psychiatric treatment or assessment.<sup>5</sup>

In February 2019, following an intensive public campaign focusing on the grossly inadequate level of health care provided to men, women and children offshore, all children were removed from Nauru and 'medevac' legislation was passed, granting doctors greater power to make medical transfer requests.<sup>6</sup> However, this legislation was repealed in December 2019, reverting to the previous system and its many deficiencies.

Many of the people transferred to Australia from Nauru or PNG for medical treatment under the 'medevac' legislation are held in closed immigration detention facilities,<sup>7</sup> despite having experienced a significant decline in mental health (requiring treatment) as a result of

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<sup>1</sup> Eoin Blackwell, 'Malaria on Manus "endemic"', *Sydney Morning Herald* (18 August 2011)

[www.smh.com.au/world/malaria-on-manus-endemic-report-20110818-1izo0.html](http://www.smh.com.au/world/malaria-on-manus-endemic-report-20110818-1izo0.html)

<sup>2</sup> Matt Siegel, 'Dengue outbreak at Australian detention centre sparks fresh concerns', *Reuters* (17 April 2014)

[www.reuters.com/article/us-australia-immigration-nauru/dengue-outbreak-at-australian-detention-centre-sparks-fresh-concerns-idUSBREA3G02Z20140417](http://www.reuters.com/article/us-australia-immigration-nauru/dengue-outbreak-at-australian-detention-centre-sparks-fresh-concerns-idUSBREA3G02Z20140417)

<sup>3</sup> 'Reports of suspected typhoid outbreak on Manus Island', *SBS News* (19 April 2019)

[www.sbs.com.au/news/reports-of-suspected-typhoid-outbreak-on-manus-island](http://www.sbs.com.au/news/reports-of-suspected-typhoid-outbreak-on-manus-island)

<sup>4</sup> See, for example: Coroners Court of Queensland, *Findings of inquest into the death of Hamid Khazaei* (30 July 2018), 3 (para 14); Melanie Vujkovic, 'His burns were "very survivable" but Omid Masoumali died slowly over two days', *ABC News* (1 March 2019) [www.abc.net.au/news/2019-03-01/inquest-death-iranian-refugee-omid-masoumali-burns/10854742](http://www.abc.net.au/news/2019-03-01/inquest-death-iranian-refugee-omid-masoumali-burns/10854742)

<sup>5</sup> Kaldor Centre, *Medical transfer proceedings* (2019) [www.kaldorcentre.unsw.edu.au/medical-transfer-proceedings](http://www.kaldorcentre.unsw.edu.au/medical-transfer-proceedings) <accessed 18 December 2019>

<sup>6</sup> *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth), Sch 6. These provisions were [repealed](#) in December 2019.

<sup>7</sup> By contrast, a significant number of the people who were transferred under the previous system are living in the community.

their prolonged offshore detention. Many have been waiting a long time to receive treatment. Mental health issues are commonly managed by medication or not at all. Moreover, the current level of care provided to this group is reported as being not appropriately adapted to their specific vulnerabilities – notably, as a result of being treated in a health system that dealt with most mental health issues as ‘behavioural’ issues (in PNG, for example), or the fact that many of their health issues are chronic and have been left untreated for years.

### **2.5.3 Forced transfers within the detention network and deportations**

#### ***Transfers within the detention network***

People in immigration detention are subject to re-location between facilities abruptly, without explanation, and without regard for their family ties and community support or ongoing legal and medical matters. Individuals held in detention for many years may be subjected to several transfers during this time.<sup>1</sup> According to one organisation:

There have been ongoing difficulties in locating detainees who are clients as they are regularly transferred ‘on a whim’ without notice interstate. I have a client who in the last four months has been transferred from Melbourne to Perth and then back to Melbourne. The reason for the transfer is unknown.

Given the distances between facilities, the usual consequence of relocation is that a person who is detained can no longer be visited by their spouse, children, and other people with whom close contact is important. The separation of family members is distressing to both the person who is detained and their family members, may damage family functioning, and can perpetuate previously experienced trauma. In relation to family separation experienced by people transferred from Nauru or PNG to Australia in particular, one mental health expert critiqued the practice of placing husbands in detention while their wives are given a community placement, saying: ‘Not only is the separation of vulnerable groups detrimental, but also when a spouse is required to visit the [detention facility], it can re-trigger their previous detention experiences and limit the opportunity for recovery.’

The perception among many detainees is that transfers are punitive and used as disciplinary measures.<sup>2</sup> Transfers can also result in people being moved to the bottom of the public health waiting list for essential medical procedures in the health system of a different state.

Beyond the fact of these transfers, there are concerns about the way in which they are carried out: often without notice, before dawn, leaving no opportunity for the person being moved to notify key people, and unsettling the entire detention population. The Department states:

Where a detainee is not aware of a prospective transfer (i.e. ‘involuntary’ transfers), transfer operations are usually conducted at short notice to the detainee(s). Involuntary transfers may provide enough time for the detainee(s) to

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<sup>1</sup> AHRC, [Risk management in immigration detention](#) (2019), 27

<sup>2</sup> Ibid, 63

collect their property, however, this is secondary to the safety and security of the transfer operation, the property will follow the detainee(s) in this circumstance.<sup>1</sup>

However, reports from civil society paint a different picture. As one states:

People in detention are transferred to other detention centres without notice. The transfers usually occur at night or early morning and the person in detention is woken up and told to pack their things. There are up to six guards involved in this process. People in detention are not given adequate time to pack their personal effects and are transferred with just the clothes they are wearing. It can take months for a detained person's effects to arrive at their new facility. ... I had to make a complaint to the [Department] to speed up the transfer of my client's personal effects.

Many detention visitors and legal representatives recount experiences of applying to visit a particular individual, only to arrive at the facility and be told that the person has just been transferred. For example, according to one legal representative:

We have encountered a number of difficulties in regards to the transfer of clients interstate, separating them from legal assistance and families. In addition, clients may be transferred without prior warning to lawyers meaning that lawyers may have to go through extensive efforts to find the new whereabouts of clients. It often occurs at late hours and can appear deliberate to clients though advised it's for operational reasons by the Department of Home Affairs.

The AHRC has raised concerns that, even during its own inspections in one year (which were completed within the space of two months), they encountered several people more than once in different detention facilities.<sup>2</sup> It also identified a number of issues that are consistent with the feedback received from civil society, including the lack of notice of transfers, limited time to pack belongings and notify family members and legal representatives, lack of knowledge about where people are being transferred to until the transfer is underway or they have arrived, and lack of knowledge about why transfers occur.<sup>3</sup> The AHRC noted that it:

... appreciates that the transfer process involves significant risk management considerations, and there may be some (exceptional) circumstances in which the practices listed above are warranted. However, the fact that these practices may be used with such regularity suggests that the risk assessments informing the transfer process are not sufficiently tailored to individual circumstances. These practices therefore may not be appropriately justified in all cases.<sup>4</sup>

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<sup>1</sup> Department of Home Affairs, [Home Affairs response to the Australian Human Rights Commission \(AHRC\) Risk Management in Detention Report 2019](#) (2019), 3

<sup>2</sup> AHRC, [Risk management in immigration detention](#) (2019), 11

<sup>3</sup> Ibid, 10-11

<sup>4</sup> Ibid, 28

The lack of knowledge about where people are being moved to is reported to be particularly traumatising for people who have been transferred from Nauru or PNG (and fear being returned), or are on 'return pathways' (and fear being deported to their countries of origin). Asylum seekers with histories of torture and trauma are particularly affected by transfer processes, which may replicate previous traumatic experiences. In addition, transfers disrupt established relationships with trauma counsellors.

*Case study: Arbitrary transfers of mentally ill asylum seekers*

In October 2019, the *Guardian* newspaper reported that the ABF had removed a seriously mentally ill young asylum seeker from a detention centre in Melbourne, where a youth mental health facility was preparing to treat him, and flown him to Yongah Hill IDC on the other side of the country. There, he was admitted to hospital emergency or psychiatric departments six times, before finally being flown back to Melbourne almost a month later. His transfer away from Melbourne reportedly occurred 'without warning and without consulting the external health professionals who were arranging to have him readmitted to the Melbourne facility'. Commenting on the case, Sister Brigid Arthur, cofounder of the Brigidine Asylum Seekers Project, described the practice of transferring asylum seekers within the detention network as 'arbitrary', 'inexplicable' and involving 'a level of cruelty', adding:

The arbitrary nature of it strikes fear into most of the detainees because they never know when they're going to be moved. It's always without warning and usually in the middle of the night or very early morning. So, one has to ask, is it a measure to extract compliance from people so they're too frightened to raise issues or in any way rock the boat? If it is, then that's immoral. It's a blight on our democracy.'<sup>1</sup>

In 2018, another young asylum seeker, Sarwan Aljhelie, committed suicide in detention after being transferred to Yongah Hill from Villawood in Sydney, away from his family and three children, without warning or explanation. According to his family, he had attempted suicide in detention several times before, including once three weeks earlier when 'instead of being placed on 24/7 watch, Aljhelie was returned from hospital to his room where guards goaded him about not doing it properly.'<sup>2</sup>

### **Removals from Australia**

Once an application for a visa in Australia has been refused and fully determined at all levels, and any valid visa has expired, an individual becomes an 'unlawful non-citizen'. Section 198 of the Migration Act provides for the removal of unlawful non-citizens in particular circumstances 'as soon as reasonably practicable'.

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<sup>1</sup> Helen Davidson, 'Mentally ill asylum seeker sent away from promised treatment on 5,400km Qantas round trip', *The Guardian* (17 October 2019) [www.theguardian.com/australia-news/2019/oct/17/mentally-ill-asylum-seeker-sent-away-from-promised-treatment-on-5400km-qantas-round-trip](http://www.theguardian.com/australia-news/2019/oct/17/mentally-ill-asylum-seeker-sent-away-from-promised-treatment-on-5400km-qantas-round-trip)

<sup>2</sup> Helen Davidson, 'Suicide in detention: family wants answers after Iraqi man dies after four attempts', *The Guardian* (11 September 2018) [www.theguardian.com/australia-news/2018/sep/11/sarwan-aljhelies-family-demand-answers-after-suicide-in-immigration-detention](http://www.theguardian.com/australia-news/2018/sep/11/sarwan-aljhelies-family-demand-answers-after-suicide-in-immigration-detention)

The largest proportion of unlawful non-citizens removed from Australia are bridging visa overstayers and visitor visa overstayers, the majority of whom leave voluntarily with only minimal contact with the Department. However, some failed asylum seekers may be unwilling to participate in voluntary removal procedures – especially those who continue to fear for their safety upon return, feel that their case has not been adequately considered, may be suffering from a mental illness, and/or have family in Australia who have been recognised as refugees and from whom they may be permanently separated.<sup>1</sup> These people will be subject to forced return, and may be detained both prior to – and during – their removal from Australia.<sup>2</sup> As with transfers between detention centres, individuals who are taken from detention and removed from Australia often receive very little notice of the removal. The Department requires that all detainees departing Australia be cleared as fit to travel. This is a bare minimum requirement, and does not discharge the Department’s obligation to ensure deportations are conducted humanely and appropriately, with the least restrictions possible and regard to the individual circumstances of the person being removed from Australia.

Detention during removal can be traumatic. According to one source:

I know of one story when a man was being deported against his will back to [country of origin]. He was handcuffed, gagged and escorted by two or three Serco guards onto the plane. He managed to get permission to go to the toilet, ran up to the front of the plane removed his gag and told the passengers what was happening. Consequently, he was removed from the plane and returned to detention. When he was deported the next time, he was put under sedation before being put on the plane. Friends and lawyers here only knew about his removal once he was back in [country of origin].

It can be difficult to get access to – or information about – people who have been deported, especially if they face arrest and detention upon arrival in their countries of origin. Accordingly, independent and regular oversight of deportations is essential.

#### **2.5.4 Detention of children**

##### ***Number of children in detention according to formal statistics***

The number of children in immigration detention facilities started to decline from late 2013. It has continued to remain very low (usually five or fewer) in recent years, which is a very positive development. However, despite the reduction in the number of children in immigration detention, the legal framework providing for the detention of children (including unaccompanied minors) remains in place, with the Migration Act still prescribing mandatory detention for all non-citizens who arrive in Australia without a valid visa. Of

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<sup>1</sup> See, for example, the case of Thileepan Gnanewaran: Ben Doherty, ‘Wife’s despair as asylum seeker deported by Australia is arrested in Sri Lanka’, *The Guardian* (19 July 2018) [www.theguardian.com/australia-news/2018/jul/18/wife-of-asylum-seeker-deported-by-australia-in-defiance-of-un-speaks-of-despair](http://www.theguardian.com/australia-news/2018/jul/18/wife-of-asylum-seeker-deported-by-australia-in-defiance-of-un-speaks-of-despair)

<sup>2</sup> Data obtained by the Lowy Institute shows that Australia has increased the number of forced returns of asylum seekers between 2010 and 2016: Jay Song and Neil Cuthbert, *Removal of failed asylum seekers in Australia: a comparative perspective* (Lowy Institute, 27 March 2017)

further concern is the fact that the Minister is also the guardian of unaccompanied child migrants, meaning there is no independent body advocating for and protecting the rights of detained unaccompanied child migrants.<sup>1</sup>

In Australia, children are not placed in IDCs, but they can be placed in ITAs and APODs. While children are no longer detained in Nauru or PNG, there are young men who came as unaccompanied minors and remain in those places.

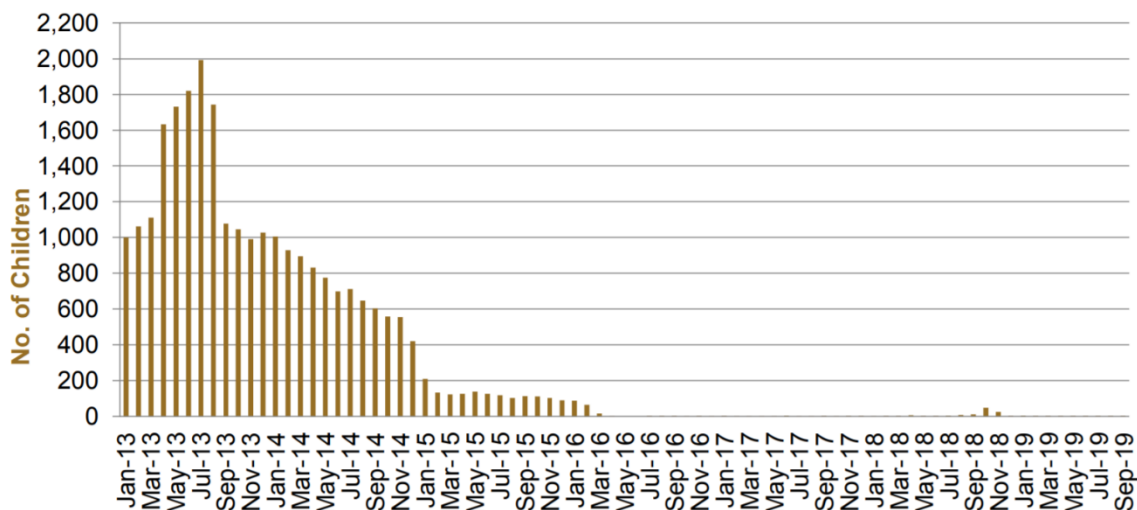


Figure 5: Children in immigration detention facilities over the years

### **Children held in immigration detention facilities as ‘guests’**

A number of children are in immigration detention facilities as ‘guests’, accompanying one or both of their parents, and therefore do not appear in official statistics released by the Department. These children are considered to be lawful non-citizens. Previously, concerns about this practice were raised in relation to the children of parents who received adverse security assessments (see section 2.2.3). After those cases were resolved, it appeared that the government might have suspended this practice (although this is hard to verify). Regardless, reports indicate that it has now been resumed. Best practice would be for families with children to be accommodated together in low security residential arrangements, wherever possible, rather than children joining parents in closed immigration detention.

<sup>1</sup> [Immigration \(Guardianship of Children\) Act 1946](#) (Cth), s 6



*Case study: Huyen Thu Thi Tran and Isabella Lee Pin Loong*

The WGAD adopted an opinion in May 2019 in relation to a Vietnamese child who was born in detention in March 2018 and continues to remain there as a 'guest' with her mother, an unlawful non-citizen. The WGAD concluded that the detention of the child is 'in contravention of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the [ICCPR], is arbitrary and falls within category I'.<sup>1</sup> It recommended that the Australian Government release both the mother and child and 'accord them an enforceable right to compensation and other reparations, in accordance with international law'.<sup>2</sup> As of December 2019, this recommendation has not been implemented.

**General concerns about children in immigration detention**

When children are held in closed detention settings (including APODs), common challenges have included the lack of access to appropriate services, uncertainty about detention timeframes, overcrowding, and exposure to mentally ill adults. Detention environments, even those that are low security, are not conducive to healthy child development, and they are not suitable for families.

Organisations working with children currently in community placements in Australia, but with previous experiences of immigration detention offshore, have reported: 'The ongoing sense of uncertainty for the families and children in community placement impede their ability to feel safe and recover from previous traumatic experiences'. According to one organisation:

A significant amount of the children that we are working with have had lengthy periods of time in offshore detention, up to 6 years on Nauru. This has impacted on their developmental and learning needs. In particular, many of the children are presenting with impaired development due to limited access to nurturing and safe environments to learn and reach appropriate milestones. Additionally, those children that had access to formal schooling frequently reported experiencing severe physical and psychological bullying. This often resulted in their parent/guardians withdrawing them from school on Nauru and as such [they] are having difficulty adjusting to Australian schooling and [are] behind the expected learning progress for a child their age. This cohort of children has also reported being exposed to and witnessing many adults, adolescents and other children self-harm and attempt suicide while on Nauru. Some of the children we are working with have also had their own previous experiences of self-harm and suicide attempts while on Nauru due to distress they experienced. Many of the parents/guardians of these children have also been detrimentally impacted by the prolonged offshore detention experience which has had and continues to have an impact on their ability to appropriately respond to their child's emotional needs.

<sup>1</sup> WGAD, [Opinion No. 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong \(Australia\)](#), (UN Doc A/HRC/WGAD/2019/2, 6 June 2019), para 16

<sup>2</sup> Ibid, para 121

The Victorian Commission for Children and Young People (CCYP) visited four children and their families in detention in 2018-19, and subsequently raised a number of significant concerns with the Department, ABF and Serco, including: ‘the children’s access to the outside world and contact with their peers that is critical for development; limited access to outdoor space and schooling for one child; and access to health and dental care’.<sup>1</sup> As of 2019, the CCYP was ‘yet to see significant improvements in the conditions for these children’.<sup>2</sup>

As long as Australian law and policy still provides for the possibility of detention of children, both in Australia and Nauru, these concerns remain relevant – even if the children are presently living in community settings.

### ***Children currently in the Christmas Island detention facility***

As at January 2020, the only occupants of the Christmas Island detention facility are a Sri Lankan family of four, comprising parents Nadesalingam and Priya and their two Australian-born children of two and four years of age. The family had previously been living in the small town of Biloela in Central Queensland and in March 2018 they were detained in an early morning raid by the ABF, one day after their visas expired.<sup>3</sup> According to reports, during their removal and subsequent detention ‘Priya’s husband was separated from his wife and children and Priya, in her van, was separated from her children and not allowed to sit with them, despite the children being obviously distressed’.<sup>4</sup>

The family was placed in the Melbourne ITA, where serious concerns about the level of health care provided to children were raised. It was reported that both children suffered from severe vitamin deficiencies, and medical and behavioural problems as a result of their prolonged detention. In July 2019, the two-year old child had to be put under general anaesthetic to remove four of her baby teeth that had rotted during her time in detention.<sup>5</sup>

In August 2019, the family was about to be deported to Sri Lanka when a last-minute injunction stopped the deportation. They were flown to the Christmas Island detention facility instead, where they remained the sole occupants. Leaked video footage of the removal to Christmas Island shows Priya again being separated from her young children, who appear to be highly distressed, as officers get clothes ready for them.<sup>6</sup>

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<sup>1</sup> Commission for Children and Young People, *Annual Report: 2018-19* (2019), 52

<sup>2</sup> *Ibid*, 53.

<sup>3</sup> Ben Doherty, ‘Small town rallies after asylum seeker family carried off in dawn raid’, *The Guardian* (12 March 2018) [www.theguardian.com/australia-news/2018/mar/12/small-town-rallies-after-asylum-seeker-family-carried-off-in-dawn-raid](http://www.theguardian.com/australia-news/2018/mar/12/small-town-rallies-after-asylum-seeker-family-carried-off-in-dawn-raid)

<sup>4</sup> Inga Stunzner, Amy McCosker and Paul Robinson, ‘Asylum seeker family removed “without warning” at dawn in central Queensland, Tamil Refugee Council says’, *ABC News* (12 March 2018) [www.abc.net.au/news/2018-03-12/asylum-seeker-family-removed-at-dawn-biloela-central-qld/9538368](http://www.abc.net.au/news/2018-03-12/asylum-seeker-family-removed-at-dawn-biloela-central-qld/9538368)

<sup>5</sup> Bianca Hall, ‘Probe ordered into detention centre care of toddler who had teeth removed’, *Sydney Morning Herald* (25 July 2019) [www.smh.com.au/national/probe-ordered-into-detention-centre-care-of-toddler-who-had-teeth-removed-20190725-p52ary.html](http://www.smh.com.au/national/probe-ordered-into-detention-centre-care-of-toddler-who-had-teeth-removed-20190725-p52ary.html)

<sup>6</sup> Video shown on *The Project* (Channel 10, 30 August 2019) and available at: [www.mamamia.com.au/tamil-family/](http://www.mamamia.com.au/tamil-family/)

In October 2019, two UN Special Rapporteurs requested that Australia transfer the family into a community setting arrangement within 30 days.<sup>1</sup> The Australian Government refused to do so, and has insisted that the family will remain on Christmas Island until their immigration matter is resolved.<sup>2</sup> Given the intensive media attention and public campaign for the release of this family, it appears this decision (which undoubtedly is not in the best interest of the children, given the extreme isolation of the family) is a punitive and politically motivated one to keep them away from the scrutiny of media and their support networks.

### 2.5.5 Specific concerns relevant to the treatment of people placed in APODs

Alternative Places of Detention (APODs) have been used in Australia for a long time, but in the past few years there has been an increase in the use of non-purpose built APODs (such as hotels, especially in Melbourne and Brisbane), primarily to accommodate people transferred from Nauru and PNG for medical treatment in Australia. These facilities are temporarily designated as APODs for the purpose of the Migration Act and continue to accommodate the general public as well (usually in a separate section or floor).

In 2018, the AHRC inspected a number of APODs, and reported them to be ‘exceptionally restrictive environments with regard to freedom of movement’.<sup>3</sup> This observation is confirmed by more recent reports from detention visitors and civil society, who say people in APOD facilities often face severely restrictive conditions, are confined to their rooms for most of the day (only being permitted into outside areas for one or two hours a day, with escorts), and have security guards inside their rooms at all times, including overnight.<sup>4</sup>

There are reportedly frequent transfers between APODs and detention facilities. There are also reports of arbitrary rules, such as a 28-day restriction on leaving the APOD to attend activities offered in the detention centre (for example, to visit the gym), applicable even to those detainees who are not newly arrived and who spent time in that detention facility prior to being moved to the APOD. There is also a lack of meaningful activities and excursions for APOD detainees.

These reported conditions are particularly concerning given the vulnerability of those usually detained in APODs, including people transferred to Australia after almost seven years in Nauru or PNG because of severe mental and/or physical health issues.

While the AHRC in its report has acknowledged the challenges arising from the pressure that medical transfers place on the detention network (especially following the closure of some Australian facilities), it has emphasised that hotels are not appropriate places of detention

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<sup>1</sup> ‘United Nations asks Australia to take Tamil family out of detention on Christmas Island’, *ABC News* (2 October 2019) [www.abc.net.au/news/2019-10-02/un-asks-australia-to-release-family-from-christmas-island/11567188](http://www.abc.net.au/news/2019-10-02/un-asks-australia-to-release-family-from-christmas-island/11567188)

<sup>2</sup> Rachel Eddie, ‘Tamil family will remain in detention despite UN request: Home Affairs’, *Sydney Morning Herald* (2 October 2019) [www.smh.com.au/politics/federal/un-asks-australia-to-release-tamil-family-20191002-p52wwy.html](http://www.smh.com.au/politics/federal/un-asks-australia-to-release-tamil-family-20191002-p52wwy.html)

<sup>3</sup> AHRC, *Risk management in immigration detention* (2019), 48

<sup>4</sup> *Ibid*

and has raised particular concerns about the length of time some people spend there, considering APODs were initially intended to be short-term accommodation options.<sup>1</sup>

## 2.5.6 Offshore processing<sup>2</sup>

### *Nauru*

Over the years, various organisations and media outlets have reported on the security, residential conditions, and access to services of asylum seekers and refugees in Nauru. The Nauru Regional Processing Centre (RPC) was a closed detention centre from its re-opening in September 2012 until October 2015, when it became an ‘open centre’ offering some freedom of movement. People then started to be relocated to community accommodation. Until recently, the majority lived in community accommodation while a small number continued to live in the RPC (primarily RPC1, a section which had a ‘supported accommodation’ area for vulnerable people). The latest Operation Sovereign Borders monthly update (from October 2019) reported that, as at 31 October 2019, no one was living in the Nauru RPC.<sup>3</sup>

Living in the community provides relative freedom of movement to refugees and asylum seekers on Nauru, but there remains a real and perceived lack of safety. Many people report a feeling of ‘being trapped’ on a small island (the area of Nauru is less than 21km<sup>2</sup>) with an uncertain future. Many of the children who spent years on Nauru and were then transferred to Australia in late 2018 after extensive public campaigns (or who left for the United States as part of the bilateral resettlement arrangement) are years behind in schooling as they faced significant bullying in local Nauruan schools and stopped attending school as a result. In 2016, service providers estimated that, since the closure of the Save the Children school in mid-2015, only about 5-15 per cent of children were attending school.<sup>4</sup> That number is likely to have reduced even further in the following years.

Those men, women and children who have found relative safety in Australia after being medically transferred often struggle to recover from the trauma they experienced on Nauru. We have received preliminary findings of research (pending publication) conducted by a group of psychiatrists based on comprehensive interviews with a number of people in this group. They talked about numerous instances of sexual assault on Nauru. They also talked about feeling worthless and betrayed as they thought they were safe when they reached Australia, only to be put in a situation that many found similar to that from which they had fled. Parents talked about events occurring after their arrival in Australia that triggered trauma in their children, such as dealing with immigration authorities and going through security checks. They talked of their concerns for the wellbeing of their children and questioned whether they would ever recover given the intensity of their reactions (such as bedwetting) to these events.

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<sup>1</sup> Ibid, 49

<sup>2</sup> For information about the legal and administrative arrangements for offshore processing, see: Madeline Gleeson, [Protection deficit: the failure of Australia’s offshore processing arrangements to guarantee ‘protection elsewhere’ in the Pacific](#) (2019) *International Journal of Refugee Law* [advance edition available online]. See also concerns about the provision of health care in section 2.5.2.

<sup>3</sup> ABF, [Operation Sovereign Borders monthly update: October 2019](#), 31 October 2019

<sup>4</sup> Amnesty International, [Island of despair: Australia’s ‘processing’ of refugees on Nauru](#) (17 October 2016), 31

## **PNG**

Similar to Nauru, there have been several comprehensive reports about living conditions and key issues of concern relating to refugees and asylum seekers in PNG. We have referred to some of these reports in different sections of this chapter.<sup>1</sup>

Until October 2017, refugees and asylum seekers were detained at the RPC on the Lombrum naval base on Los Negros Island in Manus Province. In April 2017, the Australian Government announced that the centre would close by the end of October and the men relocated to three accommodation areas closer to Lorengau town on Manus Island. In the months before the closure, facilities and services (including health care services) were gradually reduced and then terminated. On 31 October 2017, most of the Australian service providers left, and the next day power and water supplies were cut off. Many men did not want to leave the RPC as they feared for their safety in the centres closer to the town. Between 23 and 24 November 2017, the PNG police, paramilitary and immigration officials removed those left in the centre by force, threats and intimidation.

After the relocation, numerous violent attacks, assaults and robberies were reported. While people were not considered to be detained in the new accommodation sites, a curfew of 6pm–6am was imposed. The men could not leave Manus Island without permission and were unable to live elsewhere. Despite multi-million-dollar contracts, those responsible for providing casework and employment support failed to deliver these services effectively. There were many reports indicating that when people did find employment, a large proportion of their salary was taken by the agency and they would lose access to various other support services, including health care.

Transfers from Manus Island to the PNG capital Port Moresby – organised by the PNG Immigration and Citizenship Authority (ICA) – were generally only arranged for those men receiving medical care or attending interviews with officials from the United States pursuant to the bilateral resettlement arrangement between that country and Australia. In late October 2019, the remaining refugees and asylum seekers were transferred off Manus Island to Port Moresby where they were accommodated in various motels. The majority were subsequently transferred to community accommodation.

While the material conditions of the community accommodation are adequate for some, many others have complained about general insecurity and cramped and difficult conditions, and there is lack of clarity about what lies ahead in future. Many of the men continue to suffer from gastro-intestinal disorders, dental problems and sleeplessness. Communications from PNG ICA are limited and often contradictory, leading to people losing trust in their messaging. There are reports that the main method of case management is through intimidation and threats. For example, people were threatened with losing their allowance if they did not move from motels to community accommodation and, since the opening of the Bomana Immigration Centre, asylum seekers have repeatedly been threatened with detention there. Arbitrary and inconsistent rules apply to people. For example, there are arbitrary curfews that only apply to some people in some of the

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<sup>1</sup> See also: RCOA and Amnesty International, [Until when: the forgotten men on Manus Island](#) (2018)

accommodation. People are constantly questioned about their visitors and their whereabouts, even outside of the curfew hours.

Of greatest concern is the situation of the men detained in the Bomana Immigration Centre since August 2019. There are significant concerns about the way people have been taken into and treated in detention there, including in relation to the lack of means of communication with the outside world, the lack of external scrutiny and monitoring, the inadequate provision of health care, and material conditions such as food and sanitation.<sup>1</sup> It is also unclear how people were selected for detention, as not all asylum seekers were detained, despite the threat of detention being systemically used to control the rest of this population.

### ***Limits on transparency in offshore processing<sup>2</sup>***

Nauru has fully cooperated with Australia's requests regarding offshore processing, and has implemented some of its own initiatives to limit transparency. For example, in 2016, Nauru announced that it would not grant entry visas to any Australian or New Zealand passport holder unless they were contracted to work for the ABF. Nauru has also experienced its own erosion of democratic institutions. Since 2014, constraints on the independence and effectiveness of Nauru's political opposition, judiciary and police, together with the fact that its media is state-owned and unable to publish material critical of the government, has meant that demands for accountability about immigration detention have been ineffective.

In PNG, refugees and asylum seekers spent more than six years in Manus Province, a remote and underdeveloped region which was difficult to access. In March 2019, PNG ICA issued a travel update stating that travel to Manus Island for the purposes of tourism was no longer permitted, and that applications showing evidence of such intention would be rejected.<sup>3</sup> The main reason for this update was believed to be to stop refugee advocates from traveling to Manus Island and meeting with refugees. A number of such advocates were in fact deported after travelling to Manus Island. In July 2019, following an increase in incidents of self-harm and suicide attempts, Australian Senator Nick McKim travelled to Manus Island to visit refugees but was deported from PNG after he requested to see the conditions inside an accommodation centre.<sup>4</sup> The men detained at the Bomana Immigration Centre are unable to communicate with the outside world, including with their families and legal representatives, and almost all of the visit requests made by monitoring agencies, friends and religious figures to visit this facility have been denied.

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<sup>1</sup> For more information, see: Jo Chandler, "Designed to torture": asylum seeker chooses Iranian prison over PNG detention centre', *The Guardian* (11 November 2019)

[www.theguardian.com/world/2019/nov/10/designed-to-torture-asylum-seeker-chooses-iranian-prison-over-png-detention-centre](http://www.theguardian.com/world/2019/nov/10/designed-to-torture-asylum-seeker-chooses-iranian-prison-over-png-detention-centre); Helen Davidson, 'Leaked photos of Papua New Guinea prison reveal "torture" of 18 asylum seekers cut off from world', *The Guardian* (15 January 2020)

[www.theguardian.com/world/2020/jan/15/leaked-photos-of-papua-new-guinea-prison-reveal-torture-of-18-asylum-seekers-cut-off-from-world](http://www.theguardian.com/world/2020/jan/15/leaked-photos-of-papua-new-guinea-prison-reveal-torture-of-18-asylum-seekers-cut-off-from-world)

<sup>2</sup> Concerns about the lack of transparency in relation to detention in Australia are outlined in section 2.5.7 below.

<sup>3</sup> This advice is no longer available on the PNG ICA website, presumably as the transfer of people out of Manus Island negates the need to bar tourists from visiting there.

<sup>4</sup> Naaman Zhou, 'Greens Senator Nick McKim deported from Manus Island', *The Guardian* (20 July 2019)

[www.theguardian.com/australia-news/2019/jul/20/greens-senator-nick-mckim-deported-from-manus-island](http://www.theguardian.com/australia-news/2019/jul/20/greens-senator-nick-mckim-deported-from-manus-island)

## ***Deaths offshore***

Twelve people have died in Nauru and PNG (or in Australia immediately following evacuation from Nauru and PNG) since offshore processing was reintroduced in 2012.<sup>1</sup> Of these, five are reported to have been suicides, suspected suicides or otherwise resulting from self-harm (Fariborz Karam, Salim Kyawning, Rajeev Rajendran, Rakib Khan and Omid Masoumali); one died following seizures and reportedly being denied medical treatment (Faysal Ishak Ahmed); one died in a traffic accident (Mohammad Jahingir); two drowned (Kamil Hussain and Sayed Ibrahim Hussein); one died of septicaemia from an untreated infection and medical delays (Hamid Khazaei); one was murdered by security guards and others in a riot at the Manus Island detention centre in February 2014 (Reza Berati); and the body of one was found in the forest on Manus Island, with the exact cause of death unclear (Hamed Shamshiripour).<sup>2</sup> It is believed that a number of these deaths would have been preventable, had timely and appropriate medical care been made available.

### **2.5.7 Lack of transparency**

Australia's immigration detention policy limits transparency and creates a culture of secrecy, which has a direct impact on the human rights of people subject to the system.

#### ***Limits on formal oversight***

The Commonwealth Ombudsman conducts inspections of detention centres in Australia, and previously visited Nauru and PNG (with the agreement of those countries) to 'examin[e] administrative actions of Australian officials and their contracted service providers',<sup>3</sup> but does not publish reports on the inspections. The Australian Red Cross conducts regular inspections of all detention facilities in Australia, and the International Committee of the Red Cross (with the support of the Australian Red Cross) conducts monitoring visits of the offshore detention centres, but the reports of these inspections are also not published. The AHRC is geographically limited: it publishes its findings regarding detention on Australian territory, but is not able to access people who are or may be confined in Nauru and PNG. The Office of the UN High Commissioner for Refugees (UNHCR) is the only agency that conducts monitoring visits both in Australia and offshore, and publishes some of its findings.

#### ***Limits on informal oversight***

Informal oversight is provided when relatives, friends and supporters visit people detained in immigration detention centres. These visits provide emotional and psychological support for detainees who would otherwise not receive these sorts of support. In addition, visitors provide an informal check and balance on the conditions of detention and the experiences of detainees. The importance of informal visits for transparency of carceral institutions has been noted in overseas studies.<sup>4</sup> Visitor oversight is limited when detention centres are located remotely and when visitor access is restricted.

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<sup>1</sup> A thirteenth man, Sayed Mirwais Rohani, committed suicide in Brisbane in 2019, after being transferred from Manus Island to Australia for medical treatment in 2017.

<sup>2</sup> Data available in the Australian Border Deaths Database (see footnote about the Database in section 2.5.2)

<sup>3</sup> Commonwealth Ombudsman, *Immigration matters* (2017)

[www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0024/47661/Immigration-Matters-June-2017.pdf](http://www.ombudsman.gov.au/_data/assets/pdf_file/0024/47661/Immigration-Matters-June-2017.pdf)  
<accessed 13 January 2020>

<sup>4</sup> For a summary of this research, see: Amy Nethery, [Secrecy and human rights abuse in Australia's offshore immigration detention centres](#) (2016) 20(7), *International Journal of Human Rights*, 1018

In August 2017, the Refugee Council of Australia published a report about the experiences of visitors to immigration detention facilities. The challenges identified at that time were:

- constantly changing and inconsistent rules
- the amount of paperwork required to book a visit
- lack of relaxed and communal visits (as had previously been permitted)
- drug tests conducted on visitors to IDCs that often resulted in ‘false positives’ and prevented people from visiting
- restrictions on bringing food to the visits.<sup>1</sup>

In January 2018, the Department introduced even more restrictive policies in relation to visiting detention facilities. They included a more complicated visit application process – requiring visitors to apply five business days in advance, fill out a lengthy online form and provide 100 points of ID – and an extension of unreliable drug testing to all detention facilities (including ITAs). The new online application system is onerous and requires voluminous and sometimes sensitive details. On entry, visitors must submit to drug detection tests, pat-downs, and bag searches. Visitors may be denied entry with no avenue for appeal. Packaged processed food can be shared at the visit, but visitors can no longer bring fresh food or other items. Gifts, such as clothing, toiletries, and stationery, must be dropped off at a different time to visiting hours.<sup>2</sup>

A clear impact of the changes is that some vulnerable, long-term detainees no longer receive regular visits and are therefore deprived of an important support. After inspecting detention facilities in 2018, the AHRC assessed that applying these restrictions to all visitors ‘may not be necessary, reasonable and proportionate, particularly for visitors who have proven track record of complying with entry requirements and have never been suspected of bringing in contraband or presenting incorrect information about their identity’.<sup>3</sup>

One positive development has been the introduction of a ‘trusted visitors pilot’ (now a permanent program) in Sydney and Melbourne, which allows community visitors to apply to become ‘trusted visitors’ (after going through a number of checks) and not have to go through all the administrative requirements every visit. However, this program is only available in Sydney and Melbourne, and not to family members or friends of detainees.

Legal representatives also face challenges in relation to visiting and contacting clients. The main issues they identify include difficulty in contacting clients during hours that the phone lines are available, difficulty in sending documents by fax (which makes it difficult to have urgent documents signed), and a lack of facilities for professional visits which means that meetings to discuss legal matters with clients often need to take place in public areas without privacy.

Finally, the media are not able to access detention centres in Australia.

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<sup>1</sup> RCOA, [Unwelcome visitors: challenges faced by people visiting immigration detention](#) (2017)

<sup>2</sup> Amy Nethery, ‘Punitive bureaucracy: restricting visits to Australia’s immigration detention centres’ in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019), 305

<sup>3</sup> AHRC, [Risk management in immigration detention](#) (2019), 59



## **Legislated non-transparency in the Australian Border Force Act 2015**

The *Australian Border Force Act 2015* (Cth) restricts all people contracted to the ABF from speaking about their work, at the risk of two years imprisonment.<sup>1</sup> Since 2017, after widespread protests and advocacy, medical practitioners have been exempted from this law, but it remains in place for other employees and contractors. It has made it difficult for some oversight to occur. For example, in 2015, the UN Special Rapporteur for the Human Rights of Migrants postponed his official visit to Australia citing concerns about the Act and stating that it would prevent him from ‘fully and freely carrying out [his] duties during the visit’.<sup>2</sup>

### **2.5.8 Hostility to, and ineffectiveness of, current oversight mechanisms**

Places of immigration detention are monitored and/or visited by a range of organisations and individuals, and oversight should also be provided through complaints processes set up by the Department/ABF and Serco. However, despite the number and diversity of people and organisations visiting and advocating for people in immigration detention, and sharing those concerns with the Department, there is a shared view that most complaints are not taken seriously, and that after decades of advocacy the conditions in detention have not improved (or indeed, according to many, have significantly worsened).

Particular concerns raised by civil society members include the following:

- There is no mechanism through which to raise urgent complaints or concerns.
- Internal oversight mechanisms are ineffective, sometimes resulting only in ‘identical 5-paragraph responses’.<sup>3</sup>
- People in detention have reported that Serco staff write false reports in their systems in order to discredit them, in the event that they make a complaint.
- External oversight bodies suffer from the ‘fundamental flaw’ of not having ‘teeth’. Their recommendations are routinely ignored. When civil society members try to follow up with the Government on complaints raised in individual cases, or general recommendations about the management of detention, they receive no response (or no response that fully and substantively addresses the concerns raised).<sup>4</sup>
- Making a complaint can lead to retribution and make detention conditions worse, with some detainees afraid even to be seen speaking to monitoring agencies. Reported consequences include being placed in isolation or a ‘behavioural management’ unit, or transferred away from family and support services (formerly to Christmas Island, now to Yongah Hill). According to one detainee: ‘If you dare to

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<sup>1</sup> [Australian Border Force Act 2015](#) (Cth), s 42

<sup>2</sup> OHCHR, [‘Migrants/Human rights: Official visit to Australia postponed due to protection concerns’](#) (25 September 2015).

<sup>3</sup> According to one detention visitor: ‘When I tell [people in detention] to put in a complaint, they laugh at me and say that how can you complain about a person to the same person?’ Complaints processes have been described as ‘Home Affairs non-transparently reviewing Home Affairs’.

<sup>4</sup> For example, one civil society organisation said that it received no response to requests for information from the Government about how it had responded or would respond to recommendations of the AHRC in the Cherkupalli case of arbitrary detention: [Cherkupalli v Commonwealth of Australia \(Department of Immigration & Citizenship\)](#) (2012) AusHRC 49

write a complaint, they will start persecuting you, then they will start to dehumanise you, to the point that you start to hate your own existence ... Serco-run detention centres are a state within a state'.<sup>1</sup>

Barriers to effective oversight include budgetary restrictions, the difficulty of facilitating visits to remote detention facilities, and the difficulty individuals face in engaging with complaints mechanisms due to language barriers, capacity, and a lack of funded legal assistance. However, the biggest concern is the actual or perceived hostility of the Australian Government to oversight and critique of its detention practices. Australia has publicly demonstrated opposition to – or unwillingness to accept feedback from – the UN Special Rapporteur on the Human Rights of Migrants, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the AHRC.<sup>2</sup>

The former President of the AHRC, Gillian Triggs (now Assistant High Commissioner for Protection at UNHCR), faced significant personal attacks and government pressure to resign following the release of the AHRC's *Forgotten Children* report on its National Inquiry into Children in Immigration Detention and other comments critical of Australia's immigration policy.<sup>3</sup> Within civil society, it is common to hear that the relationship between the government (and the Department in particular) and the refugee advocacy sector has deteriorated and become mired in intractable divisions and distrust.

## 2.6 Recommendations

### *Identifying places of immigration detention*

During their visits to Australia, we recommend that the SPT and WGAD consider:

- affirming that Australia's obligations under international human rights law extend to *all* places where people are or may be deprived of liberty in an immigration context
- advising the Government of the situations in which detention at sea falls within the scope of Australia's international human rights obligations, and how Australia might reconcile its maritime interception and detention policies with those obligations
- with regard to offshore processing, confirming the consistent position of UN bodies and special procedures that Australia's obligations do extend to people transferred to Nauru and PNG (at least in so far as Australian organs, agents and private contractors continue to be involved in their detention in those States)<sup>4</sup>

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<sup>1</sup> Helen Davidson, 'Serco guard at Western Australia immigration centre accused of sexual assault', *The Guardian* (19 September 2018) [www.theguardian.com/australia-news/2018/sep/18/guard-at-western-australia-immigration-centre-accused-of-sexual-assault](http://www.theguardian.com/australia-news/2018/sep/18/guard-at-western-australia-immigration-centre-accused-of-sexual-assault)

<sup>2</sup> See, for example: Lisa Cox, 'Tony Abbott: Australians "sick of being lectured to" by United Nations, after report finds anti-torture breach', *Sydney Morning Herald* (9 March 2015); Madeline Gleeson, [Monitoring places of immigration detention in Australia under OPCAT](#) (2019) 25(1) *Australian Journal of Human Rights* 150, 164

<sup>3</sup> James Bennett, 'Gillian Triggs says she will not resign in face of "highly personalised" government pressure', *ABC News* (12 June 2015) [www.abc.net.au/news/2015-06-12/gillian-triggs-says-she-has-not-considered-resigning/6540862](http://www.abc.net.au/news/2015-06-12/gillian-triggs-says-she-has-not-considered-resigning/6540862)

<sup>4</sup> See, for example: UN Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia* (UN Doc CAT/C/AUS/CO/4-5, 23 December 2014), para 17; UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (UN Doc CCPR/C/AUS/CO/6, 1 December 2017), para 35; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on*

- seeking more detail on the immigration detention population, including where people are being held (including in APODs), how long they have been there (with further breakdown of the length of detention beyond two years), the reasons for their detention and other demographic information.

### ***Addressing systemic issues identified in places of immigration detention***

We also recommend that the SPT and WGAD consider advising the Government on:

- specific measures required to ensure that Australian law and policy comply with international human rights standards relating to immigration detention
- specific ways to manage the cases of people at risk of prolonged and indefinite detention, including non-refugees who cannot be returned to their countries of origin, refugees who have had their visas refused or cancelled on character grounds, and individuals with Adverse Security Assessments
- the importance of ensuring detained non-citizens have access to funded legal assistance, not only for applying for visas but also for seeking review of negative decisions (particularly where those decisions result in detention)
- the importance of eliminating arbitrariness in the fact, length and conditions of detention – including by ensuring all people deprived of their liberty are fully informed about decisions that affect their wellbeing in a timely manner, in a language they understand, and with reasonable opportunities for them to discuss decisions with legal representatives and seek review where appropriate
- how to identify and eliminate risks of torture and cruel, inhuman or degrading treatment or punishment in the way detention facilities are managed and detained people are treated, and how to foster a respectful rights-based culture in the immigration detention system
- how to manage risks in the immigration detention network without resorting to excessive or arbitrary use of force, use of restraints, and securitisation, including how to avoid arbitrariness and risks of torture and cruel, inhuman or degrading treatment or punishment in the conduct of individual risk assessments
- the importance of providing ample and adequate opportunities for people in detention to participate in education and recreation activities – both within and (where appropriate) outside of detention facilities
- international best practices regarding the treatment of LGBTIQ-identifying detainees
- the need to ensure a reasonable standard of health care is provided to people in immigration detention, and specific steps the Government should take to address current deficiencies in the provision of health care
- the need for careful monitoring of the mental health of detainees, and the negative health impacts of lengthy, indefinite detention
- the importance of clinically appropriate policies regarding mental health and people at risk of self-harm, which are based on the recommendations of health care providers and torture and trauma counsellors, and adapted to the needs of the

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*the fifth periodic report of Australia* (UN Doc E/C.12/AUS/CO/5, 11 July 2017), para 18; UN Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018: Opinion No. 21/2018 concerning Ghasem Hamedani (Australia)* (UN Doc A/HRC/WGAD/2018/21, 29 May 2018), para 63.

individual (including, for example, by ensuring that staffing decisions are sensitive to the needs of victims of sexual violence)

- the importance of minimising transfers within the detention network that disrupt family ties and access to community support and legal and medical services
- how to carry out ‘involuntary’ transfers and deportations in a manner consistent with international law, including legal standards governing the use of force
- how to bring Australian law, policy and practice into line with international law governing the best interests of children and respect for family unity<sup>1</sup>
- the appropriateness of using non-purpose built APODs as places of detention
- specific steps it should take to ensure that non-citizens are not subject to detention in Nauru or PNG that is arbitrary or otherwise contrary to international law
- the risks inherent in secretly detaining non-citizens at sea for any amount of time, and the importance of ensuring any such detention is subject to independent, effective, and (where possible) public oversight
- how to improve current oversight mechanisms, including by ensuring recommendations are responded to in good faith and in a timely and transparent way
- the need to ensure detained non-citizens, who are vulnerable to broad discretionary ministerial powers, do not face (or fear facing) prejudicial outcomes as a result of making complaints or engaging with oversight mechanisms
- the need for amendments to the secrecy and disclosure provisions of the Australian Border Force Act and any other legislation that criminalises or penalises the sharing of relevant information without departmental approval
- how to rebuild trust and engage effectively and constructively with civil society to promote positive outcomes for people in immigration detention.

### ***Additional information***

The SPT and WGAD may also wish to seek information from the Australian Government on:

- Australian involvement in the detention of men in the Bomana Immigration Centre
- all incidents of maritime interception and/or detention at sea since the introduction of Operation Sovereign Borders in September 2013 (whether on board Australian or private vessels, and wherever located), including the conditions of that detention
- the number and length of incidents of detention at Australian airports; the conditions of that detention, including access to translators, lawyers, health care professionals and other relevant support people; specific measures taken to ensure the welfare of particularly vulnerable people (including asylum seekers, unaccompanied minors, and people with mental health concerns); and where people are taken after being detained at an airport

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<sup>1</sup> In view of the fact that ‘deprivation of liberty is deprivation of childhood’, and ‘detention of children for purely migration-related reasons can never be considered a measure of last resort or in the best interests of the child and shall, therefore, always be prohibited’: UN General Assembly, [Global study on children deprived of liberty: Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty](#) (UN Doc A/74/136, 11 July 2019), 4, 7

- the number and type of incidents of self-harm (including in APODs), including the number of incidents of food/fluid refusal in immigration detention, and the response of relevant service providers (including any medical treatment administered).

## CHAPTER 3: DETENTION OF PEOPLE WITH DISABILITY

### Key points

- As per international standards, Australia's implementation of OPCAT should cover places of detention more broadly, including both disability-specific sites of detention and mainstream settings in which people with disability may be deprived of their liberty and/or have specific experiences of detention.
- Australia's NPM should assume responsibility for inspecting disability-specific places of detention and should not assume that existing monitoring provisions are adequate. In these settings, people with disability are routinely deprived of their liberty, but there is limited monitoring and oversight.
- People with disability are significantly over-represented in 'mainstream places of detention'. People with intellectual, cognitive and psychosocial disability are particularly vulnerable to being incarcerated.
- Along with covering mainstream and disability-specific places of detention, the inspection mandate must challenge specific practices of detention, including specific treatment and support regime practices of institutional violence against people with disability.
- The indefinite detention of people with psychosocial, cognitive and intellectual disability as a result of contact with the criminal justice system is a significant issue of concern, disproportionately experienced by Aboriginal and Torres Strait Islander people with disability.

### 3.1 Legal and policy framework for detention of people with disability

Australia's ratification of OPCAT provides the urgently needed opportunity to highlight the violation of the rights of persons with disabilities in diverse sites of detention in Australia, and build on advancing international protections for people with disabilities, including those articulated in the Convention on the Rights of Persons with Disabilities (CRPD). It offers an opportunity to improve protections for people with disability against torture and other forms of cruel, inhuman and degrading treatment or punishment and emphasises a preventative, rather than reactive, approach.

Australian laws, policies and practices have led to the involuntary and indefinite detention, torture, and ill-treatment of people with disability, which continues today. For example, all Australian jurisdictions have in place 'unfitness to stand trial' laws, which diminish procedural safeguards compared to typical trials, and lead to the indefinite detention of persons with disabilities without conviction.<sup>1</sup> This commonly results in people being detained for a longer period than if they had been convicted.<sup>2</sup> This situation is exacerbated by a lack of community-based housing, and therapeutic and disability support options both within and outside the justice system. In reviewing Commonwealth laws, policies and programs in relation to legal capacity for people with disability, the Australian Law Reform

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<sup>1</sup> Australian Law Reform Commission, *Equality, capacity and disability in Commonwealth laws*, ALRC Report 124 (2014)

<sup>2</sup> Australian Human Rights Commission, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, Submission to the Senate Community Affairs References Committee, (2016)

Commission recommended reform of the ‘unfitness’ test, the provision of appropriate supports, and limits on – and reviews of – detention.<sup>1</sup>

Legislation in the states and territories of Australia also differs in its protection of the rights of people with disability in incarceration. For example, legislation in all states and territories enables involuntary detention of people with psychosocial disability in mental health facilities in specified circumstances. State law in Queensland allows for the incarceration of young people with disability in adult watch houses with little to no support or intervention that is responsive to disability. And young people with disability in Western Australia (WA) can be locked up from the age of 10.

State and territory financial management, guardianship and mental health laws result in denial of individual legal capacity. Guardianship orders can include functions to forcibly return a person with disability to an institution or to deny access by family members (and others) to those persons. Financial management orders can also be used to compel a person with disability to remain in an institutional setting.

State-based laws fail to prevent – and in some cases actively condone – practices that constitute or lead to torture and ill-treatment, under the guise of ‘behaviour modification’, including psychosurgery, forced sterilisation, electroconvulsive therapy, and chemical, mechanical and physical restraint. This occurs in both mainstream and disability-specific places of detention. In its most recent Concluding Observations to Australia (September 2019) the UN Committee on the Rights of Persons with Disabilities calls for the:

... establishment of a nationally consistent legislative and administrative framework for the protection of all persons with disabilities, including children, from psychotropic medication, physical restraint and seclusion under the guise of ‘behaviour modification’ and the elimination of restrictive practices, including domestic discipline/corporal punishment, in all settings.<sup>2</sup>

Under state and territory education policy frameworks, ‘behaviour management’ techniques, including chemical and physical restraint and solitary confinement, have been used for children with disability in schools, such as restricting them to fenced-off sections of a playground, confining them to a segregated area of a school building during class time, or caging children with disability in repurposed storage cupboards.

Many children and young people with disability are excluded from attendance at mainstream Australian schools, since discrimination is permitted where an adjustment to the school and its provision of education would constitute ‘unjustifiable hardship’ on the school. Children with disability are therefore educated in segregated, closed settings which lack the community oversight that schools can provide.

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<sup>1</sup> Australian Law Reform Commission, *Equality, capacity and disability in Commonwealth laws*, ALRC Report 124 (2014)

<sup>2</sup> Recommendation 30(a), Committee on the Rights of Persons with Disabilities (2019) *Concluding observations on the combined second and third reports of Australia*, CRPD/C/AUS/CO/2-3, September 2019, 8, adopted by the Committee at its twenty-second session (26 August – 20 September 2019)

There are specific obligations under the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities in relation to violence, torture and ill-treatment against children, including children with disability. However, the right of children with disability to be free from violence, abuse and neglect is not referenced in Australian education policies or frameworks.

### **3.2 Historical snapshot of detention of people with disability in Australia**

OPCAT does not create or codify any new human rights, but instead establishes a constructive and collaborative framework in which the UN Subcommittee on Prevention of Torture (SPT) and the independent National Preventive Mechanisms (NPMs) collectively seek to prevent torture and ill-treatment.

People with disability are vulnerable to experiencing torture and ill-treatment in a range of mainstream and disability-specific settings. The term ‘detention’ is commonly understood by reference to ‘traditional’ places of detention, where people are detained pursuant to legislation or a judicial or administrative order of the State. However, Article 4 of OPCAT defines places of detention more broadly as those places ‘where persons are or may be deprived of their liberty’. This ranges from traditional places of detention such as prisons, police stations, prisoner and deportation transport, juvenile detention centres and immigration detention centres, to more specific facilities where people with disability are deprived of their liberty, including locked psychiatric wards or hospitals, compulsory care facilities, aged care facilities and schools with ‘exclusion’ or ‘time-out’ rooms, emergency rooms and rehabilitation facilities.

People with disability are vastly over-represented in all places of detention in Australia, and are particularly vulnerable during their period of detention. In addition, Aboriginal and Torres Strait Islander people with disability, and people with intellectual and cognitive disability are over-represented across the majority of detention settings. There is evidence that some detention facilities in Australia – and practices within these detention sites – cause or exacerbate impairment.<sup>1</sup>

Detention of a person with disability will be uniquely experienced by them and may disproportionately impact on them. For example, the impact of a denial of the basic disability support requirements, including decision making support, of persons in incarceration can perpetuate throughout a person’s lifetime. This is particular so for persons with intellectual or cognitive disabilities, whose ability to exercise legal capacity is significantly impacted upon by their environment and the support that may, or may not, be available.

Australia has historically housed many people with physical, intellectual, cognitive and/or psychosocial disabilities in institutional settings, within a legislative, policy and practice framework that promoted segregation. Torture, and inhumane and degrading treatment of people with disability were common in these traditional institutional settings, including in hospitals and large and small congregate residential facilities. Starting in the early 1800s,

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<sup>1</sup>See, for example, Green J.P. and Eagar K. The health of people in Australian immigration detention centres. *Medical Journal of Australia* (2010), 192(2), 65-70



psychiatric hospitals were established, particularly in New South Wales (NSW) and Victoria, and human rights abuses were common. The core function of these institutions was to segregate people with psychosocial disability from the community, and this continues to this day. The Interim Report of the Royal Commission into Victoria's Mental Health System, published in November 2019, quotes one witness:<sup>1</sup>

There were no beds in the youth psychiatric ward and the youth psychiatric ward was also far away ... I was admitted to the main ward of an adult psychiatric hospital at the age of 17. Within two days of my admission, I had seen things that have scarred me for a lifetime. I saw people crying and screaming in anguish on the floors. I saw people being dragged away and restrained by medical staff.

The 2015 inquiry of the federal parliament's Senate Community Affairs References Committee documented that the levels of violence, abuse and neglect of people with disability in institutional and residential settings in Australia were such that a Royal Commission was warranted.<sup>2</sup>

The committee is convinced that violence, abuse and neglect against people with disability is widespread and is occurring across all Australian communities. At the heart of this mistreatment are questions as to how our society views people with disability.

While steps have been taken across Australia to close large institutional disability facilities, people with disability continue to be forced, often due to lack of other accessible alternatives, or access to support services, to live in smaller congregate facilities (group homes) where they are vulnerable to ongoing violence, abuse and neglect. Most recent reports in January 2020, indicate that the NDIS Quality and Safeguards Commission is dealing with approximately 100 allegations of abuse and neglect of people with disability per week, including 6,694 instances of restrictive practices.<sup>3</sup>

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Disability Royal Commission) is currently underway and is drawing greater attention to the settings and practices that must attract NPM and SPT oversight. This Royal Commission is looking at all forms of violence against, and abuse, neglect and exploitation of, people with disability in all settings and contexts. The Commission is due to provide an interim report no later than 30 October 2020, and a final report by 29 April 2022. It is critical that the evidence presented to, and the findings of, the Royal Commission inform the broad structure and functioning of Australia's NPM.

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<sup>1</sup> Royal Commission into Victoria's Mental Health System, Interim Report, Parl Paper No. 87 (2018–19), 253

<sup>2</sup> Senate Community Affairs References Committee. *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability (2015)* Canberra, Australian Capital Territory: Commonwealth of Australia, 54

<sup>3</sup> See media reporting at [www.theguardian.com/australia-news/2020/jan/31/ndis-watchdog-is-fielding-nearly-100-allegations-of-abuse-or-neglect-a-week?CMP=share\\_btn\\_link](http://www.theguardian.com/australia-news/2020/jan/31/ndis-watchdog-is-fielding-nearly-100-allegations-of-abuse-or-neglect-a-week?CMP=share_btn_link)

### 3.3 Identifying the places where people with disability are detained

It is clear from the text of OPCAT, that the application of OPCAT extends beyond ‘traditional’ places of detention. Article 4(1) requires States Parties to allow the NPM and SPT to visit ‘any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence’. Article 4(2) notes that ‘deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority’. Lea et al note:<sup>1</sup>

Such an expansive definition may include psychiatric hospitals, compulsory care facilities, community-based residences (including group homes and respite centres), aged care facilities, child welfare institutions, hospital emergency rooms where patients may be subject to physical or chemical restraint, seclusion rooms in educational settings, boarding schools and rehabilitation facilities.

They refer to guidance by the SPT, which suggests such an expansive definition of a place of detention is expected:

[T]he preventive approach which underpins the OPCAT means that as expansive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the NPM ... The SPT therefore takes the view that any place in which a person is deprived of liberty (in the sense of not being free to leave), or where it considers that a person might be being deprived of their liberty, should fall within the scope of its visiting mandate – and, in consequence, under the visiting mandate of an NPM – if it relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function.

This guidance is supported by the practice of the SPT, which has visited a wide range of places of deprivation of liberty in its in-country visits, including centres for children and detoxification centres.<sup>2</sup> It is also consistent with the practice of established State NPMs, which have inspected facilities including aged care facilities, social care homes, child welfare institutions and educational settings.<sup>3</sup>

While the Australian Government has implied a focus on ‘primary places of detention’, implementation of OPCAT should be in accordance with this expansive definition of ‘sites of detention’ that encapsulates both disability-specific and mainstream settings in which people with disability may be deprived of their liberty and/or have specific experiences of detention.

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<sup>1</sup> Lea M., Beaupert F., Bevan N., Celermajer D., Gooding P., Minty R., et al. A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability. *Australian Journal of Human Rights*, (2018) 24(1), 70-96

<sup>2</sup> University of Bristol, Human Rights Implementation Centre. *Deprivation of liberty’ as per Article 4 of OPCAT: The scope* (2011)

<sup>3</sup> Council of Europe. The European NPM Newsletter. *Issue No. 46/47 November– December, 27–30* (2013), 27; See also Hallo de Wolf A. G. Visits to less traditional places of detention: Challenges under the OPCAT. *Essex Human Rights Review* (2009) 6(1), 73-97

In fact, by focusing on traditional ‘primary’ places of detention, attention is drawn away from those settings where people with disability are routinely deprived of their liberty, but where there may be limited monitoring and oversight, or where practices are undertaken as part of procedure, sanctioned with the premise of ‘best practice’ or ‘safety’.

Article 14 of the CRPD states that the ‘existence of a disability shall in no case justify a deprivation of liberty’. Detention can therefore never be justified based on impairment, regardless of whether other factors are also used to justify a particular deprivation of liberty.

In addition to taking a broad interpretation of sites of detention, independent monitoring and reporting against OPCAT in Australia should adopt a preventative and safeguarding lens and address specific practices such as the use of mechanical restraint, chemical restraint and seclusion, and the circumstances that lead to these forms of practices being used.

### 3.3.1 Mainstream places of detention

In this chapter, we focus primarily on disability-specific places and practices of detention, with the experiences of people with disability in mainstream detention reflected through the other chapters of this report. However, it is worth drawing attention to the over-representation of people with disability in mainstream places of detention, and the unique experiences and disproportionate impacts on them.

The Australian Institute of Health and Welfare notes the ‘high levels’ of disability among prisoners in Australia,<sup>1</sup> with almost one-third of prisoners reporting a long-term health condition or disability that limits their daily activities and/or affects their participation in education or employment.<sup>2</sup> People with intellectual, cognitive and psychosocial disabilities are particularly vulnerable to being incarcerated,<sup>3</sup> with data documenting the ‘substantially higher representation of intellectual disability and borderline intellectual disability than in the general population’ in prisons.<sup>4</sup> Aboriginal and Torres Strait Islander people are over-represented both in prisons<sup>5</sup> and in the experience of disability.<sup>6</sup> Children and young people

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<sup>1</sup> Johnston I. and Pickles J. *The Health of Australia’s Prisoners 2012*. Canberra: Australian Institute of Health and Welfare (2013), 3

<sup>2</sup> Australian Institute of Health and Welfare. *The health of Australia’s prisoners, 2015* (2015) Cat. No. PHE 207. Canberra: AIHW.

<sup>3</sup> Law Reform Committee, Parliament of Victoria. *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*. Parliamentary Paper, no. 216, Session 2010–2013. (2013) East Melbourne: Parliament of Victoria; Johnston I. and Pickles J. *The health of Australia’s prisoners 2012* (2013) Canberra: Australian Institute of Health and Welfare, 35

<sup>4</sup> Baldry E., Clarence M., Dowse L., and Trollor J. Reducing vulnerability to harm in adults with cognitive disabilities in the Australian criminal justice system. *Journal of Policy and Practice in Intellectual Disabilities* (2013) 10(3), 222–29. doi:10.1111/jppi.2013.10.issue-3

<sup>5</sup> Australian Bureau of Statistics. *Prisoners in Australia, 2016*. (2016) ABS Catalogue No 4517.0. Australian Bureau of Statistics

<sup>6</sup> Sotiri, M. and Simpson, J. Indigenous people and cognitive disability: An introduction to issues in police stations. *Current Issues in Criminal Justice*, (2006) 17(3), pp.431-443; Baldry, E., McCausland, R., Dowse, L. and McEntyre, E. *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. (2015) UNSW Australia

with disability are held in justice detention facilities with little to no oversight and assessment and provision of disability support<sup>1</sup>.

#### *Case study*

Images of alleged mistreatment at Townsville's Cleveland Youth Detention Centre emerged in 2016, prompting calls for the Royal Commission into the Detention and Protection of Children in the Northern Territory to be extended to Queensland.

One series of CCTV images obtained by the 7.30 news program shows a boy aged 17 being held face-down by five adults. He was handcuffed, ankle-cuffed, stripped naked and then left alone in isolation for more than an hour. The incident was prompted by the boy refusing to have a shower. Images from another incident caught on CCTV show a girl in a swimming pool being threatened by security guards with an un-muzzled dog.

The disturbing images are contained within internal reports written in 2013 and 2015 by the Queensland Government's own Youth Detention Inspectorate.<sup>2</sup> This report prompted an independent review of Queensland's youth detention centres ordered by state Attorney-General and Justice Minister, Yvette D'Ath, who said the move was in response to serious allegations levelled against Queensland youth detention centre staff by former detainees and former employees.<sup>3</sup>

Lea et al note the difficulty of accurately reporting on the rates of people with disability held in offshore or onshore immigration detention, but statistics suggest significant representation of people with disability in these facilities.<sup>4</sup>

### **3.3.2 Disability-specific places of detention**

The risk of harm for people with disability in detention settings is significantly increased by the traditionally 'closed off' nature of many detention settings which are unique to people with disability. Many of these places of detention do not have any, or sufficiently rigorous, inspection regimes. Other places that are not traditionally places of detention, but in which people with disability may have a specific experience of detention, include schools (both day and boarding), congregate care settings, hospitals (emergency rooms, psychiatric wards), rehabilitation facilities, out-of-home care and mental health units.

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<sup>1</sup> The ABC exposed treatment of a young indigenous boy with intellectual disability who was held naked in an adult maximum security police watch house in Brisbane after he was deemed a suicide risk

[www.abc.net.au/news/2019-06-18/boy-held-completely-naked-in-prison-watch-house-for-days/11207734](http://www.abc.net.au/news/2019-06-18/boy-held-completely-naked-in-prison-watch-house-for-days/11207734)

<sup>2</sup> Amnesty International received the reports under Freedom of Information laws.

[www.abc.net.au/news/2016-08-18/images-of-alleged-mistreatment-cleveland-youthdetention-centre/7758204](http://www.abc.net.au/news/2016-08-18/images-of-alleged-mistreatment-cleveland-youthdetention-centre/7758204)

<sup>3</sup> [www.abc.net.au/news/2016-08-19/queensland-youth-detention-centres-independentreview-ordered/7767580](http://www.abc.net.au/news/2016-08-19/queensland-youth-detention-centres-independentreview-ordered/7767580)

<sup>4</sup> Lea M., Beupert F., Bevan N., Celermajer D., Gooding P., Minty R., et al. A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability. *Australian Journal of Human Rights*, (2018) 24(1), 70-96

### **Forensic disability units**

The indefinite detention of people with psychosocial, cognitive and intellectual disability as a result of contact with the criminal justice system has recently attracted intense media and advocacy attention in Australia and has been addressed by several government inquiries.<sup>1</sup> Gooding et al note that detention frequently occurs in forensic psychiatric or disability units pursuant to forensic disability legislation, after a person has been found either unfit to stand trial or not guilty of an offence by reason of mental impairment.<sup>2</sup> For some forensic patients, the period of detention can be indefinite.<sup>3</sup> Indefinite detention is disproportionately experienced by Aboriginal and Torres Strait Islander people with disability.

In detention, people with disability are vulnerable to punitive treatment and practices, such as chemical and physical restraints and solitary confinement. For example, in the situation of four Aboriginal men with disability indefinitely detained in prisons, the Australian Human Rights Commission (AHRC) found that detention conditions amounted to cruel, inhuman or degrading treatment and that Australia was in breach of its international obligations.<sup>4</sup>

As Lea et al note, the detention of people with disability in prison alongside convicted offenders in these circumstances not only invokes OPCAT's mechanisms; their detention in specialist forensic units may equally result in abusive practices that constitute ill-treatment, and even torture. They explain:<sup>5</sup>

Secure civil, rather than forensic, psychiatric units also fall within OPCAT's ambit, being places where, pursuant to state or territory mental health legislation, people with psychosocial disability are deprived of liberty. A person found to meet the criteria for involuntary treatment under mental health legislation is typically either detained in a secure hospital ward or made subject to a community treatment order mandating mental health treatment. Once a person has been detained under the mental health or forensic disability legislation, they are usually required to comply with treatment and management regimes determined by, or in collaboration with, clinicians. Aside from loss of liberty, detention usually is also accompanied by other forms of deprivation, such as rights to a family life, and/or restriction on sexual

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<sup>1</sup> Senate Community Affairs References Committee. 2015. *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of aboriginal and torres strait islander people with disability, and culturally and linguistically diverse people with disability*. Canberra, Australian Capital Territory: Commonwealth of Australia; Senate Community Affairs References Committee. 2016. *Indefinite detention of people with cognitive and psychiatric impairment in Australia*. Canberra, Australian Capital Territory: Commonwealth of Australia.

<sup>2</sup> Gooding, P., A. Arstein-Kerslake, L. Andrews, and M. Bernadette. 2017. Unfitness to stand trial and the indefinite detention of persons with cognitive disabilities in Australia: Human rights challenges and proposals for change. *Melbourne University Law Review* 40, no. 3: 816.

<sup>3</sup> Senate Community Affairs References Committee. 2016. *Indefinite detention of people with cognitive and psychiatric impairment in Australia*. Canberra, Australian Capital Territory: Commonwealth of Australia; Sotiri, McGee, and Baldry 2012).

<sup>4</sup> KA, KB, KC and KD v Commonwealth (Department of Prime Minister and Cabinet, Department of Social Services, Attorney-General's Department) [2014] AusHRC 80

<sup>5</sup> Lea M., Beaupert F., Bevan N., Celermajer D., Gooding P., Minty R., et al. A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability. *Australian Journal of Human Rights*, (2018) 24(1), 70-96

activity. For forensic patients, whether or not – and when – they progress towards less onerous conditions and ultimately unconditional release is largely contingent upon their compliance with treatment and management regimes. The involuntary treatment context, in which forcible administration of medication is permitted in particular situations, carries with it a heightened risk of ill-treatment because of the blurred line between lawful and unlawful forms of treatment.

#### *Case studies*

David's\* initial forensic order (FO) was made in 1998 and he was subsequently found permanently unfit for trial and placed in an Authorised Mental Health Service (notwithstanding that he has intellectual disability and does not have a dual diagnosis of mental illness) before being transitioned to a purpose-built forensic disability service (FDS) following its opening in 2011. In 2016, David's five-yearly review under the Forensic Disability Act (Qld) found, among other things, that David had not benefited from his time at the FDS and that the environment and service model were unlikely to provide him with a benefit in the future. Notwithstanding this finding, David remained incarcerated at the FDS, with limited access to the community, in conditions that essentially constitute solitary confinement. As there is no end date to his detention, he is essentially indefinitely detained. Under the legislation, the review process is limited to identifying issues with the system without addressing the practicalities of care and support needs.

Mark\* was diagnosed with an intellectual disability at a young age and placed, as a child, under the care of Disability Services Queensland (DSQ) for public safety with the aim of helping him to develop more socially acceptable and less dangerous patterns of behaviour. Mark was placed on two consecutive Forensic Disability Orders, ultimately found permanently unfit for trial, and detained in a purpose-built FDS. His living conditions consist of a dual occupancy reinforced unit with a secure perimeter fence. Mark is the only resident in this unit and is subject to 24-hour periods of seclusion. Mark's interactions are limited to clinicians and staff working with him. The majority of these interactions occur through a server window. Within the living area of the unit, there are seven CCTV cameras that monitor Mark. This includes a camera in the toilet and shower. Independent oversight and monitoring of institutions like the FDS would be beneficial to ensure that fundamental human rights and freedoms are observed in environments with limited community access.

*\* Names in case studies have been changed to protect identity.*

#### ***Psychiatric facilities***

Laws, policy and practice for involuntary treatment of people with psychosocial disability purport to 'protect' people who may pose a risk of harm to themselves or others. They do this by providing compulsory treatment in the community or in mental health facilities, placing significant limitations on a person's rights to liberty and security and equal recognition before the law. Some forms of treatment within these facilities – including

administration of neuroleptic medication in psychiatric institutions,<sup>1</sup> forced psychiatric interventions,<sup>2</sup> and the involuntary administration of ECT<sup>3</sup> – have been found to constitute torture in certain circumstances.

The National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (2014) allows for the compulsory treatment of people with psychosocial disability in institutional settings and the community:

A 'chemical restraint' means the use of medication or chemical substance for the primary purpose of influencing a person's behaviour or movement. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or physical condition.

Community treatment orders (CTOs) do not require a person's consent, and freedom of movement and access to the community depends on compliance. This is despite research finding:<sup>4</sup>

... no consistent evidence that CCT [compulsory community treatment] reduces readmission or length of inpatient stay, although it might have some benefit in enforcing use of outpatient treatment or increasing service provision, or both.

### ***Disability institutions***

In recent decades, a strong emphasis on de-institutionalisation and reformation of the social and housing policy frameworks in Australia has resulted in the movement of many people with disability from institutions into smaller, community-based group homes.<sup>5</sup> Lea et al note that, while the outcomes of the de-institutionalisation movement in Australia have generally been considered positive, including for those who have experienced lengthy periods of institutionalisation, some institutional settings have remained and the reduction in institutional living arrangements has not correlated with an increase in community supports and services. They note that 'the post-institutional living arrangements of many people with disability – such as small-scale congregate care or 'group homes' – can aptly be described as

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<sup>1</sup> Kooijmans P. *Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (1986) E/CN4/1986/15. New York: United Nations, General Assembly, 29.

<sup>2</sup> Nowak M. *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (2008) A/63/175. New York: United Nations General Assembly

<sup>3</sup> Nowak M. 2008. *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (2008) A/63/175. New York: United Nations General Assembly

<sup>4</sup> Barnett P.; Matthews H.; Lloyd-Evans B.; Mackay E.; Pilling S.; Johnson S. Compulsory community treatment to reduce readmission to hospital and increase engagement with community care in people with mental illness: a systematic review and meta-analysis. *Lancet (Psychiatry)* Vol.5, December 2018, 1013

<sup>5</sup> Wiesel I., and Bigby C. Movement on shifting sands: Deinstitutionalisation and people with intellectual disability in Australia, 1974–2014. (2015) *Urban Policy and Research* 33(2), 178–94. doi:10.1080/08111146.2014.980902

a new form of institutionalisation, which carries over many highly institutionalised practices and cultures.<sup>1</sup>

In fact, the Specialist Disability Accommodation (SDA) Framework set up under the National Disability Insurance Scheme (NDIS) currently facilitates and encourages the establishment of residential institutions, where people with disability may be obliged to live in particular arrangements to access their support. Where dependent on this support, they are, therefore, unable to leave and may be trapped in situations of abuse and neglect.<sup>2</sup> For many people with disability not eligible for the NDIS, or unable to access social housing support, they may be trapped in situations of violence, abuse and neglect, particularly where they are dependent on family members for support.

### **Educational facilities**

Specialist school settings can have a number of negative impacts on child safety, creating precarious and unsafe situations. For instance, segregated settings limit the number of people with whom children with disability come into contact, limiting community oversight of the policies and everyday practices of these institutions. They can also make children with disability over-reliant on staff members in relation to reporting experiences of violence, abuse and neglect. In some cases, special schools are also boarding schools, frequently in regional areas, exacerbating the child's reliance on school staff for access to the rest of their community. Additionally, isolated settings can foster behaviours that would be deemed unacceptable by mainstream organisations and the wider community, normalising them for staff, students, family members and others.

In many mainstream school environments, 'protecting against harm to self or others' is frequently used to justify a range of responses to 'challenging behaviours'. Numerous recent inquiries into the education and experience of students with disability in Australia have documented significant human rights breaches, including the use of restrictive practices.<sup>3</sup> This is of particular concern in light of the lack of regulation of, and policies and guidelines on, the use of restrictive practices in educational settings which, of itself, is considered as 'perpetuating this cycle of abuse'.<sup>4</sup> The inquiry by the Senate Community Affairs References Committee found multiple examples of children with disability being held down by school staff, tied down to chairs, and locked in closets.<sup>5</sup> Similarly, the Victorian Equal Opportunity

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<sup>1</sup> Lea M., Beaupert F., Bevan N., Celermajer D., Gooding P., Minty R., et al. A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability. *Australian Journal of Human Rights*, (2018) 24(1), 70-96

<sup>2</sup> See media report from 2017 of neglect and abuse in small group homes [www.abc.net.au/news/2017-03-28/people-with-intellectual-disabilities-locked-away-in-suburbia/8390350](http://www.abc.net.au/news/2017-03-28/people-with-intellectual-disabilities-locked-away-in-suburbia/8390350)

<sup>3</sup> See for example, Department of Education and Training. *Review of the program for students with disabilities*. (2016) Melbourne: Victorian Government Printer; Shaddock A., Packer S., and Roy A. *Report of the Expert Panel on Students with Complex Needs and Challenging Behaviour*. (2015); Victorian Auditor-General. *Programs for students with special learning needs* (2012) Melbourne: Victorian Government Printer.

<sup>4</sup> Senate Community Affairs References Committee. *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (2015) Canberra, Australian Capital Territory: Commonwealth of Australia; Senate Community Affairs References Committee. 2016, 106.

<sup>5</sup> Senate Community Affairs References Committee. *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular*



and Human Rights Commission's 2012 investigation noted that 60 per cent of educators surveyed had physically restrained a student with disability.<sup>1</sup> Further reports of restrictive practices have recently been reported during public hearings for the Disability Royal Commission.<sup>2</sup>

#### *Case study*

Queensland Advocacy Incorporated (QAI) and another community organisation supporting people with disability supported a parent to share the experience of her child and the use of restrictive practices in schools at the March 2017 human rights forum: *Walk the Talk: Realising the 2010-2020 National Disability Strategy and our human rights promises*. She spoke about the experiences of her son who, then eight years old and attending a state primary school in Queensland, on numerous occasions, was put into a withdrawal room (her son called this 'the dark room'). Her son was not provided any form of education or support during the lengthy periods in which he was contained in the withdrawal room and suffered significant, adverse effects from this, including experiencing feelings of fear while left alone in the room, stigma and denial of ordinary educational opportunities.

The mother spoke of her belief that such 'behaviour management' may constitute psychological abuse, deprivation of liberty, physical abuse and assault. The state school, she said, did not provide quality inclusive education and made no reasonable accommodation for her son's support requirements. She felt that the actions of the school were in breach of the Convention Against Torture. Her son went on to thrive without any such restrictions in an inclusive and supported learning environment in another state school in Queensland.

### **3.3.3 Practices of detention**

As well as shining a light on both mainstream and disability-specific places of detention, OPCAT provides an opportunity to challenge specific treatment and support regime practices of institutional violence against people with disability, such as involuntary treatment and the use of restraint and seclusion, which have increasingly been problematised within the international human rights system.<sup>3</sup> Indeed, the focus of OPCAT on the protection of people with disability from torture and ill-treatment resonates strongly

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*situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*. (2015) Canberra, Australian Capital Territory: Commonwealth of Australia; Senate Community Affairs References Committee. 2016, 105

<sup>1</sup> Victorian Equal Opportunity and Human Rights Commission. *Held back: The experiences of students with disabilities in Victorian schools*. (2012) Melbourne: Victorian Government Printer, 11

<sup>2</sup> See the Royal Commission into Violence, Abuse, Neglect, Exploitation of People with Disability hearing transcripts, Monday 4 November 2019 [disability.royalcommission.gov.au/hearings/Pages/transcripts.aspx](https://disability.royalcommission.gov.au/hearings/Pages/transcripts.aspx)

<sup>3</sup> Nowak M. *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*. (2008) A/63/175. New York: United Nations General Assembly; Méndez J. *Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*. (2013) A/HRC/22/53. New York: United Nations, General Assembly

with the elements of the CRPD which oblige States Parties to respond to violence.<sup>1</sup> As Lea et al note:<sup>2</sup>

It is conceivable that deprivations of liberty might occur outside the walls of physical institutions, particularly where a person can readily be detained by virtue of this situation. For example, a person subject to a community treatment order (CTO) made pursuant to mental health legislation, can live in the community but is deprived of the liberty to make decisions about their health care by virtue of attached conditions requiring submission to psychiatric treatment, such as regular administration of neuroleptic medication. The use of chemical restraint is of key concern in relation to this form of involuntary outpatient treatment. Further, a CTO recipient can typically be detained using a streamlined process involving the use of reasonable force by police if they fail to comply with the conditions attaching to the order (Callaghan and Newton-Howes 2017, 904). The OPCAT definitions of ‘deprivation of liberty’ and the ‘places’ that NPMs and SPTs can visit may not contemplate sites of coercion entailing community-based orders. Nonetheless, these virtual sites overlap and interlock with physical sites of detention in various ways – for example, by acting as a means to continue involuntary treatment once a person leaves a place of detention. This highlights that regardless of whether non-traditional sites (and modalities) of detention are subject to direct OPCAT monitoring, NPMs and SPTs should be mindful of how the NPM mandate interacts with this wider coercive context.

There is considerable evidence that the right of people with disability to be free from involuntary treatment, violence, torture and ill-treatment is frequently breached in places of detention. Indeed, it has been noted that restraint and seclusion practices generally occur in ‘unexpected spaces of confinement’, such as group homes, day programs, aged care facilities and schools.<sup>3</sup>

At present, the use of seclusion and restraint (both chemical restraint and physical restraint) are regulated by legislation in some Australian jurisdictions. ‘Restrictive practices’ refers to ‘any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with a disability, with the primary purpose of protecting the person or others from harm’<sup>4</sup> and are directed towards ‘control[ling] or manag[ing] a person’s behaviour’.<sup>5</sup> Restrictive practices include chemical, physical and mechanical restraint and

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<sup>1</sup> See in particular Articles 14–17 of the CRPD

<sup>2</sup> Lea M., Beupert F., Bevan N., Celermajer D., Gooding P., Minty R., et al. A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability. *Australian Journal of Human Rights*, (2018) 24(1), 70-96

<sup>3</sup> Adams D.L., and Erelles N. Unexpected spaces of confinement: Aversive technologies, intellectual disability, and ‘Bare Life’. *Punishment & Society* (2017) 19(3), 348–65. doi:10.1177/ 1462474517705147

<sup>4</sup> National Framework for Reducing and Eliminating the Use of Restrictive Practices cited in Senate Community Affairs References Committee. *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*. (2015) Canberra, Australian Capital Territory: Commonwealth of Australia, 91

<sup>5</sup> Senate Community Affairs References Committee. *Indefinite detention of people with cognitive and psychiatric impairment in Australia*. (2016) Canberra, Australian Capital Territory: Commonwealth of Australia

seclusion.<sup>1</sup> By impacting on perception, restricting movement and subduing behaviour, chemical restraint also impacts on the ‘freedom’ and ‘community participation’ of people with disability.<sup>2</sup>

Restrictive practices are used not only in disability services, but also within schools, prisons, day programs, aged care facilities and community settings. Lea et al note:<sup>3</sup>

Typically, restraint and seclusion practices are framed as therapeutic and protective because the person with disability is identified as the source of the problem and in turn the legitimate site of intervention. Moreover, in disability ‘support’ settings, restraint and seclusion are often part of mundane workplace practice. In such settings, the behaviour of individuals is viewed through a prism of organisational risk management (insurance, Occupational Health and Safety, duty of care), and restraint and seclusion are absorbed into professional ethical practice.

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<sup>1</sup> Restraint can be mechanical (‘use of a device to prevent or restrict a person’s movement for the primary purpose of influencing a person’s behaviour’), physical (‘prolonged use of physical force to subdue movement for the primary purpose of influencing a person’s behaviour’) or chemical (‘use of medication for the primary purpose of influencing a person’s behaviour or movement’): Senate Community Affairs References Committee. *Indefinite detention of people with cognitive and psychiatric impairment in Australia*. (2016) Canberra, Australian Capital Territory: Commonwealth of Australia, 91–92. Seclusion involves ‘sole confinement of a person with disability’ (Senate Community Affairs References Committee. *Indefinite detention of people with cognitive and psychiatric impairment in Australia*. (2016) Canberra, Australian Capital Territory: Commonwealth of Australia, 91)

<sup>2</sup> Fabris E., and Aubrecht K. Chemical constraint: Experiences of psychiatric coercion, restraint, and detention as incarceratory techniques. In *Disability incarcerated: Imprisonment and disability in the United States and Canada*, ed. Liat Ben-Moshe, Chris Chapman, and Alison C. Carey (2014), 185–99. New York: Palgrave Macmillan; Steele L. Disabling forensic mental health detention: The carcerality of the disabled body. *Punishment & Society* (2017) 19(3), 327–47. doi:10.1177/1462474516680204

<sup>3</sup> Lea M., Beaupert F., Bevan N., Celermajer D., Gooding P., Minty R., et al. A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability. *Australian Journal of Human Rights*, (2018) 24(1), 70-96

### *Case study*

The below case studies accompanied the Australian Cross Disability Alliance Submission (now Disabled Peoples Organisations Australia) to the 2015 *Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings*.

Zac\* voluntarily admitted himself to a hospital's psychiatric inpatient unit. At no time was he given information regarding his rights as a voluntary patient, and there was a failure to provide him with services for his pre-existing diabetes. Zac became concerned that his 'treatment' involved only medication and not a referral to a social worker, psychologist, or community counselling service, despite the psychiatrist recommending this. Although the issue was raised with hospital staff, no action was taken. He notified staff of his intention to discharge himself (which was within his rights as a voluntary patient) but he was warned his status would be changed to 'involuntary' should he attempt to discharge himself. Zac then attempted to leave the ward, and was subsequently reclassified as an involuntary patient and put into seclusion for six-and-a-half hours, and stripped of his clothing. He was not provided with an explanation of his change of patient status to involuntary or the reason for being placed in seclusion. Due to his experience in involuntary seclusion, Zac continues to experience emotional and physical symptoms, including chronic depression.

Adam's\* death at a hospital's psychiatric ward during a struggle with security guards was the subject of a recent inquest. Evidence to the inquest suggests he was asphyxiated while being held face down by security staff. A witness told the inquest that the victim apparently yelled "I give up", but security did not ease off. He died soon after.

Hugo\* died in a mental health facility. He was killed by a combination of powerful anti-psychotic medications given to him by staff, according to a Government pathologist. Staff and patients aware of the circumstances of his death say Hugo was pleading not to be given more drugs on the night he died. Staff and patients also allege there was an attempt to conceal information about the circumstances of his death from his family.

*\* Names in case studies have been changed to protect identity.*

Research and data on the use and impact of restrictive practices on people with disability is limited. However, the available research suggests 'challenging behaviour' exhibited by a person with disability is the result of the maladaptive environment. In the context of children, Méndez has recognized that an important safeguard against torture and other forms of ill-treatment is the support given to children in detention to maintain contact with parents and family through telephone, electronic or other correspondence, and regular visits at all times. His recommendations include that children should be placed in a facility that is as close as possible to the place of residence of their family, with any exceptions to this requirement clearly described in the law and not left to the discretion of the competent authorities. Moreover, he contends that children should be given permission to leave detention facilities for a visit to their home and family, and for educational, vocational or other important reasons, emphasising that the child's contact with the outside world is an integral part of the human right to humane treatment, and should never be denied as a

disciplinary measure. Further, Méndez recommends that children in detention be provided with purposeful, out-of-cell activities.<sup>1</sup>

This recognition of the vital importance of therapeutic rehabilitation for persons in incarceration has broader significance – to ignore such basic therapeutic need could consign a person to a lifetime of such experience. The provision of appropriate habilitation and rehabilitation is particularly critical for persons with intellectual or cognitive disability, whose skills and capacity can fluctuate in accordance with their environment.

### **3.4 NPM responsible for places where people with disability are detained**

It is imperative that the Australian NPM does not view disability as a separate, specialist issue to be dealt with by other regulatory bodies or other stakeholders.

Currently, there are a number of bodies that function to undertake preventive monitoring in mainstream settings where people with disability are over-represented, as well as in disability-specific settings. However, the ongoing experiences of people with disability demonstrates that the Australian NPM must not rely solely on the existing monitoring provisions. For example, as Weller notes:<sup>2</sup>

... the Community Visitors in Victoria who operate from the Office of the Public Advocate work to a human rights framework and are well placed to continue effective monitoring (Lea et al. 2018). However, there has been no systematic analysis of the practices adopted by these groups to assess whether a disability-aware and human rights approach is adopted. Special expertise must be developed, nurtured and sustained.

Recent media coverage in relation to the Disability Royal Commission drew attention to the ongoing issues of violence in group homes and the shortcomings of unpaid Community Visitor Scheme in Victoria.<sup>3</sup>

The Official Community Visitor (OCV) Scheme in NSW was previously under the umbrella of the NSW Ombudsman but recently transitioned to the new, NSW Ageing and Disability Commission. OCVs are paid a small fee to make visits and have considerable powers to enter premises, inspect records, etc. Technically, they are statutory officers, independent from government, and they report back to the Commission. To date, the OCV has rarely referred issues to disability advocacy organisations for follow up. The OCVs each have to visit a number of institutions and that usually precludes them from being able to respond appropriately to individual/systemic abuse practices within those institutions.

The recently established Quality and Safeguards Commission has an oversight and monitoring role for those disability services registered in the National Disability Insurance Scheme (NDIS). However, to date, the Commission has been highly reactive to complaints

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<sup>1</sup> United Nations General Assembly. Human Rights Council, 28th Session. 5 March 2015, p 17

<sup>2</sup> Penelope Weller. OPCAT monitoring and the Convention on the Rights of Persons with Disabilities, *Australian Journal of Human Rights* (2019) 25(1), 130-149, DOI: 10.1080/1323238X.2019.1588056

<sup>3</sup> [www.abc.net.au/radio/programs/pm/experts-say-group-homes-need-complete-restructure/11762376](http://www.abc.net.au/radio/programs/pm/experts-say-group-homes-need-complete-restructure/11762376)

and does not take a proactive role in ensuring the safety of people with disability living in institutions. While the Commission is taking an educative role, they are currently constrained by a lack of resources.

### **3.5 Key issues of concern in relation to the detention of people with disability**

***The legislative and policy framework that allows for the detention of people with disability and the lack of access to justice and support for people with disability to understand their individual rights, including their right to challenge their detention.***

There is a chronic lack of funding for appropriately qualified and skilled, independent, legal and non-legal advocates.

***The justification of detention of people with disability on the basis of procedure, best interest, or medical necessity, and the barriers that hinder challenging that detention such as indefinite forensic detention and compulsory treatment orders.***

In 2013, the Special Rapporteur on Torture called for an ‘absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement.’<sup>1</sup> The NPM must seek to enforce this ban. The NPM in Australia must address the issue of non-consensual treatments and practices, behaviour modification methods and the use of restrictive practices, such as physical, chemical and mechanical restraints, applied to people with disability in detention.

***The systemic gatekeeping and embedded practices in institutions, which results in detention and restrictive practices inflicted against people with disability in institutions going unreported.***

In addition, there remains a cultural norm in Australia of minimising violence against people with disability, such that what would ordinarily be treated as crimes are given diminished status.

***The disproportionate impact on Aboriginal and Torres Strait Islander people with disability, and those with intellectual and cognitive disability.***

Intersectional and generational discrimination has resulted in the disproportionate detention of First Nations people with disability, particularly in justice settings.

***The lack of disability expertise in current oversight and monitoring bodies in Australia.***

The disability rights community in Australia has advocated strongly for an NPM that is responsive to disability. Australia has the opportunity to lead the way in this regard. Adequate monitoring of the treatment of people with disability in all places of detention will require additional legislated powers, adequate and/or expanded resources and a strong cultural shift within existing and newly established monitoring bodies. To achieve this the NPM should also:

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<sup>1</sup> Mendez, J. E. 2013. A/HRC/22/53 para 63, available: [www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)

- employ people, including people with disability, with specific expertise in human rights and disability, and in disability support, communication methods and supported decision-making
- include people with disability as peer monitors to conduct inspections and participate in making recommendations to relevant authorities and submitting relevant reform proposals to improve conditions of people deprived of their liberty
- develop a disability inclusion action plan to ensure the NPM operates in a fully accessible, inclusive and non-discriminatory manner
- cover a broad scope of places of detention, including commonly understood places of detention as well as disability specific and related institutions where people with disability are over-represented, and formally detained or compelled to remain
- prioritise disability-specific and related institutions, where people with disability are over-represented and formally detained or compelled to remain, not only to monitor conditions and practices but also to work towards ending disability-based detention.

***Lack of engagement with people with disability and their representative organisations.***

The 2019 Concluding Observations of the Committee on the Rights of Persons with Disabilities urges the Australian Government to:

Ensure that organisations of persons with disabilities can effectively engage in the establishment and work of the national preventive mechanism.

The NPM must be fully disability-inclusive. People with disability and their representative organisations must co-design – or be actively engaged in – decisions regarding the design, development and implementation of the NPM, including developing the monitoring criteria, the role and make-up of inspection teams, and decisions regarding prioritising places of detention.

A formal NPM advisory panel of people with disability and representative organisations should be established.

The NPM must incorporate formal feedback mechanisms to allow people with disability in all forms of detention to provide information on their experiences, with strong provisions to ensure anonymity. These mechanisms must have adequate provisions to enable decision supports, where appropriate, and must allow people to provide feedback in a range of communication forms.

### **3.6 Recommendations**

In addition to the points made above, we recommend that, during their visits to Australia, the SPT and the WGAD:

- take an expansive interpretation of places and practices of detention that fall under the mandate of OPCAT – and advocate for the Australian Government to do the same – and ensure their visit includes examples of all places where people with disability are detained, and/or subject to forced treatment and restrictive practices,

including: psychiatric hospitals, assisted boarding houses and disability residential institutions, forensic units, juvenile justice facilities, and schools

- prioritise meetings with people with disability and their representative organisations based in each state and territory
- give priority to the issue of the indefinite detention of people with psychosocial, cognitive and intellectual disability as a result of contact with the criminal justice system and its disproportionate impact on Aboriginal and Torres Strait Islander people with disability
- seek to engage constructively with the Commissioners from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability in relation to the role of the NPM in preventing and monitoring places and practices of detention of people with disability.



## CHAPTER 4: PRISONS, YOUTH JUSTICE AND POLICE CUSTODY

### Key points

Australia's prisons, youth justice facilities and police custody facilities are operated at the level of Australia's states and territories. Practices, capacity and conditions therefore vary by jurisdiction. Different issues are also raised in each field of detention. Key concerns highlighted by civil society contributors to this chapter that are of relevance to the visits of the WGAD and the SPT include

- increasing rates of incarceration, and particularly incarceration of unsentenced (remand) prisoners
- overcrowding and its impacts on accommodation and access to services
- the specific impacts of incarceration and police custody on Aboriginal and Torres Strait Islander people
- inadequacies in provision of support for people with complex health and mental health needs
- over-use of solitary confinement and restraints in relation to children, young people, and young adults
- over-use of strip-searching across all sectors.

Note: the content of this chapter is based on contributions generously provided by a range of civil society contributors. Given this method of compilation of information, and the extent of justice detention across the nine Australian jurisdictions, only a selection of issues and jurisdictions is discussed here.

### 4.1 Overview of detention in prisons, youth justice facilities and police custody facilities in Australia

#### 4.1.1 Overview of prison populations in Australia

According to the Australian Bureau of Statistics' (ABS) Prisoners in Australia 2018 report:<sup>1</sup>

- there were 42,974 prisoners in Australian prisons, an increase of 4 per cent (1,772 prisoners) from 30 June 2017
- between 2017 and 2018, the national imprisonment rate increased by 3 per cent from 216 to 221 prisoners per 100,000 adult population
- seven out of ten prisoners (68 per cent, or 29,030 prisoners) were sentenced, while 32 per cent (13,856 prisoners) were unsentenced
- males accounted for 92 per cent of all prisoners (39,343 prisoners) and females the remaining 8 per cent (3,625 prisoners)
- Aboriginal and Torres Strait Islander people accounted for over a quarter (28 per cent or 11,849 prisoners) of the total Australian prisoner population (by way of comparison, the total Aboriginal and Torres Strait Islander population aged 18

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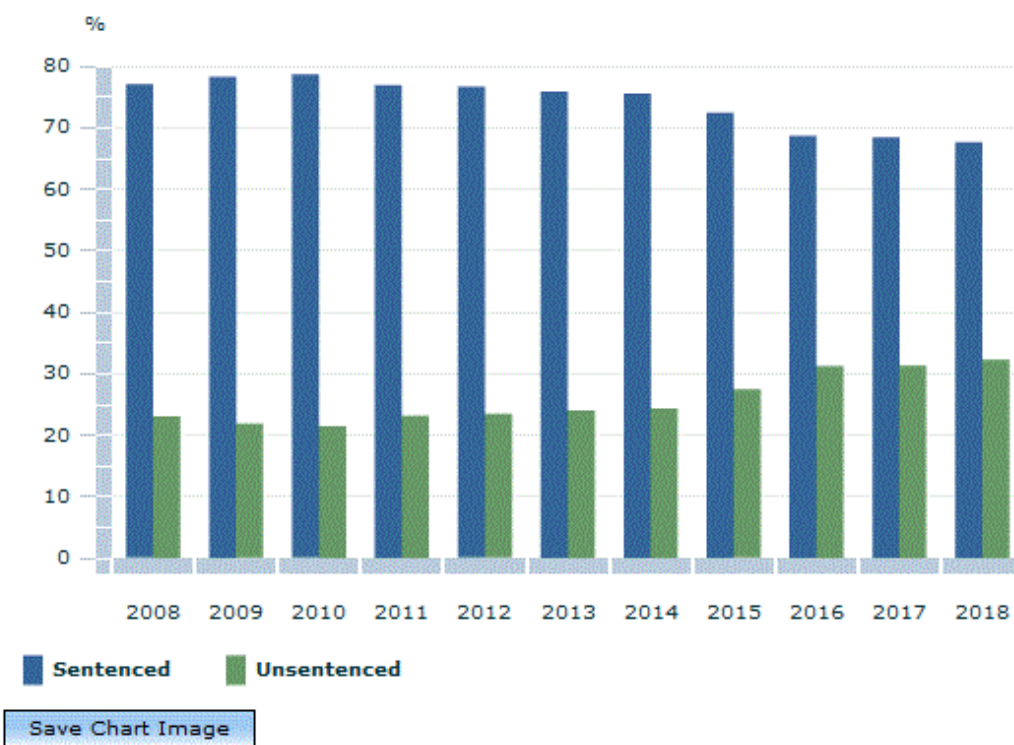
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years and over in 2018 was approximately 2 per cent of the Australian population aged 18 years and over)

- Since 30 June 2017, the adult prisoner population increased across all states and territories except for South Australia, where it decreased by 1 per cent (41 prisoners); New South Wales and Victoria experienced the largest increases in prisoner numbers, increasing by 591 and 517 prisoners, respectively
- New South Wales had the largest adult prisoner population, comprising nearly one-third (32 per cent or 13,740 prisoners) of the total Australian adult prisoner population, followed by Queensland (21 per cent or 8,840 prisoners) and Victoria (18 per cent or 7,666 prisoners)
- the Northern Territory had the highest imprisonment rate (955 prisoners per 100,000 adult population) while Tasmania had the lowest imprisonment rate (148 prisoners per 100,000 adult population)
- in all states and territories, at least half of all prisoners were recorded as having had prior adult imprisonment under sentence.

**PROPORTION OF SENTENCED AND UNSENTENCED PRISONERS, 30 June 2008 to 30 June 2018**



Australian Bureau of Statistics

© Commonwealth of Australia 2018.

*Figure 6: Proportion of sentenced and unsentenced prisoners, 30 June 2008 to 30 June 2018*

According to the report Health of Australia’s Prisoners 2018 by the Australian Institute of Health and Welfare (AIHW):

- three in four prison entrants had previously been in prison – 73 per cent had been in prison before, 45 per cent within the previous 12 months

- two in five prison entrants had been told they had a mental health condition, with almost one in four currently taking mental health-related medication
- one in five prison entrants reported a history of self-harm
- almost three in 10 younger prison entrants had a history of family incarceration
- two in three entrants reported using illicit drugs in the previous year
- one in three prison entrants had a school education level of Year 9 or under
- almost one in three prison entrants had a chronic physical health condition
- more than one in two prison discharges expected they would be homeless on release.

### ***Over-representation of Aboriginal and Torres Strait Islander people in adult detention***<sup>1</sup>

Aboriginal and Torres Strait Islander people constitute over a quarter (28 per cent or 11,849 prisoners) of the total adult Australian prisoner population, while comprising approximately 2 per cent of the Australian adult population.

In the last five years (from June quarter 2013 to June quarter 2018), the number of persons in custody in the NT has increased by 39 per cent (12,043 persons). At June 2018, Aboriginal and Torres Strait Islanders comprised 84 per cent (1,477 prisoners) of the adult prisoner population in the NT, while comprising 28.8 per cent of the overall NT population. This was the largest proportion of Aboriginal and Torres Strait Islander prisoners of any state or territory.<sup>2</sup>

An Aboriginal adult is twelve times more likely to be imprisoned in the NT than a non-Aboriginal adult.<sup>3</sup>

#### **4.1.2 Overview of youth justice populations in Australia**

##### ***General populations in youth justice detention***

According to the Australian Institute of Health and Welfare 2019, on an average day:<sup>4</sup>

- 5,513 young people (aged 10–17) were under supervision across Australia of whom
  - 4,568 were under community supervision
  - 974 were in detention
- in total, 4,933 young people were in detention some time during the year
- about three in five young people in detention on an average day were unsentenced.

<sup>1</sup> See also discussion in Chapter 6

<sup>2</sup> Australian Bureau of Statistics, NT Snapshot at June 2018  
[www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Northern%20Territory~27](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Northern%20Territory~27)

<sup>3</sup> At June 2018, Aboriginal and Torres Strait Islander age-standardised imprisonment rate was more than 12 times the non-Indigenous age-standardised imprisonment rate (2,579 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population compared to 205 prisoners per 100,000 adult non-Indigenous population): Australian Bureau of Statistics, NT Snapshot at June 2018

<sup>4</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (2019) Cat. no. JUV 129. Canberra: AIHW

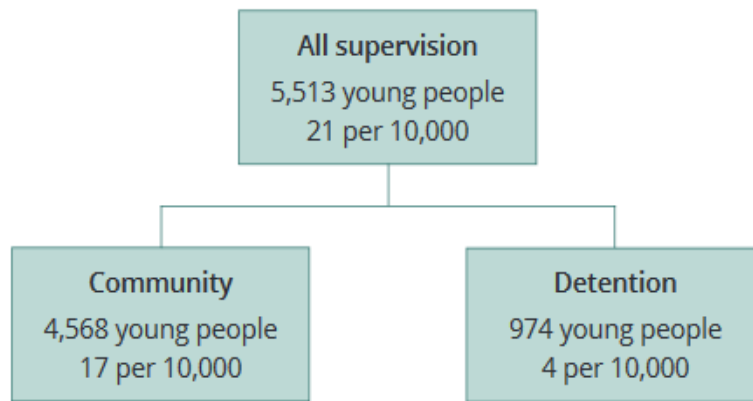


Figure 7: Young people under supervision on an average day, by supervision type, 2017–2018<sup>1</sup>

The majority of young people under supervision on an average day in 2017–18 were male (81 per cent). This proportion was higher among those in detention (91 per cent) than those supervised in the community (80 per cent). The youngest person under supervision in this period was 11 years old; the majority of young people under supervision were aged 15 years and older.

<sup>1</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (2019) Cat. no. JUV 129. Canberra: AIHW

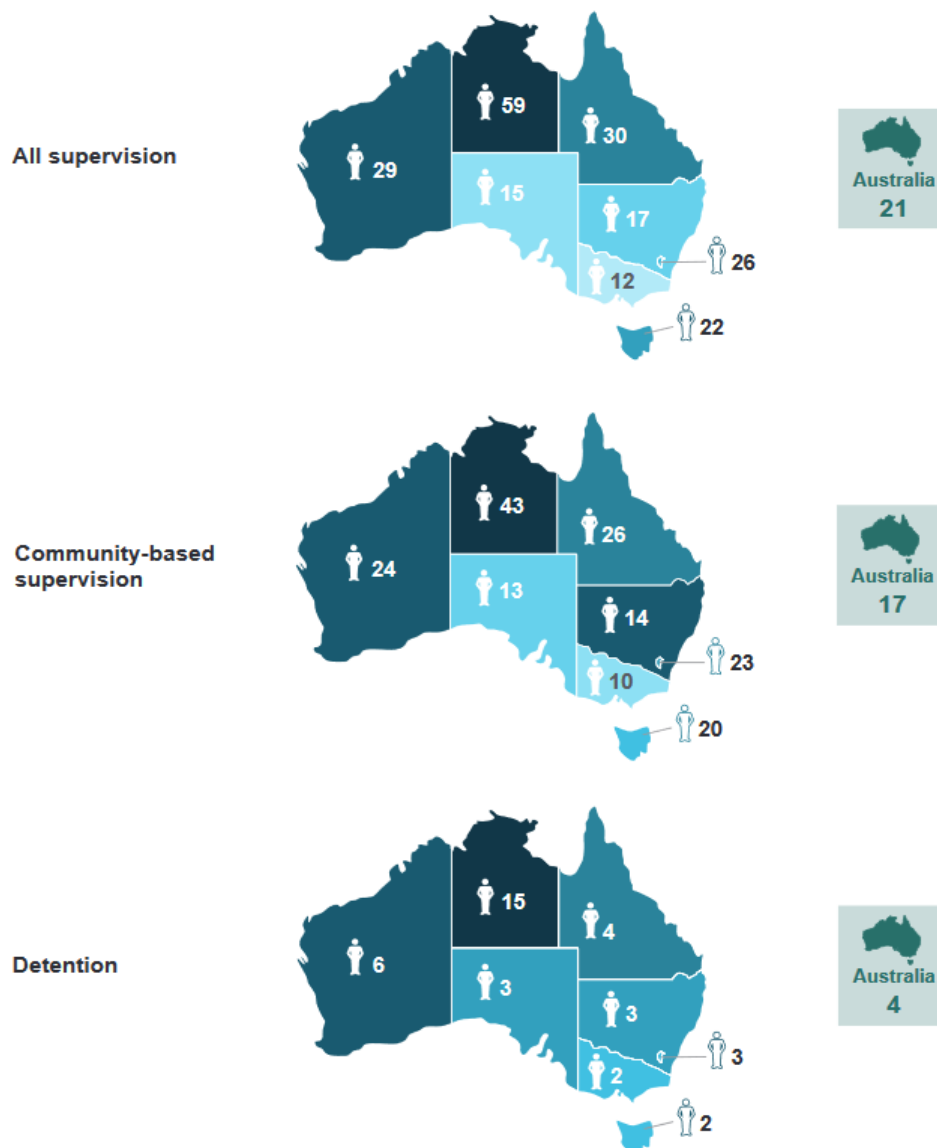


Figure 8: Young people aged 10–17 under supervision on an average day – by supervision type, in each state and territory, 2017–18 (numbers per 10,000)<sup>1</sup>

Rates of supervision (community and detention) overall have fallen over the past five years. The rate fell for community-based supervision (from 20 to 17 per 10,000) and rose slightly for detention (from 3 to 4 per 10,000).

**Over-representation of Aboriginal and Torres Strait Islander people in youth detention<sup>2</sup>**

Aboriginal and Torres Strait Islander young people are also significantly over-represented in youth justice facilities. Although only about 5 per cent of young people aged 10–17 in Australia are Indigenous, half (49 per cent) of those under supervision on an average day in 2017–18 were Indigenous. While supervision rates have fallen in recent years, they are still very high.

<sup>1</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (2019) Cat. no. JUV 129. Canberra: AIHW

<sup>2</sup> See also discussion in Chapter 6

Between 2013–14 and 2017–18, the rate of Indigenous young people aged 10–17 under supervision on an average day fell from 199 to 187 per 10,000. The rate of non-Indigenous young people under supervision also fell over the period, from 13 to 11 per 10,000.

On average, Indigenous young people entered youth justice supervision at a younger age than non-Indigenous young people. Two in five (39 per cent) of Indigenous young people under supervision in 2017–18 were first supervised when aged 10–13, compared with about one in seven (15 per cent) non-Indigenous young people.<sup>1</sup>

These statistics are worse for young people in detention in the NT. Indeed, throughout 2019 at all times nearly one hundred percent of young people in detention were Aboriginal.<sup>2</sup> The young people in detention in the NT come from diverse cultural, linguistic and regional backgrounds – from urban centres (Alice Springs, Tennant Creek, Katherine) to more remote communities (Central Australia, Arnhem land, Tiwi Islands, Wadeye etc) where English is often not their first language and where cultural practices and traditional ways of being are the norm.<sup>3</sup> The majority of these children and young people come from families and communities which are socially and economically disadvantaged and are living in poverty,<sup>4</sup> and many of the young people in detention are ‘crossover kids’ from the Child Protection system.

#### 4.1.3 Overview of police custody in Australia

Data on police custody in Australia are more difficult to obtain. The Victorian Crime Statistics Agency (CSA), for example, notes that police custody information is not available.<sup>5</sup>

## 4.2 Overview of facilities<sup>6</sup>

### *Prisons*

There are 109 adult prisons in Australia. As detailed in the Commonwealth Ombudsman’s 2019 Report, 40 of these are in NSW, 21 in WA, 15 in Victoria and 14 in Queensland.

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<sup>1</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (2019) Cat. no. JUV 129. Canberra: AIHW, v-vi. See also the current inquiry by the Victorian CCYP into overrepresentation of Aboriginal children and young people in the youth justice system [ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way](http://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way)

<sup>2</sup> [www.theguardian.com/australia-news/2019/may/31/system-is-broken-all-children-in-nt-detention-are-aboriginal-officials-say](http://www.theguardian.com/australia-news/2019/may/31/system-is-broken-all-children-in-nt-detention-are-aboriginal-officials-say)

<sup>3</sup> Royal Commission into the child protection and youth detention systems of the Northern Territory. *Final Report*, Chapter 18 ‘Culture in Detention’ (2016)

<sup>4</sup> The AIHW has identified ‘disadvantage in areas of health, education, employment, housing, and social inclusion’ as key contributing factors to pathways into child protection systems, which in turn have been linked to a significantly increased risk of youth offending: AIHW, Closing the Gap Clearinghouse Resource sheet 34, Daryl Higgins and Kristin Davis (2014), Law and justice: prevention and early intervention programs for Indigenous youth. See also AIHW (2016), *Vulnerable young people: interactions across homelessness, youth justice and child protection*, 1 July 2011 – 30 June 2015:

<sup>5</sup> [www.crimestatistics.vic.gov.au/about-the-data/explanatory-notes](http://www.crimestatistics.vic.gov.au/about-the-data/explanatory-notes)

<sup>6</sup> This section draws on Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) Baseline Assessment of Australia’s OPCAT Readiness* (September 2019), 31

## **Youth justice**

There are 16 juvenile detention facilities in Australia. Each jurisdiction has either one or two such facilities, with the exception of NSW which has six.

## **Police custody**

There are 366 'police lock-ups or police station cells (where people are held for equal to, or greater than, 24 hours)'. NSW (with 112) and Victoria (with 101) have by far the largest number.

### **4.3 Overview of monitoring agencies for justice detention facilities across Australia**

The Commonwealth Ombudsman summarises the monitoring agencies in the September 2019 Baseline Study.<sup>1</sup>

All states and territories have (at least) an Ombudsman's office which oversees adult prisons, and a children's commissioner/guardian with oversight of youth justice facilities. Some have specialised prisons inspectorates (WA, NSW, ACT and Tasmania).

The main gap is in oversight of police cells. The Commonwealth Ombudsman found oversight of police cells to be non-existent in some states, and in others ad hoc, and/or limited.

### **4.4 Key issues of concern in relation to justice detention facilities**

#### **4.4.1 Prisons**

Australia's prisons are managed at state and territory level, with widely varying prison cohorts and political and geographical characteristics. In this section, we first make some general points, followed by a selection of jurisdiction-specific observations. As noted earlier, the specific jurisdictional information was provided by civil society contributors; it is not suggested that these jurisdictions are the only jurisdictions about which issues could be raised for this brief.

Many of Australia's prisons are significantly overcrowded; they also face serious challenges in managing the increasingly complex needs of people being sentenced to imprisonment. They are often unable to properly provide appropriate care and accommodation for particular cohorts of people, including those with complex health issues, those living with physical and/or mental health disability (particularly psychosocial disability),<sup>2</sup> people

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<sup>1</sup> Commonwealth Ombudsman, [Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\) Baseline Assessment of Australia's OPCAT Readiness](#) (September 2019)

<sup>2</sup> Brown D. Prisoners as citizens: Human rights in Australian prisons. (2002) Federation Press; Human Rights Watch. *'I needed help, instead I was punished': Abuse and neglect of prisoners with disabilities in Australia* (2018) Canberra: Human Rights Watch

experiencing complex grief and trauma issues, Indigenous peoples,<sup>1</sup> LGBT people, women, young people, children and other vulnerable groups.

As academic Elizabeth Grant has observed, many people who might warrant non-custodial dispositions are held away from the community and in overly secure environments due to:<sup>2</sup>

- lack of accessible, affordable housing
- lack of supported accommodation for people with psychosocial disability
- inability to access National Disability Insurance Scheme (NDIS) packages and support services when living with psychosocial disability
- lack of suitable housing in community for people on bail and parole, and for people with drug and alcohol issues (particularly people with complex health issues, psychiatric conditions and/or suffering drug psychosis)
- inability to deal safely and appropriately with people exhibiting behaviours resulting from substance misuse, in particular, as the use of methamphetamine and other substances increases<sup>3</sup>
- lack of appropriate safe accommodation for children and young people when family care is impossible.

Grant, an international scholar of Indigenous architecture with considerable expertise in the design of custodial environments,<sup>4</sup> notes significant issues related to the design of Australia's various types of custodial environments including:

- hard and poorly designed police and prison environments
- an overreliance on technology (for example, CCTV, security technology) rather than adopting prisoner management through direct contact
- not employing the principles of a 'people-centred' approach to the design of police, prison and other forms of custody
- preference for large institutions, which may allow individuals less control over their environment and lead to all prisoners living in overly secure environments

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<sup>1</sup> Commonwealth of Australia *Royal Commission on Aboriginal Deaths in Custody, National Report vols 1-5*, (1991) Canberra: Commonwealth of Australia

<sup>2</sup> Grant E., Zillante G., Tually S., Chong A., Srivastava A., Lester L., et al. Housing and Indigenous people living with a disability: lived experiences of housing and community infrastructure. *Australian Housing and Urban Research Institute, AHURI Positioning Paper* (2016) 168; Beer A. and Faulkner D.R. The housing careers of people with a disability and carers of people with a disability. Australian Housing and Urban Research Institute (2008)

<sup>3</sup> Chalmers J., Lancaster K. and Hughes C. The stigmatisation of 'ice' and under-reporting of meth/amphetamine use in general population surveys: a case study from Australia. *International Journal of Drug Policy* (2016) 36, 15-24

<sup>4</sup> See, for example; Grant E. Towards safer and more congruent prison environments for male Aboriginal prisoners: A South Australian study (PhD Thesis) The University of Adelaide (2008); Grant E. The incarceration of Aboriginal women and children, in Ashton, P. & Wilson, J. (eds). *Silent System: Forgotten Australians and the Institutionalisation of Women and Children*. Melbourne: Australian Scholarly Publishing: (2014) 43-58.; Grant E. An international overview of the initiatives to accommodate Indigenous Prisoners, in Jewkes, Y., Crewe, B. & Bennett, J. (eds) *The Prison Handbook (2nd Edition)*, London: Routledge: (2016) 340-358



- the use of ‘cookie cutter’ approaches to the design of police, courthouse and prison facilities in some states – this leads to facilities which do not take into account the climatic, environmental, social and specific needs of users
- the over-use of solitary confinement<sup>1</sup>
- a lack of appropriately designed, health and wellbeing focused environments for people with physical, psychosocial, grief and trauma, substance misuse issues
- a lack of ‘trauma-informed’<sup>2</sup> design approaches to the design of custodial settings
- culturally inappropriate environments for Indigenous peoples (including locating custodial environments significant distances from family, Country and community)<sup>3</sup>
- prisoners living in extreme temperatures (particularly in Western Australia and the Northern Territory)<sup>4</sup>
- a lack of women-focused facilities for females
- a lack of appropriate, de-institutionalised accommodation for children and young people.<sup>5</sup>

## **Victoria**

Prisons in Victoria have been experiencing **serious overcrowding**, impacting on conditions, access to courts, access to programs, and access to medical services.<sup>6</sup> The opening of a new 1,000-bed men’s prison, Ravenhall Correctional Centre, in 2017 reduced overcrowding, but expansion was then necessary to accommodate 1,300 inmates. Further expansion is forecast in 2020, reportedly through double-bunking.<sup>7</sup>

<sup>1</sup> Office of the Children’s Commissioner, NT. *Own initiative investigation report: Services provided by the Department of Correctional Services at the Don Dale Youth Detention Centre* (2015); Shalev S. A sourcebook on solitary confinement, London: Mannheim Centre for Criminology, London School of Economics (2008)

<sup>2</sup> Ford J. *What is a ‘trauma-informed’ juvenile justice system? A targeted approach. Juvenile justice information exchange (JJIE)*. (2016) [jjie.org/2016/06/20/what-is-a-traumainformed-juvenile-justice-system-a-targeted-approach/](http://jjie.org/2016/06/20/what-is-a-traumainformed-juvenile-justice-system-a-targeted-approach/). See also: Grant E., Lulham R. and Naylor B. The use of segregation for children in Australian youth detention systems: An argument for prohibition, *Advancing Corrections*, (2017) 3,117-136

<sup>3</sup> *Royal Commission on Aboriginal Deaths in Custody, National Report vols 1-5*, Canberra: Commonwealth of Australia (1991) See also: Grant E. Towards safer and more congruent prison environments for male Aboriginal prisoners: A South Australian study (PhD Thesis) The University of Adelaide (2008); Office of the Inspector of Custodial Services (WA). *Inspection standards for Aboriginal prisoners, Version 1* (2008) available at [www.oics.wa.gov.au/wp-content/uploads/2013/11/Final\\_Aboriginal\\_Prisoner\\_Standards\\_v\\_11.pdf](http://www.oics.wa.gov.au/wp-content/uploads/2013/11/Final_Aboriginal_Prisoner_Standards_v_11.pdf).

<sup>4</sup> Grant E., Hansen A. and Williamson T. Design issues for prisoner health: Thermal conditions in Australian custodial environments. *World Health Design*, (2012) 5(3), 80-85; See also: Christian B. Extreme temperatures at WA prisons ‘inhumane’, report finds. *ABC News* (2015) available at [www.abc.net.au/news/2015-11-17/wa-prisons-not-equipped-for-extreme-temperatures-report-finds/6948414](http://www.abc.net.au/news/2015-11-17/wa-prisons-not-equipped-for-extreme-temperatures-report-finds/6948414); Maynard S. Exclusive: Detainees denied cold water, cooling before NT prison riot. *The Saturday Paper* (2019) available at [www.thesaturdaypaper.com.au/news/law-crime/2019/12/14/exclusive-detainees-denied-cold-water-cooling-before-nt-prison-riot](http://www.thesaturdaypaper.com.au/news/law-crime/2019/12/14/exclusive-detainees-denied-cold-water-cooling-before-nt-prison-riot)

<sup>5</sup> *Royal Commission into the child protection and youth detention systems of the Northern Territory* (2016) [www.pm.gov.au/media/2016-07-28/royalcommission-child-protection-and-youth-detention-systems-northern-territory](http://www.pm.gov.au/media/2016-07-28/royalcommission-child-protection-and-youth-detention-systems-northern-territory)

<sup>6</sup> See for example: Victorian Ombudsman *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015) at [www.ombudsman.vic.gov.au/getattachment/5188692a-35b6-411f-907e-3e7704f45e17](http://www.ombudsman.vic.gov.au/getattachment/5188692a-35b6-411f-907e-3e7704f45e17)

<sup>7</sup> [www.theage.com.au/national/victoria/stack-and-rack-victoria-s-newest-prison-already-full-and-set-to-expand-again-20190706-p524qr.html](http://www.theage.com.au/national/victoria/stack-and-rack-victoria-s-newest-prison-already-full-and-set-to-expand-again-20190706-p524qr.html)

Victorian prisons are housing **people with disabilities** who have not been found guilty of an offence and should be housed in a secure therapeutic facility. There is very limited provision for such facilities in Victoria, particularly for women.<sup>1</sup>

The particular vulnerabilities of many **women in prison** have been well documented. As Jesuit Social Services pointed out recently, more than 40 per cent of women in Victorian prisons are on remand, where they have limited opportunities to access programs and services designed to support rehabilitation. This is despite 'around 60 per cent of women in prison having used drugs daily before incarceration and around a quarter (24.4 per cent) of women in the system there for drug-related offences.' They also point out the links between female incarceration and family violence, with 65 per cent of women in prison themselves victims of family violence.<sup>2 3</sup>

The Victorian Ombudsman criticised the extensive and routine **use of strip searching** in the main women's prison, the Dame Phyllis Frost Centre. While Corrections Victoria initially rejected these criticisms, subsequent changes were made in the practice.<sup>4</sup> Strip searching can be experienced by any prisoner as degrading and humiliating; international jurisprudence recognises that it is only justified to address a specific security or other risk. The Report also identified instances of excessive use of force and restraint at this prison, including on pregnant women.

An NGO working for many years in the Victorian prison system raised a number of issues about the use of **solitary confinement and seclusion** (or 'management') identified in their experience with clients, including:

- A management unit allows a 2-hour run out, but whenever another prisoner needs to be moved, those prisoners on run-out are locked in again. They can be locked in and out 10–15 times during their 2-hour run-out.
- To accommodate a high-profile protection prisoner housed in isolation, other prisoners were locked in cells during the high-profile prisoner's run-out when previously they were not on a lock-down regime.
- Prisoners are often put into management for their protection, meaning that they are punished when not at fault.
- 18-year olds were transferred from youth detention and held in adult prison management cells.
- Individual prisoners experiencing poor conditions/care including:

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<sup>1</sup> See for example: Victorian Ombudsman *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018) at [www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Investigation-into-the-imprisonment-of-a-woman-fou](http://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Investigation-into-the-imprisonment-of-a-woman-fou)

<sup>2</sup> [jss.org.au/with-female-incarceration-rates-on-the-rise-its-time-we-work-towards-a-justice-system-that-better-supports-vulnerable-women/](http://jss.org.au/with-female-incarceration-rates-on-the-rise-its-time-we-work-towards-a-justice-system-that-better-supports-vulnerable-women/)

<sup>3</sup> Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (November 2017) available at [www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348](http://www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348)

<sup>4</sup> Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (November 2017) available at [www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348](http://www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348)

- a prisoner in a management/isolation cell in winter with no glass in the window and no blanket
- a prisoner under 30 years of age moved into management/isolation in the last month of sentence and released straight into the community
- a male suffering delusions put into isolation 24/7 from observation cells; he was then released directly from management into the community
- a male under 20 years of age with an intellectual disability put in isolation/management for mental health reasons prior to release.

Australian prisons currently provide very little **internet access**. Internet access is now seen as essential in the general community, for access to information and for maintaining educational, business and social connections. Some jurisdictions internationally have moved to support internet access, with appropriate security and risk controls. A recent Australia-wide study found:

The available literature suggests that Canberra’s Alexander Maconochie Centre is the only correctional facility in Australia that allows prisoners to access the internet.<sup>1</sup>

### ***New South Wales***

In NSW, **growth in the prison population, ageing infrastructure and overcrowding** have been significant issues for adult prisons.<sup>2</sup> This has led to a number of recent and upcoming changes in the NSW prison system, including:

- increased use of cells accommodating two or three people<sup>3</sup> – Corrective Services NSW has recently advised of their intention to reduce the number of shared cells that were added to manage prisoner growth<sup>4</sup>
- the opening of two dormitory-style prisons, Macquarie Correctional Centre and Hunter Correctional Centre, in February and March 2018 respectively (these prisons are frequently referred to as ‘Rapid Builds’ due to the speed of their construction)<sup>5</sup>
- the expansion of a number of correctional centres,<sup>6</sup> to result in the closure of four correctional centres in 2020<sup>7</sup>

<sup>1</sup> Aysha Kerr and Matthew Willis, *Prisoner use of information and communications technology*. Australian Institute of Criminology, Trends and Issues: No. 560 October 2018 (references omitted)

<sup>2</sup> See NSW Inspector of Custodial Services, *Full House: The Growth of the Inmate Population in NSW* (Report, April 2015) [6.84]; Audit Office of NSW, *Managing the Growth in the NSW Prison Population* (Report, 24 May 2019)

<sup>3</sup> NSW Inspector of Custodial Services, *Full House: The Growth of the Inmate Population in NSW* (Report, April 2015) 32–6; Audit Office of NSW, *Managing the Growth in the NSW Prison Population* (Report, 24 May 2019) 1–2, 10

<sup>4</sup> [www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/prisons-to-be-retired-as-safer-beds-available.aspx](http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/prisons-to-be-retired-as-safer-beds-available.aspx)

<sup>5</sup> See Legislative Council Portfolio Committee No. 4 – Legal Affairs, Parliament of New South Wales, Parklea Correctional Centre and other operational issues (Report 38, December 2018) 75

<sup>6</sup> Corrective Services NSW, *New Prisons* (Web Page, 11 July 2019)

[www.correctiveservices.justice.nsw.gov.au/new-prisons](http://www.correctiveservices.justice.nsw.gov.au/new-prisons)

<sup>7</sup> Department of Communities and Justice (NSW), ‘Prisons to be retired as safer beds available’ (Media Release, 24 September 2019) [www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/prisons-to-be-retired-as-safer-beds-available.aspx](http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/prisons-to-be-retired-as-safer-beds-available.aspx)

- the construction of Clarence Correctional Centre, a 1,700-bed facility in northern NSW due to open in mid-2020 – it will be operated by Serco,<sup>1</sup> the third prison in NSW that is privately operated, along with Junee Correctional Centre managed by the GEO Group Australia, and Parklea Correctional Centre managed by MTC-Broadspectrum<sup>2</sup>
- the NSW Government has announced that the opening of Clarence Correctional Centre will result in the closure of Grafton Correctional Centre, which opened in 1893<sup>3</sup>
- the NSW Inspector of Custodial Services has welcomed modern facilities replacing infrastructure built in the 1800s (such as Grafton and Berrima correctional centres), and has said it will be monitoring conditions in the new and expanded facilities when they start operating.<sup>4</sup>

The **increased remand population** in custody in NSW has been a driving factor in the growth of the NSW prison population. In particular, this has contributed to the growth in the number of women held in custody.<sup>5</sup> The NSW Inspector of Custodial Services will be releasing a report concerning women on remand in 2020.

The geographic distribution of correctional centres in NSW, combined with the growth in the prison population, has contributed to the **number and frequency of transfers** between correctional centres.<sup>6</sup>

In 2017–18, inmates in NSW correctional centres had the **equal lowest average hours per day out of cells** (8.4 hours per day, equal with the ACT).<sup>7</sup>

### **Northern Territory**

Danila Dilba Health Service has provided information on issues in justice detention in the Northern Territory from their experience as an Aboriginal community-controlled organisation providing culturally appropriate, comprehensive primary health care and community services to Aboriginal and Torres Strait Islander people in the Darwin and Palmerston region in the Northern Territory.

<sup>1</sup> Serco, *Clarence Correctional Centre* (Web Page) [www.serco.com/aspac/sites/clarence-correctional-centre](http://www.serco.com/aspac/sites/clarence-correctional-centre)

<sup>2</sup> GEO Group Australia *Junee Correctional Centre: Reducing Reoffending through Innovation* (Web Page) [www.geogroup.com.au/junee-correctional-centre.html](http://www.geogroup.com.au/junee-correctional-centre.html); MTC-Broadspectrum, *Parklea Correctional Centre* (Web Page, 31 March 2019) [www.mtcbroadspectrum.com/parklea-correctional-centre](http://www.mtcbroadspectrum.com/parklea-correctional-centre)

<sup>3</sup> Department of Communities and Justice (NSW) 'Grafton prison closes as Clarence opens' (Media Release, 27 August 2019) available at [www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/grafton-prison-closes-as-clarence-opens.aspx](http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/grafton-prison-closes-as-clarence-opens.aspx)

<sup>4</sup> For further reports, see: NSW Inspector of Custodial Services, *Full House: The Growth of the Inmate Population in NSW* (Report, April 2015); Audit Office of NSW, *Managing the Growth in the NSW Prison Population* (Report, 24 May 2019); Legislative Council Portfolio Committee No. 4 – Legal Affairs, Parliament of New South Wales, *Parklea Correctional Centre and other operational issues* (Report 38, December 2018).

<sup>5</sup> Audit Office of NSW, *Managing the Growth in the NSW Prison Population* (Report, 24 May 2019) 7, 36; see also Evann J Ooi, 'Recent Trends in the NSW Female Prison Population' (Crime and Justice Bulletin No 130, NSW Bureau of Crime Statistics and Research, January 2018) 4

<sup>6</sup> NSW Inspector of Custodial Services, *Full House: The Growth of the Inmate Population in NSW* (Report, April 2015) 34

<sup>7</sup> Productivity Commission, *Report on Government Services 2019: Chapter 8 - Corrective Services* (Report, 24 January 2019) table 8A.12

Serious concerns have been highlighted regarding **overcrowding and inhumane conditions** at Alice Springs Correctional Centre. This is an adult custodial facility located 20 kilometres out of Alice Springs, in the Central Desert. The outdated facility has received much criticism in recent time for its appalling conditions. In late 2018, there was a riot at the Alice Springs Correctional Centre, precipitated by a breakdown in air conditioning on a 40 degree Celsius day, overcrowding and long periods of confinement for prisoners.<sup>1</sup> In sentencing a man in early 2019, His Honour Justice Mildren of the Northern Territory Supreme Court stated of the Alice Springs Correctional Centre:

The conditions are appalling, overcrowded and without any significant ventilation, more like those commonly found in Third World countries rather than in a country like Australia.<sup>2</sup>

Despite the known prevalence of **disability and mental health issues** (including neuro and cognitive disability), access to assessment, treatment and support for persons with disabilities in custody continues to be completely inadequate. A recent *Report on the review of Forensic Mental Health and Disability Services within the Northern Territory* (January 2019), commissioned by the NT Department of Health,<sup>3</sup> noted the prevalence of forensic mental health orders in the NT is higher than in other jurisdictions.<sup>4</sup> This report also noted the inadequacy of existing facilities to cater to these complex needs.

In particular, for many years groups have highlighted concerns about the indefinite detention of people sentenced under Part IIA of the NT Criminal Code, that is persons found 'not fit to plead' or 'not fit to stand trial' due to mental impairment.<sup>5</sup> Part IIA provides for these people to be accommodated in an 'appropriate place', namely a therapeutic facility other than a correctional facility.<sup>6</sup> However, the NT does not currently have a facility of this nature. At present, there are no secure therapeutic residential facilities for people found not guilty due to mental impairment, and so people with complex health and mental health needs are effectively kept indefinitely in adult correctional facilities (prisons), until a judge determines that they are no longer a risk to the community.<sup>7</sup> The recent report commissioned by NT Department of Health indicates that these custodial facilities are manifestly inadequate for this purpose. Relevant recommendations of the report include:

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<sup>1</sup> [www.thesaturdaypaper.com.au/news/law-crime/2019/12/14/exclusive-detainees-denied-cold-water-cooling-before-nt-prison-riot?fbclid=IwAR2nBDbUa-NJpyQJUtp52eNQmXG7ekHHbHyD-6zlcJhlmRBBY7CuRjBvIE](http://www.thesaturdaypaper.com.au/news/law-crime/2019/12/14/exclusive-detainees-denied-cold-water-cooling-before-nt-prison-riot?fbclid=IwAR2nBDbUa-NJpyQJUtp52eNQmXG7ekHHbHyD-6zlcJhlmRBBY7CuRjBvIE)

<sup>2</sup> The Queen and SW (SCC 21655453, 21728729) NTSC, Transcript of Proceedings 30 January 2019, [http://www.supremecourt.nt.gov.au/remarks/2019/01/AW\\_30012019\\_21655463\\_21728729\\_sen.net.pdf](http://www.supremecourt.nt.gov.au/remarks/2019/01/AW_30012019_21655463_21728729_sen.net.pdf)

<sup>3</sup> [health.nt.gov.au/data/assets/pdf\\_file/0007/727657/Report-on-the-Forensic-Mental-Health-and-Disability-Services-within-the-NT.pdf](http://health.nt.gov.au/data/assets/pdf_file/0007/727657/Report-on-the-Forensic-Mental-Health-and-Disability-Services-within-the-NT.pdf)

<sup>4</sup> [www.alrc.gov.au/sites/default/files/subs/118\\_nt\\_government.pdf](http://www.alrc.gov.au/sites/default/files/subs/118_nt_government.pdf)

<sup>5</sup> Senate Standing Committee on Community Affairs. Report on the Inquiry into 'Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia.' Chapter 2

<sup>6</sup> See s 43ZA(2A) Criminal Code

<sup>7</sup> See discussion of this in [www.abc.net.au/news/2019-02-10/justin-walker-indefinite-detention-prison-mentally-unfit-guilty/10796740](http://www.abc.net.au/news/2019-02-10/justin-walker-indefinite-detention-prison-mentally-unfit-guilty/10796740); see also criticism of this situation in Supreme Court decisions: *R v KMD* [No 2] [2017] NTSC 18 and *R v Ebatarintja* [2010] NTSC 6

- that the Northern Territory Government develop ‘as a matter of urgency, a territory wide services plan for clients of forensic mental health and forensic disability services that incorporates secure inpatient or residential care, secure supported accommodation and access to community based forensic supports at a minimum. The role and responsibility of, and interface with, the National Disability Insurance Scheme should be made clear in the plan’ (recommendation 3)
- that the Northern Territory Government shift ‘operational authority for the Complex Behavioural Unit at the Darwin (Holtz) Correctional Complex to NT Health, and degazettes the facility as a correctional unit in favour of changing the legal status to a health facility, approved as a treatment facility within the meaning of the Mental Health and Related Services Act. Appropriate changes to the existing security arrangements, staffing and physical asset should be made to allow this change to occur’ (recommendation 4).

The above report by the NT Department of Health also noted that there is a lack of clear service pathways that recognise the **specific needs of women and girls** (Report p.8).

There are also concerns about the practice of **transfers** of people from Alice Springs to Darwin, thousands of kilometres from family and community, for security, or other operational reasons. This practice results in these people having limited access to family and culture.

### ***Australian Capital Territory***

The Australian Capital Territory has one adult prison, the Alexander Maconochie Centre, opened in 2008. As at June 2019 the prison had 452 inmates. The prison was originally established as a ‘human rights based prison’ but a recent review applying ‘healthy prison’ criteria, has been critical of many features of the prison.<sup>1</sup>

### ***Western Australia***

From 30 June 2018 to 30 June 2019, the number of prisoners in adult custodial facilities increased from 6,868 to 6,940, an increase of 72 prisoners (or around one per cent). The small increase is in line with normal fluctuations in the prison population. In terms of the youth prison population, there was a decrease – from 156 children and young people in detention as at 30 June 2018 to 123 at 30 June 2019. This appears to be attributable to a reduction in the number of young people on remand.

Despite the stabilisation of the adult prison population, **prisons still remain overcrowded** as they have for several years. It is also likely that the population can be expected to rise again. According to the 2019 Report on Government Services, Western Australia’s prisons are operating at 123.6 per cent capacity.<sup>2</sup>

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<sup>1</sup> ACT Inspector of Custodial Services, *Report of a Review of A Correctional Centre* (Nov 2019) available at [www.ics.act.gov.au/\\_data/assets/pdf\\_file/0011/1463681/10606R-ACT-ICS-Healthy-Prison-Review-Nov-2019\\_FA-TAGGED.pdf](http://www.ics.act.gov.au/_data/assets/pdf_file/0011/1463681/10606R-ACT-ICS-Healthy-Prison-Review-Nov-2019_FA-TAGGED.pdf)

<sup>2</sup> Productivity Commission, *Report on Government Services 2019: Chapter 8 - Corrective Services* table 8A.13.

In a 2019 review of **strip search practices** in Western Australian prisons, the Office of the Inspector of Custodial Services (OICS) found out of almost 900,000 strip searches conducted on prisoners in the past five years, only 571 contraband items were found. In other words, contraband was only found less than once in every 1,500 strip searches.<sup>1</sup>

Most strip searches are routine, procedure-based searches, such as when a prisoner transfers from one secure location to another, and before and after visits. This has resulted in the excessive searching of prisoners, some of whom have been searched more than 200 times in a year. Very few (3 per cent) strip searches are based on intelligence or a reasonable suspicion that the person is carrying contraband.

As reported by the OICS, three facilities in Western Australia have significantly reduced or eliminated strip searches. There has been no increase in positive drug tests at these facilities. Nor has there been an increase in the detection of contraband through other searching methods, such as searching property and cells. This suggests that reducing or eliminating strip searching has does not lead to increased trafficking of contraband. It has, however, had a positive impact on the relationships between the people in custody and staff. This improves the safety of the facility.

A case involving a woman giving birth alone in a locked cell at Bandyup Women's Prison was the subject of a report by the WA OICS in 2018. The Inspector said he completed the review to understand how such a 'distressing, degrading and high-risk set of events could have happened in a 21st-century Australian prison'.<sup>2</sup>

#### 4.4.2 Private prisons

Australia has the largest proportion of privately managed prisons in the world, and Victoria has the largest proportion in Australia (with almost 40 per cent of its prison population in three privately managed prisons).<sup>3</sup> This has at least two implications here: the risk that profit will be prioritised in the provision of services, and limitations on access to information on the basis of its commercial confidentiality.

According to the Jesuit Social Services<sup>4</sup>

The ideology that drives Australian states' privatisation policies and their application to the delivery of imprisonment has evolved over these years, as have contract and governance structures. ... Prevailing discussion now appears to centre on the search for 'value for money' in prisons – with consideration to performance, cost, efficiency

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<sup>1</sup>Office of the Inspector of Custodial Services, *Strip searching practices in Western Australian prisons* March 2019: <https://www.oics.wa.gov.au/wp-content/uploads/2019/04/Strip-Searches-Review.pdf>

<sup>2</sup> [www.abc.net.au/news/2018-12-12/woman-pleaded-for-help-giving-birth-alone-in-bandyup-prison-cell/10608464](http://www.abc.net.au/news/2018-12-12/woman-pleaded-for-help-giving-birth-alone-in-bandyup-prison-cell/10608464)

<sup>3</sup> Deirdre O'Neill, Valarie Sands and Graeme Hodge: Victoria's prison system: rising costs and population, little accountability (June 2019) available at [lens.monash.edu/@politics-society/2019/06/28/1375605/victorias-prison-system-rising-costs-and-population-little-accountability](http://lens.monash.edu/@politics-society/2019/06/28/1375605/victorias-prison-system-rising-costs-and-population-little-accountability)

<sup>4</sup> Jesuit Social Services Report: *Outsourcing Community Safety: Can private prisons work for public good?* (2017) available at [jss.org.au/wp-content/uploads/2017/11/Private-Prisons-2017-DRAFT-FINAL.pdf](http://jss.org.au/wp-content/uploads/2017/11/Private-Prisons-2017-DRAFT-FINAL.pdf)

and accountability – although of course there is deep debate about how that is measured.

The report goes on to say:

Prisons across Australia continue to lack sufficient public accountability. It can readily be argued that neither government nor the community has enough information or assurance that prisons – public or private – can positively change the lives of prisoners or fulfil community expectations of justice. The lack of available information to unpack indicators of performance and outcomes of prisons hampers our ability to objectively compare public and private prisons. The lack of public accountability [also] restricts the ability for the community to understand and to participate in ensuring government takes responsibility for providing the circumstances for prisons to deliver on both our international obligations and the intent of imprisonment.

#### 4.4.3 Prison transport

Inhumane conditions of transportation were highlighted in the case of Mr Ward, who died in 2008 in an overheated prison van in Western Australia,<sup>1</sup> and in the 2008 Victorian case of [Benbrika v Others](#)<sup>2</sup> where the terrorism trial of the defendants was halted to ensure that the defendants were held closer to the court, to remove the need for inhumane transportation processes.

Prison transfers are also a major issue of concern in the NT. As noted earlier, people are often transported from Alice Springs to Darwin, a distance of 1,500 kilometres. The physical distance and significant expense of travel makes maintaining contact with family and community unrealistic in practice.

#### 4.4.4 Youth justice

A general issue of importance is the age of criminal responsibility, which is currently 10 years of age in all Australian jurisdictions (see Chapter 6). Recommendations to raise the **age of criminal responsibility** were made by the NT Royal Commission and other recent reviews. The Australian and New Zealand Children’s Commissioners and Guardians (ANZCCG) issued a joint statement calling for this reform in November 2019.<sup>3</sup> The states and territories and the federal government have now created a working group to examine this issue.<sup>4</sup>

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<sup>1</sup> [www.sbs.com.au/nitv/nitv-news/article/2018/01/31/cooked-death-ten-years-after-shocking-death-custody-has-anything-changed](http://www.sbs.com.au/nitv/nitv-news/article/2018/01/31/cooked-death-ten-years-after-shocking-death-custody-has-anything-changed)

<sup>2</sup> [www.austlii.edu.au/cgi-](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2008/80.html?context=1;query=Benbrika%20v%20Ors;mask_path=)

[bin/viewdoc/au/cases/vic/VSC/2008/80.html?context=1;query=Benbrika%20v%20Ors;mask\\_path=](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2008/80.html?context=1;query=Benbrika%20v%20Ors;mask_path=)

<sup>3</sup> [ccyp.vic.gov.au/news/raise-the-age-of-criminal-responsibility-australian-and-new-zealand-childrens-commissioners-and-guardians/](http://ccyp.vic.gov.au/news/raise-the-age-of-criminal-responsibility-australian-and-new-zealand-childrens-commissioners-and-guardians/); [ccyp.vic.gov.au/news/in-my-blood-it-runs/](http://ccyp.vic.gov.au/news/in-my-blood-it-runs/)

<sup>4</sup> [www.department.justice.wa.gov.au/R/review-criminal-age.aspx](http://www.department.justice.wa.gov.au/R/review-criminal-age.aspx). See also the concluding observations of the Committee on the Rights of the Child regarding Australia: [tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AUS/CRC\\_C\\_AUS\\_CO\\_5-6\\_37291\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AUS/CRC_C_AUS_CO_5-6_37291_E.pdf)



There is also a growing body of evidence linking **poor health outcomes** with likelihood of involvement in the youth justice system. A recent study examining the link between hearing impairment and youth offending in the NT,<sup>1</sup> highlighted a range of risk factors that underpin the pathway to youth offending, demonstrating the urgent need for interagency collaboration to meet the complex needs of vulnerable children in the NT.

A recent study at Banksia Hill Youth Detention Centre in Western Australia found that 89 per cent of young offenders have a severe neurodevelopmental impairment, and 39 per cent were diagnosed with Foetal Alcohol Spectrum Disorder (FASD).<sup>2</sup> This is the highest prevalence of neurodevelopmental impairment in a custodial context to have been found in the world.

Danila Dilba points to the increasing numbers of Aboriginal young people in the criminal justice system in the NT who are affected by FASD and other neuro-impairments. It is expected that there is a similarly high-prevalence of FASD and neurodevelopmental impairment among children in the NT youth justice system.<sup>3</sup> Research has continued to emphasise the need to divert or find alternative arrangements for these youth with FASD from contact with the justice system, to prevent indefinite entrenchment.<sup>4</sup>

The following discussion will begin with specific concerns in various Australian jurisdictions about the significant use of what is variously called seclusion/ administrative segregation/solitary confinement, and of physical, medical and chemical restraints, in youth detention.

Other specific issues then discussed will include detention of Aboriginal and Torres Strait Islander children and young people, conditions of detention, and staff training.

### **Victoria**

A series of disturbances and riots in various youth justice facilities in Victoria in recent years has placed significant pressures on accommodation. In 2016, a number of young people were placed in a unit within the maximum security adult prison, Barwon Prison, to relieve accommodation pressures. Civil society litigation under the Victorian Charter of Human Rights led to the removal of these young people from the prison.<sup>5</sup>

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<sup>1</sup> Yaofend He, Vincent et al. Hearing and justice: The link between hearing impairment in early childhood and youth offending in Aboriginal children living in remote communities of the Northern Territory, Australia. *Health and Justice* (2019) 7, 16 [healthandjusticejournal.biomedcentral.com/articles/10.1186/s40352-019-0097-6](https://healthandjusticejournal.biomedcentral.com/articles/10.1186/s40352-019-0097-6)

<sup>2</sup> Bower C. et al. Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia. *BJM Open* (19 February 2018) [bmjopen.bmj.com/content/8/2/e019605](https://bmjopen.bmj.com/content/8/2/e019605)

<sup>3</sup> Royal Commission *Final Report*, Chapter 15, 351

<sup>4</sup> See for example: Blagg H., Zulich T. and Bush Z. Indefinite detention meets colonial dispossession: Indigenous youths with Foetal Alcohol Spectrum Disorders in a white settler justice system (2017) *Social and Legal Studies* [doi.org/10.1177/0964663916676650](https://doi.org/10.1177/0964663916676650)

<sup>5</sup> *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2017] VSC 251

The Victorian Government plans to build a new youth justice prison at Cherry Creek, for completion in 2021.<sup>1</sup> Modifications to these plans were announced in September 2019, with the Minister for Corrections stating: ‘The design changes at Cherry Creek were informed by international best practice, feedback from independent experts including the Youth Justice Custodial Facilities Working Group, and recommendations from the Armytage/Ogloff and Neil Comrie AO reviews’.<sup>2</sup>

In 2019, the Victorian Ombudsman conducted an investigation into the implementation of OPCAT in Victoria.<sup>3</sup> The report explored different NPM models and made a recommendation for an appropriate NPM for Victoria. The report also presents findings from the Ombudsman’s OPCAT-style inspection of Port Phillip Prison, a maximum-security adult prison, and Malmsbury Youth Justice Precinct, which is one of two youth justice precincts operating in Victoria, predominantly accommodating male children and young people aged between 15 and 21 years.

The inspections were thematic and focused on the experience of children and young people (under 25). They investigated **practices related to solitary confinement**. Important summary observations included:

The evidence in this report, from detainees, staff and the facilities themselves, is both overwhelming and distressing. It is apparent that whatever name, and for whatever reason, the practice of isolating children and young people is widespread in both prison and youth justice environments. It is equally apparent that the practice is seen as punitive even when that is not the intention; young people can be isolated both for acts of violence and for being the victim of an act of violence, and when used in response to challenging behaviour may exacerbate rather than improve the situation.

The evidence also suggests that the rate and duration of separation at Port Phillip and the rate of isolation at Malmsbury are too high. While legitimate reasons will always exist to isolate or separate, numerous studies in addition to the evidence in this report confirm that practices related to solitary confinement on children and young people are counter-productive. In the youth justice context, for example, we have seen unrest causing lock-downs, causing more unrest, causing more lock-downs.

The inspection noted that there appeared to be a direct correlation between, on the one hand, the extent to which a facility prioritised a trauma-informed approach to managing the children and young people in its care and, on the other, the tendency of staff at the facility to recognise the harm caused by isolation and other restrictive practices.

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<sup>1</sup> [engage.vic.gov.au/youthjusticecentre](https://engage.vic.gov.au/youthjusticecentre)

<sup>2</sup> [www.premier.vic.gov.au/building-a-safer-and-more-secure-youth-justice-system](https://www.premier.vic.gov.au/building-a-safer-and-more-secure-youth-justice-system)

<sup>3</sup> Victorian Ombudsman *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* Available online at: [www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/OPCAT-in-Victoria-A-thematic-investigation-of-prac](https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/OPCAT-in-Victoria-A-thematic-investigation-of-prac)

The inspections observed several factors that increase the risk of ill-treatment at each facility. The risks observed at Port Phillip Prison include:

- instances of young people being subject to ‘prolonged solitary confinement’ (greater than 15 days), contrary to rule 43(b) of the Mandela Rules and potentially incompatible with section 10(b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Human Rights Act)
- young people remaining in ‘separation’ despite their separation order ending, contrary to regulation 27(2) of the *Corrections Regulations 2009* (Vic) (the Regulations) and arguably incompatible with section 21(3) of the Human Rights Act
- that there was little difference between the separation and intermediate regimes, meaning that in many cases the intermediate regime was likely to amount to solitary confinement, and appeared to be ‘separation’ without satisfying the requirements of regulation 27 of the Regulations
- recent 2019 amendments to the Regulations authorise the indefinite solitary confinement of prisoners ‘for the management, good order or security of the prison’, without the requirement that the separation not be longer than is necessary to achieve that purpose, which is contrary to rule 43(a) of the Mandela Rules and arguably incompatible with section 10(a) of the Human Rights Act
- the medical and psychiatric conditions of prisoners were not routinely considered before making separation orders, contrary to regulation 27(5) of the Regulations
- young people being separated on mainstream units, with unintended and unjust consequences for those people, others on the unit, and staff
- the use of separation and observation without active treatment or therapeutic interventions for those at risk of suicide or self-harm
- the material conditions of Charlotte Unit (the ‘Management’ unit), when coupled with the terms of a separation regime, appeared particularly ill-suited to accommodate vulnerable people, meaning that accommodating young people and those with mental health issues or disability may be incompatible with obligations under rule 38(2) of the Mandela Rules
- consideration as to whether and how a young person’s mental illness or disability may have contributed to their conduct is not routinely given before disciplinary sanctions are imposed, contrary to rule 39(3) of the Mandela Rules and Port Phillip Prison’s *Checklist for Disciplinary Officers*
- that the Prison’s ‘Violence Reduction Strategy’, while a positive initiative, had on occasion exceeded 23 hours, and does not have a clear basis under the *Corrections Act 1986* (Vic) or the Regulations
- that the ‘run-out areas’ in some units fall short of the international human rights standards applicable to exercise and recreation in custodial settings, namely rule 23(2) of the Mandela Rules
- the routine use of restraints under a ‘handcuff regime’, absent any contemporaneous risk assessment, contrary to rules 48(1)(a) and (c) of the Mandela Rules.

The risks observed by the inspection at Malmsbury Youth Justice Precinct include:

- instances of isolation not being used as a last resort or in response to an immediate threat, contrary to section 488(2) of the *Children, Youth and Families Act 2005* (Vic) (the CYF Act)
- instances of isolation lasting longer than was recorded in the Isolation Register, and longer than the relevant officer was delegated to approve under section 488(3) of the CYF Act
- instances of non-compliance of the Isolation Register with regulation 32 of the *Children, Youth and Families Regulations 2017* (Vic) (the CYF Regulations)
- the disproportionate use of behavioural isolation on Aboriginal and Torres Strait Islander young people, representing 14 per cent of the population but 20 per cent of behavioural isolations
- the routine use of restraints without any contemporaneous risk assessment, contrary to rule 48 of the Mandela Rules, rule 64 of the Havana Rules and arguably incompatible with section 23(3) of the Human Rights Act
- the not-unreasonable perception from young people that facility-wide lock-downs are a form of collective punishment, which is prohibited by rule 67 of the Havana Rules and section 487(a) of the CYF Act
- the routine use of the tactical response team, including during medical consultations and to open cell door traps without a contemporaneous risk assessment
- multiple deficiencies of the Isolation Register in terms of recording the particulars of a young Aboriginal person's isolation.

Concerns regarding the welfare and treatment of young adults in Victorian prisons are also highlighted in the 2018 Report by Jesuit Social Services, *All Alone: Young adults in the Victorian justice system*.<sup>1</sup>

The Commission for Children and Young People in Victoria (CCYP) highlighted **the impact of extensive and ongoing lock-downs** across youth justice, preventing reasonable access to fresh air, programs, peers and education.<sup>2</sup>

The CCYP Annual Report 2019 also highlighted that lock-downs due to safety and security reasons (largely because of insufficient staff) tripled in 2018–19, compared to 2017–18. At Parkville Youth Justice Centre, each child and young person was detained at a rate of 317 lock-downs in 2018–19, compared to a rate of 92 lock-downs per year the previous year.<sup>3</sup>

### ***New South Wales***

The NSW Inspector of Custodial Service has also raised concerns about **the use of confinement**, where children and young people in youth justice centres may be held in their rooms for a period as punishment for misbehaviour.<sup>4</sup> The Inspector has recommended that

<sup>1</sup> [jss.org.au/all-alone-young-adults-in-the-victorian-justice-system](http://jss.org.au/all-alone-young-adults-in-the-victorian-justice-system)

<sup>2</sup> Commission for Children and Young People (Victoria): *The Same Four Walls* (2017) <https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/the-same-four-walls/>

<sup>3</sup> [ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf](https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf)

<sup>4</sup> *Children (Detention Centres) Act 1987* (NSW) s 21(d).

Youth Justice NSW reduce the use of confinement and that young people not be confined as punishment for bad language that is not abusive or threatening.<sup>1</sup>

### **Northern Territory**

Danila Dilba and other stakeholders have raised concerns about the **punitive use of separation, lock-downs and other behaviour management techniques** at Don Dale and Alice Springs Youth Detention Centres, particularly in light of the widely recognised prevalence of neuro-impairment. For example, in some cases, following incidents, access to programs has been denied. This reflects a sentiment among staff that access to programs and activities, and time spent with other children is a reward or privilege, rather than a necessary part of these children's development.

Danila Dilba also expressed concern that legislation in the NT is not sufficient to protect the rights of children in detention. In May 2018, the NT Government passed the Youth Justice Amendment Act, inserting strict new requirements to safeguard the rights of children in detention in line with the recommendations of the Royal Commission into the Protection and Detention of Children in the NT.<sup>2</sup> However, in March 2019, this legislation was retrospectively amended,<sup>3</sup> removing safeguards regarding strip searches, watering down the prohibition on use of force or restraints, and the use of separation.

The Don Dale Youth Detention Centre in Darwin is located in the old Berrimah adult male prison, which was decommissioned in 2014 because it was 'an outdated, inadequate facility for adults.'<sup>4</sup> Designed for 800 adults, Don Dale currently holds 15–20 children and young people. It is surrounded by razor wire and children and young people sleep in concrete cells.<sup>5</sup> Some detainees are not allowed to leave their blocks except for visits, and some blocks have no private showers. The policies and practices in the Don Dale facility are based on a punitive 'corrections' style model, rather than 'therapeutic' child and youth development model.<sup>6</sup>

On 28 July 2016, the former Prime Minister, Malcolm Turnbull, announced the establishment of the Royal Commission into the Protection and Detention of Children in the Northern Territory. On 17 November 2017, the Royal Commission released its Final Report. The Report contains 147 findings and makes 227 recommendations, outlining a long-term reform agenda for the Northern Territory's child protection and youth justice systems.<sup>7</sup>

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<sup>1</sup> NSW Inspector of Custodial Services: *Use of Force, Separation, Segregation and Confinement in NSW Juvenile Justice Centres* (Report, December 2018) 117. See also NSW Inspector of Custodial Services, [Making connections: providing family and community support to young people in custody](#) (Report, June 2015)

<sup>2</sup> *Youth Justice Legislation Amendment Bill 2018 Serial 48* (NT)

<sup>3</sup> *Youth Justice Legislation Amendment Bill 2018 Serial 84* (NT)

<sup>4</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report*, Chapter 10, 81, at [www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory](http://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory)

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*, 85

<sup>7</sup> See Royal Commission Final Report and Recommendations: at [www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory](http://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory)

On 1 March 2018, in response to the Final Report, the NT Government released its plan *Safe Thriving and Connected* outlining the plan for the implementation of the recommendations of the Royal Commission. In relation to youth detention, the plan made a commitment to ensure that ‘young people in detention are housed in secure, therapeutic facilities that support their rehabilitation and receive the help, guidance and structure necessary to stop future offending.’

Despite this commitment, staff and service providers working at Don Dale have continued to report ongoing issues including:

- young people being transferred between Alice Springs and Don Dale, resulting in dislocation from family and culture
- lack of comprehensive assessment and case management in relation to most young people in detention
- young people being held in lock down for staff breaks and occasionally for extended periods, including as punishment
- unsuitable accommodation, including very cramped and confined cells, at Alice Springs Youth Detention Centre, and limited fresh air and sunlight in both centres
- the High Security Unit, which was closed in response to the Royal Commission, being renamed as ‘B Block’, reopened and used as general accommodation.

Alice Springs Youth Detention Centre is regularly overcrowded, with children and young people often sharing rooms. While there are a number of Aboriginal Youth Justice Officers there is no designated Aboriginal welfare or liaison worker.

The NT Children’s Commissioner has been criticised for inaction on these and other systemic issues. These matters were raised in a class action against the Northern Territory Government, launched on behalf of young people in detention in late 2018.<sup>1</sup>

### ***Use of spit hoods***

The South Australian Ombudsman was highly critical of the use of spit hoods at the Adelaide Youth Training Centre (AYTC). There were 57 reported incidents involving the use of spit hoods at the AYTC between October 2016 and June 2019, involving 22 unique children and young people. He recommended the phasing out of the use of spit hoods within 12 months.<sup>2</sup>

### ***Strip searching***

On two occasions, the NSW Inspector of Custodial Services has recommended that youth justice centres in NSW cease undertaking routine strip searches of children and young people.<sup>3</sup> Those reports highlighted that strip searches were being conducted in a range of circumstances, including when a child or young person was admitted to a youth justice centre, following their return after a period of leave and following contact visits with

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<sup>1</sup> [www.abc.net.au/news/2018-08-17/lawsuit-alleges-human-rights-abuses-nt-youth-detention/10131188](http://www.abc.net.au/news/2018-08-17/lawsuit-alleges-human-rights-abuses-nt-youth-detention/10131188)

<sup>2</sup> Ombudsman SA, *Investigation concerning the use of spit hoods in the Adelaide Youth Training Centre* (September 2019) available at [www.ombudsman.sa.gov.au/wp-content/uploads/Department-for-Human-Services-Use-of-spit-hoods-in-the-Adelaide-Youth-Training-Centre.pdf](http://www.ombudsman.sa.gov.au/wp-content/uploads/Department-for-Human-Services-Use-of-spit-hoods-in-the-Adelaide-Youth-Training-Centre.pdf)

<sup>3</sup> NSW Inspector of Custodial Services, *Making connections: providing family and community support to young people in custody* (Report, June 2015) 24–5 and recommendation 10; NSW Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres* (Report, December 2018), 159–161

family.<sup>1</sup> Since those reports were published, legislation was enacted prohibiting strip searches as part of the general routine of a youth justice centre, except upon admission or return to a youth justice centre after day or overnight leave.<sup>2</sup>

The Victorian Commission for Children and Young People reports that a growing area of concern across several jurisdictions relates to privacy/dignity (strip searches, access to toilets while under observation).

The Australian Children's Commissioners and Guardians (ACCG), a coalition of independent commissioners, guardians and advocates for children and young people from around Australia, released a *Statement on Conditions and Treatment in Youth Justice Detention* in 2017 which included the following:<sup>3</sup>

Governments should legislate to prohibit strip/unclothed searching as part of a general compliance regime in youth detention centres. Strip/unclothed searching should only be permitted when there is a reasonable, well-founded suspicion that a child or young person is concealing items that threaten the safety or security of the youth detention centre (such as weapons), and which cannot be found using a 'pat/frisk' search.

The Commissioner for Children and Young People in Tasmania recently released advice to the Minister on the issue of strip searches.<sup>4</sup> The Office of the Guardian in South Australia also identified issues relating to privacy/dignity when children in the Adelaide Youth Training Centre (AYTC) are using the toilet, under camera/staff visibility.<sup>5</sup>

### **Staff training**

Problems with training and retention of staff in custodial youth justice facilities were highlighted in the Victorian Parliamentary Inquiry into youth justice centres in Victoria.<sup>6</sup> The Committee received evidence on a variety of staffing issues in youth justice facilities, including:

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<sup>1</sup> NSW Inspector of Custodial Services, *Making connections: providing family and community support to young people in custody* (Report, June 2015) 25; NSW Inspector of Custodial Services; *Use of force, separation, segregation and confinement in NSW juvenile justice centres* (Report, December 2018), 160

<sup>2</sup> *Children (Detention Centres) Regulation 2015* (NSW) cl 11A(9)

<sup>3</sup> Australian Children's Commissioners and Guardians, *Statement on conditions and treatment in youth justice detention* (Report, November 2017), 20 available at [www.humanrights.gov.au/sites/default/files/document/publication/ACCG\\_YouthJusticePositionStatement\\_24Nov2017.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/ACCG_YouthJusticePositionStatement_24Nov2017.pdf)

<sup>4</sup> Commissioner for Children and Young People (Tasmania), *Searches of Children and Young People in Custody in Tasmania* (Media Release, May 2019) [www.childcomm.tas.gov.au/wp-content/uploads/Media-Release-Strip-Search-FINAL-0519.pdf](http://www.childcomm.tas.gov.au/wp-content/uploads/Media-Release-Strip-Search-FINAL-0519.pdf)

<sup>5</sup> [www.gcyp.sa.gov.au/report-highlights-privacy-issues-at-youth-training-centre/](http://www.gcyp.sa.gov.au/report-highlights-privacy-issues-at-youth-training-centre/). The Victorian CCYP reports advocating on this issue also, and that it was ultimately resolved [ccyp.vic.gov.au/assets/corporate-documents/CCYP-AR-2018-P6-FINAL-web.pdf](http://ccyp.vic.gov.au/assets/corporate-documents/CCYP-AR-2018-P6-FINAL-web.pdf)

<sup>6</sup> Parliament Of Victoria Legislative Council Legal and Social Issues Committee, *Inquiry into youth justice centres in Victoria Final Report* March 2018 [www.parliament.vic.gov.au/images/stories/committees/SCLSI/Youth\\_Justice\\_System/Reports/LSIC\\_Inquiry\\_in\\_to\\_Youth\\_Justice\\_Centres\\_report\\_WEB.pdf](http://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Youth_Justice_System/Reports/LSIC_Inquiry_in_to_Youth_Justice_Centres_report_WEB.pdf) p.158

- low number of permanent staff
- high staff turnover and excessive reliance on casual staff
- inadequate training
- low pay
- unsafe work practices.

The Committee also quoted the 2017 report by Penny Armytage and Professor James Ogloff which addressed similar concerns and found:<sup>1</sup>

- sick leave days per FTE are higher for youth justice custodial staff than all staff in the child, youth and families classification
- turnover for youth justice custodial staff increased in 2016–17; in comparison, youth justice community-based staff have low turnover and reasonably low sick leave.

In the NT, with the high prevalence of neuro-impairment and trauma among children in detention,<sup>2</sup> Danila Dilba highlights concerns that staff are not adequately trained in working with vulnerable children and providing a truly therapeutic environment. Staff working with children in detention are not required to have formal qualifications in child development, and so are often incapable of meeting their complex needs.<sup>3</sup>

### ***Sentencing/ detention options for young people (aged 18-25)***

These young people, while legally adults, require sentencing options which are developmentally appropriate, rather than focused on older adult offenders. The Victorian Sentencing Advisory Council recently published a report pointing out:<sup>4</sup>

Previous research has found that young adults breach community correction orders at approximately twice the rate of adults aged 45 and over, and that 53% of Victorian prisoners aged under 25 return to prison within two years of release, compared with 44% of the general adult prison population.

The report's recommendations included the introduction or extension of units in prisons, or separate facilities, designed specifically for young adult offenders within the adult correctional system. The report particularly noted the success of the Port Phillip Prison Youth Unit 'Penhyn', which had reduced rates of recidivism. An independent evaluation also found that 'compared with mainstream units, the unit was safer, had a more positive rehabilitation focus, operated according to best practice principles and was viewed positively by prisoners.'

### ***Further issues in youth justice detention***

Other issues include:

- Lack of cultural safety for Aboriginal children and young people – see for example:

<sup>1</sup> Penny Armytage and Professor James Ogloff AM, *Youth Justice Review and Strategy: Meeting needs and reducing offending - Part 1*, Victorian Government, Melbourne, 2017

<sup>2</sup> See for example, Findings and Recommendations of the NT Royal Commission.

<sup>3</sup> See Banksia Hill Study – Findings regarding custodial staff

<sup>4</sup> Sentencing Advisory Council (Victoria), *Rethinking sentencing for young adult offenders* (2019), 30 [www.sentencingcouncil.vic.gov.au/publications/rethinking-sentencing-for-young-adult-offenders](http://www.sentencingcouncil.vic.gov.au/publications/rethinking-sentencing-for-young-adult-offenders)



Victoria: [ccyp.vic.gov.au/assets/resources/Aboriginal-Cultural-Rights/Aboriginal-cultural-rights-in-youth-justice-centres-WEB-180718.pdf](https://ccyp.vic.gov.au/assets/resources/Aboriginal-Cultural-Rights/Aboriginal-cultural-rights-in-youth-justice-centres-WEB-180718.pdf)

Queensland: [www.youthjustice.qld.gov.au/reform/youth-detention-review-implementation/implementing-review-recommendations/cultural-services-support-recommendations](https://www.youthjustice.qld.gov.au/reform/youth-detention-review-implementation/implementing-review-recommendations/cultural-services-support-recommendations)

- Impact of overcrowding on girls and young women
- Inadequate cultural and religious awareness and service provision.<sup>1</sup>

#### 4.4.5 Police custody

The Commonwealth Ombudsman identified 366 police lock-ups or cells around Australia. Police also transport people to or between places of police custody. Relevant issues to do with police custody may therefore arise in a range of locations.

##### ***Lack of oversight***

Significant gaps in oversight of police cells was highlighted by the Commonwealth Ombudsman in the 2019 Baseline Assessment. It reported that there was no oversight mechanism in NSW or South Australia, and that oversight in other states was ad hoc, and/or limited to particular locations.<sup>2</sup>

##### ***Ill-treatment in short-term detention and transport***

Serious issues with cruel, inhuman and degrading treatment of people in police detention can occur not just in 24-hour custody, but during shorter periods of detention at police stations and during transport.<sup>3</sup> Furthermore, people may be in police custody and at serious risk of harm during strip searches, for example, at festivals.<sup>4</sup>

Issues of excessive use of force, inhumane treatment, and failure to comply with strip searching protocols in Victoria were highlighted in the 2016 Report on Operation Ross by the Victorian Independent Broad-based Anti-Corruption Commission (IBAC). The Report refers to

... casual disregard and at times mistreatment of a vulnerable woman in police custody ... [and] excessive force used against three women in the public foyer of the Ballarat Police Station ... The investigation also highlighted shortcomings in a number of Victoria Police policies and practices including in relation to probity around promotions, interventions when an officer has multiple complaints, and compliance with strip search policy.<sup>5</sup>

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<sup>1</sup> CCYP Annual report: [ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf](https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf)

<sup>2</sup> Commonwealth Ombudsman, [Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\) Baseline Assessment of Australia's OPCAT Readiness](#) (September 2019), 33

<sup>3</sup> See for example OPI, *The Victorian Armed Offenders Squad*, 2008 <[www.ibac.vic.gov.au/docs/default-source/reports/opi-report/the-victorian-armed-offenders-squad---a-case-study.pdf](http://www.ibac.vic.gov.au/docs/default-source/reports/opi-report/the-victorian-armed-offenders-squad---a-case-study.pdf)>

<sup>4</sup> Grewcock M. and Sentas V. *Rethinking Strip Searches by NSW Police* (2019); [rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web.pdf](https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web.pdf)

<sup>5</sup> [www.ibac.vic.gov.au/publications-and-resources/article/operation-ross-special-report-november-2016](https://www.ibac.vic.gov.au/publications-and-resources/article/operation-ross-special-report-november-2016)

This was a public investigation by IBAC into the treatment of a female police officer (on leave) in custody following an arrest for being drunk. Key issues included strip searching, assault, and inhumane treatment.<sup>1</sup>

Ongoing concerns regarding the excessive use of force and restraints (including spit hoods) in NT police watch houses have been raised by several youth justice stakeholders.<sup>2</sup> The NT Police Ombudsman's recent annual report notes that allegations of excessive use of force are a common source of complaint.<sup>3</sup>

The NT Police Ombudsman reported on the treatment of a 'highly vulnerable' female in the watch house who was forcibly stripped and kept naked in a police cell for almost an hour after being briefly forced into a spit hood.<sup>4</sup> The report details how the young woman at the watch house was stripped by five officers and kept naked in a padded cell for 50 minutes before she was given a blanket. Complaints were made regarding unnecessary use of force, restraints, removal of clothing and failure to provide a health check or medical assistance. Despite this evidence, the Ombudsman made no findings against the officers involved. Stakeholders have raised concerns regarding the inadequacy of the Ombudsman as an oversight mechanism for the protection of children in police custody.

In NSW, Aboriginal and Torres Strait Islander people account for 10 per cent of all recorded police strip searches in the field and 22 per cent of all recorded police strip searches in custody.<sup>5</sup>

#### **4.4.6 Aboriginal deaths in custody<sup>6</sup>**

According to the most recent Productivity Commission Report on Government Services, nationally in 2016–17, 'there were 17 deaths in police custody (six out of the 17 were Aboriginal and Torres Strait Islander deaths). This number has reduced since 2007–08, predominately due to the decrease in non-Indigenous deaths (29 out of 34 deaths in 2007–08).'<sup>7</sup>

Most recently, following the death of an Aboriginal woman at Victoria's Dame Phyllis Frost Centre, concerns have been raised about the prison system's ability to provide a safe environment for Aboriginal people (and those with complex health needs) in custody.

Over the past three decades, there have been numerous coronial inquests across Australia which have made findings on the failures of police officers to adhere to standard police

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<sup>1</sup> [www.policeaccountability.org.au/commentary/making-human-rights-matter-to-ibac/](http://www.policeaccountability.org.au/commentary/making-human-rights-matter-to-ibac/)

<sup>2</sup> [www.theguardian.com/australia-news/2019/jul/05/nt-argues-using-spit-hoods-on-don-dale-detainees-justified-despite-banning-them](http://www.theguardian.com/australia-news/2019/jul/05/nt-argues-using-spit-hoods-on-don-dale-detainees-justified-despite-banning-them); [www.abc.net.au/news/2019-10-17/police-cleared-after-girl-spithooded-kept-naked-watch-house/11607166](http://www.abc.net.au/news/2019-10-17/police-cleared-after-girl-spithooded-kept-naked-watch-house/11607166)

<sup>3</sup> NT Police Ombudsman Report Part 1 (18 October 2019) p 6 at [www.ombudsman.nt.gov.au/sites/default/files/downloads/201819\\_annual\\_report\\_part\\_1\\_final.pdf](http://www.ombudsman.nt.gov.au/sites/default/files/downloads/201819_annual_report_part_1_final.pdf)

<sup>4</sup> Ibid, at p 27

<sup>5</sup> Grewcock M. and Sentas V. *Rethinking Strip Searches by NSW Police* (Report, August 2019) [rlc.org.au/publication/unsw-report-rethinking-strip-searches-nsw-police](http://rlc.org.au/publication/unsw-report-rethinking-strip-searches-nsw-police)

<sup>6</sup> See further discussion in Chapter 6

<sup>7</sup> Productivity Commission *Report on Government Services* 2019, 6.15

watchhouse procedures, rarely if ever with any consequences for the individuals involved. Some of these include: Ms Dhu (WA),<sup>1</sup> Mr Doomagee (Qld)<sup>2</sup> and Mr Briscoe (NT).<sup>3</sup>

These cases all demonstrate the need for in-depth independent auditing of all police in-custody procedures as well as independent inspections without notice.<sup>4</sup>

## 4.5 Recommendations

Further to the points already raised, we recommend that the SPT and the Working Group on Arbitrary Detention (WGAD):

- liaise with relevant Ombudsman Offices, Prisons Inspectorates and Commissioners for Children and Young People to determine appropriate sites for visits
- engage with the recommendations of the numerous recent inquiries into rights violations in youth justice and other justice facilities
- engage with governments on addressing the over-representation of Aboriginal and Torres Strait Islander people in places of justice detention, and on their specific needs when in detention
- engage with governments on addressing the complex needs of many people currently held in places of justice detention to identify more appropriate forms of treatment and placement
- engage with governments on reducing the use of seclusion and solitary confinement, and uses of restraints, in places of justice detention, particularly involving children and young people, ensuring that it is human rights compliant when its use is genuinely necessary
- encourage all governments to ensure that NPMs for police custody and transport are put in place as a priority, given the current lack of comprehensive oversight across all states and territories.

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<sup>1</sup> [www.coronerscourt.wa.gov.au/l/inquest\\_into\\_the\\_death\\_of\\_ms\\_dhu.aspx](http://www.coronerscourt.wa.gov.au/l/inquest_into_the_death_of_ms_dhu.aspx)

<sup>2</sup> [www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0008/86858/cif-doomagee-mulrunji-20100514.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0008/86858/cif-doomagee-mulrunji-20100514.pdf)

<sup>3</sup> Attorney-General (NT), Report to the Legislative Assembly pursuant to section 46B of the Coroners Act in the matter of the Corner's findings and recommendations into the death of Mr Kwementyaye Daniel Briscoe available at

[www.territorystories.nt.gov.au/jspui/bitstream/10070/275036/1/Coroners%20~%20and%20recommendation%20into%20the%20death%20of%20Mr%20Kwementyaye%20Daniel%20Briscoe%20pursuant%20to%20section%2046B%20of%20the%20Coroners%20Act%20dated%2015%20February%202013.PDF](http://www.territorystories.nt.gov.au/jspui/bitstream/10070/275036/1/Coroners%20~%20and%20recommendation%20into%20the%20death%20of%20Mr%20Kwementyaye%20Daniel%20Briscoe%20pursuant%20to%20section%2046B%20of%20the%20Coroners%20Act%20dated%2015%20February%202013.PDF)

<sup>4</sup> These cases are discussed in more detail in Chapter 6.

## CHAPTER 5: OPCAT AND AGED CARE

### Key points

- Locked units in residential aged care facilities are places of detention. Residents of these units are at a high risk of torture or cruel, inhuman or degrading treatment.
- Limited mobility of many residents in residential aged care facilities combined with the high usage of restrictive practices means that many residents are effectively detained (irrespective of whether they are in a locked unit) and at high risk of torture or cruel, inhuman or degrading treatment.
- Many residents in residential aged care facilities may be the subject of *unlawful* detention which constitutes arbitrary detention.
- Those in aged care facilities who are subject to restrictive practices are especially vulnerable to torture, cruel, inhuman or degrading treatment due to limited autonomy and mobility.
- In the context of residential aged care facilities, evidence points to restrictive practices being widely used in a manner that is often unlawful and/or unnecessary and, in this regard, constitutes cruel, inhuman or degrading treatment.
- Federal regulation of the use of restrictive practices is inadequate: it fails to spell out the need for lawfulness and for such practices to be used after exhausting all other options.
- The patchwork of federal and state/territory regulation of the use of restrictive practices means that there is a culture of non-compliance among aged care providers which heightens the risk of torture or cruel, inhuman or degrading treatment.

### 5.1 Legal and policy framework for aged care

Aged care is regulated by the federal government via the *Aged Care Act 1997* (the Aged Care Act). Mental health and disability are predominantly regulated by state and territory governments.

### 5.2 Residential aged care facilities as ‘places of detention’

We note the Committee against Torture’s comment that ‘each State party should prohibit, prevent and redress torture and ill-treatment *in all contexts of custody or control*, for example, in prisons, [and] *institutions that engage in the care of children, the aged, the mentally ill or disabled*’.<sup>1</sup>

Residential aged care generally applies to people over 65 years of age. In 2016–2017, there were 902 providers of aged care offering 200,689 residential places in 2,672 facilities in Australia.<sup>2</sup> The lack of housing, and medical and support services in the community, and the

<sup>1</sup> Committee against Torture. General Comment No. 2: Implementation of Article 2 by States Parties. (2008) CAT/C/GC/2 (24 January). 4, emphasis added.

<sup>2</sup> Aged Care Financing Authority. Sixth Report on the Funding and Financing of the Aged Care Sector (July 2018) available at [www.agedcare.health.gov.au/sites/g/files/net1426/f/documents/08\\_2018/acfa\\_sixth\\_report\\_2018\\_text\\_fa3.pdf](http://www.agedcare.health.gov.au/sites/g/files/net1426/f/documents/08_2018/acfa_sixth_report_2018_text_fa3.pdf) <accessed on 10 December 2018>

social and economic circumstances of individuals are significant factors in the entry of people into residential aged care facilities. As such, individual or third-party decisions to live in residential aged care are complex and cannot be assumed to be motivated by ‘choices’ made from a range of equally viable options nor made because an individual’s medical or cognitive needs absolutely cannot be met in the community. Nor do these choices signal that residential aged care facilities are the only possible configuration of support, medical care and housing that is ever possible.<sup>1</sup> Unfortunately, political and scholarly discourse is yet to fully turn to explore transformative alternatives to institutionalised living.

We are deeply concerned that the Australian Government has not included residential aged care facilities as a ‘primary place of detention’ for the purpose of Australia’s OPCAT obligations and Australia’s NPM arrangements. OPCAT does not allow reservations to be made to the definition of a place of deprivation of liberty, the scope of SPT and NPM mandates, or any other provision (see Article 30).

We argue that *from the outset* Australia’s NPM arrangements need to include the monitoring of residential aged care facilities.<sup>2</sup> This is because these are places regulated (and partially/fully funded) by the federal government, they are the subject of government oversight, and they are places where people experience restricted liberty through the use of: (i) locked units and/or (ii) restrictive practices. Concerns about these practices were expressed in the 2019 Interim Report of the Royal Commission into Aged Care Quality and Safety, simply titled ‘Neglect’. The report found that there was ‘ineffective regulatory oversight of aged care providers, and a lack of focus on the quality of care.’<sup>3</sup>

Furthermore, credible evidence indicates that, in Australia, some residents in many of these places have been the subject of cruel, inhuman or degrading treatment and possibly torture.

### 5.3 Current schemes for monitoring and inspection

Federal and state schemes for monitoring and inspecting residential aged care facilities have been inadequate. This has been confirmed by multiple recent inquiries.<sup>4</sup> In light of these inquiries, the federal government has been implementing some reforms but many state schemes remain unreformed and deficient.

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<sup>1</sup> Linda Steele et al. Questioning segregation of people living with dementia in Australia: an international human rights approach to care homes (2019) 8 *Laws* 18

<sup>2</sup> For an explanation of how OPCAT applies to aged care, see White M. New Zealand Human Rights Commission *He Ara Tika, A Pathway Forward: The scope and role of the Optional Protocol to the Convention against Torture (OPCAT) in relation to aged care and disability residences and facilities* (June 2016)

<sup>3</sup> The Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect, Volume 1* (31 October 2019), 68. [agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx](https://agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx)

<sup>4</sup> Groves A., Thompson D., McKellar D., Procter NG. *The Oakden report*. Department for Health and Ageing (2017), 109. See also Carnell K. and Paterson R. *Review of national aged care quality regulatory processes* (2017), 115; Senate Community Affairs References Committee. Effectiveness of the Aged Care Quality Assessment and Accreditation Framework for protecting residents from abuse and poor practices and ensuring proper clinical and medical care standards are maintained and practised: interim report. (2018); South Australian Independent Commissioner Against Corruption, *Oakden: A Shameful Chapter in South Australia’s History* (2018) available at [https://icac.sa.gov.au/system/files/ICAC\\_Report\\_Oakden.pdf](https://icac.sa.gov.au/system/files/ICAC_Report_Oakden.pdf)

Aged care facilities are federally funded and are regulated by federal aged care standards. However, where a facility is run by a state, it is also regulated under state (mental) health schemes.

At the federal level, the the Aged Care Act is the primary legislation governing aged care in Australia. Section 63.1AA of the Aged Care Act requires approved providers of aged care to report certain allegations of abuse, such as unreasonable use of force, to the Commonwealth Health Department. A 2017 inquiry into systemic abuses at the Oakden Older Persons Mental Health Service in South Australia found no 'process in place to determine, escalate and report possible incidents of elder abuse' and 'no evidence of any elder abuse reports being completed'.<sup>1</sup> The Australian Aged Care Quality Agency (Quality Agency), which was at that time responsible for accrediting Oakden, failed to detect indications of the serious failures in care.<sup>2</sup>

The Quality Agency has since been replaced by the Aged Care Quality and Safety Commission (ACQSC) (established in January 2019). On 1 January 2020, the ACQSC became responsible for approval of providers, aged care compliance and compulsory reporting which were previously the responsibility of the Secretary of the Department of Health. The ACQSC can take enforcement action, using its powers of accreditation. This body exclusively uses unannounced visits of at least two days. However, it is not functionally or financially independent.

In 2019, the federal *Inquiry into Events at Earle Haven* indicated that the ACQSC was struggling to operate 'in a concerted and coordinated fashion' and that its method of resolving complaints did not have a primary focus on the outcomes for complainants.<sup>3</sup> A second, state inquiry into Earle Haven recommended that the ACQSC be given powers to impose stronger penalties for significant non-compliance with quality and safety standards.<sup>4</sup> There is scope for the (federal) NPM to harness this body in the monitoring of residential aged care facilities.

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<sup>1</sup> Groves A., Thompson D., McKellar D., Procter NG. *The Oakden report*. Department for Health and Ageing (2017), 64

<sup>2</sup> During the period of abuse, the Quality Agency conducted an announced two-day audit of Oakden and found compliance with all 44 expected outcomes, re-accrediting the facility for three years, and only carried out a single unannounced one-day visit per year in the intervening period. Federal aged care regulators only became aware of serious failures of care at Oakden in January 2017, through an ABC News story. See Carnell K. and Paterson R. *Review of national aged care quality regulatory processes* (2017), 34-35. A Senate Committee inquiry found fault with the monitoring methodology employed by the Quality Agency; the Quality Agency had struggled to consolidate its auditing, identify service risk and make decisions as to how these risks should be addressed (Senate Community Affairs References Committee. *Effectiveness of the Aged Care Quality Assessment and Accreditation Framework for protecting residents from abuse and poor practices and ensuring proper clinical and medical care standards are maintained and practised: interim report* (2018), 41). Furthermore, the Quality Agency did not adequately involve residents and their families and seek their views: Carnell and Paterson (2017), vi-vii.

<sup>3</sup> Commonwealth Department of Health, *Inquiry into events at Earle Haven* (2019), 58 at [https://www.health.gov.au/sites/default/files/documents/2019/11/inquiry-into-events-at-earle-haven\\_0.pdf](https://www.health.gov.au/sites/default/files/documents/2019/11/inquiry-into-events-at-earle-haven_0.pdf)

<sup>4</sup> Parliament of Queensland, Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, *Investigation of the close of Earle Haven residential aged care facility at Nerang (Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying)* (November 2019), ix

At the state level, there are mechanisms to monitor those residential aged care facilities which provide mental health or disability services. Given that Australia has eight state/territory jurisdictions, these schemes are diverse. One scheme used in Victoria, NSW and South Australia is the Community Visitor Scheme which involves a group of volunteers, known as Community Visitors (CVs), making regular monthly visits, announced and unannounced, to the state's mental health facilities, including specialist aged care facilities for those with very severe and extreme dementia. One of the Oakden inquiries found that the CVs in South Australia were ineffective in monitoring these facilities because they used only announced visits and they were not trained or qualified in a way that would have enabled them to identify the excessive use of restrictive practices.<sup>1</sup>

## 5.4 Key issues of concern

### 5.4.1 Civil detention and aged care

Many aged care residents are detained in locked units in residential aged care facilities: most are subject to government-sanctioned orders or schemes which require or permit this detention. Indeed, some legislative schemes specifically refer to 'detention' in this context.<sup>2</sup> This is civil detention.

Others residents are in locked units without lawful authority. This problem has been confirmed recently by the report of the Community Affairs References Committee of the Australian Senate which, after hearing evidence concluded:

indefinite detention of people with cognitive or psychiatric *impairment is a significant problem within the aged care context* ... It is also clear this detention is often informal, unregulated and unlawful.<sup>3</sup>

The fact that detention is taking place in the context of aged care facilities is confirmed by the courts. In 2019, the South Australian Supreme Court, comprising three judges, upheld a habeas corpus action in relation to a 95-year old man (with dementia of at least moderate severity) who was unlawfully detained in a locked unit of a residential aged care facility.<sup>4</sup> The Court ordered his release.

This indicates that Australian courts recognise that detention is taking place in residential aged care facilities in Australia. Such detention must be lawful. Not many residents or their families have the resources to challenge the lawfulness of their detention and, even if they

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<sup>1</sup> South Australian Independent Commissioner Against Corruption. *Oakden: A Shameful Chapter in South Australia's History* (2018) [icac.sa.gov.au/system/files/ICAC\\_Report\\_Oakden.pdf](https://icac.sa.gov.au/system/files/ICAC_Report_Oakden.pdf) 197, 227, 261. See also: Laura Grenfell, Aged Care, Detention and OPCAT (2019) *Australian Journal of Human Rights* [www.tandfonline.com/eprint/CXYAYHYWG5P923AUPFI7/full?target=10.1080/1323238X.2019.1642998](https://www.tandfonline.com/eprint/CXYAYHYWG5P923AUPFI7/full?target=10.1080/1323238X.2019.1642998)

<sup>2</sup> These schemes are state-based. See, for example, the *Guardianship and Administration Act 1993* (SA), s 32.

<sup>3</sup> Senate Community Affairs References Committee, *Indefinite detention in Australia of people with cognitive and psychiatric impairment* (2016), 169 available at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Indefinite\\_Detention](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Indefinite_Detention)

<sup>4</sup> *Public Advocate v C, B* [2019] SASCF 58. [www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASCF/2019/58.html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASCF/2019/58.html)

do, individual remedies do not automatically trigger structural reform to prevent future detention.

Unlawful detention is a form of arbitrary detention contrary to Article 9 of the International Covenant on Civil and Political Rights (ICCPR). Australian authorities at the federal and state/territory level need to work together to ensure that all those in locked residential aged care facilities are being lawfully detained. It is the government's responsibility to ensure that all detention in government-regulated and funded facilities is lawful.

In light of the Convention on the Rights of Persons with Disabilities (CRPD), and the evidence that environmental restraints (such as code locks, locked gates and fences) negatively impact on residents in residential aged care facilities, the practice of detaining residents in residential aged care facilities needs to be questioned.<sup>1</sup>

Civil detention means that these people are placed in a vulnerable position. It means that they are at a disproportionately high risk of torture or cruel, inhuman or degrading treatment. OPCAT monitoring (via the NPM and SPT scheme) of these places of detention is therefore critical.

#### **5.4.2 Widespread use of restrictive practices in residential aged care facilities**

The liberty of many residents in aged care facilities is restricted by the use of restrictive practices. We use this term 'restrictive practices' to cover a number of practices including, chemical restraint, mechanical restraint, seclusion and physical restraints (such as lapbelts, jacket restraints, 'angel chairs', bed rails, removal of mobility aids).

According to the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, in some circumstances, restrictive practices can constitute cruel, inhuman or degrading treatment.<sup>2</sup>

National statistics published by the Australian Institute of Health and Welfare in 2019 indicate that, in 'older person services', the rate at which restraints are used has been increasing not decreasing.<sup>3</sup>

Currently, there is no national approach to the use of restrictive practices.<sup>4</sup> While international principles generally require that these practices be used 'as a last resort', there

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<sup>1</sup> Linda Steele et al. Questioning Segregation of People Living with Dementia in Australia: An International Human Rights Approach to Care Homes (2019) 8 *Laws* 18

<sup>2</sup> Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*. A/HRC/22/53 (1 February 2013), 14–15; Committee on the Rights of Persons with Disabilities, *Concluding observations on the Initial Report of Australia, adopted by the Committee at its Tenth Session (2–13 September 2013)*. CRPD/C/AUS/CO/1 (21 October 2013), 5.

<sup>3</sup> Australian Institute of Health and Welfare, 2019, *Mental Health Services: In Brief* (2018), 19 [www.aihw.gov.au/getmedia/0e102c2f-694b-4949-84fb-e5db1c941a58/aihw-hse-11.pdf.aspx?inline=true](http://www.aihw.gov.au/getmedia/0e102c2f-694b-4949-84fb-e5db1c941a58/aihw-hse-11.pdf.aspx?inline=true)

<sup>4</sup> At the state and territory level, restrictive practices are variously regulated under disability services and mental health frameworks as well as guardianship. Only Victoria and Queensland have shown a robust approach to this regulation by enacting legislative provisions regulating the use of restrictive practices in both disability services and mental health – but these do not necessarily cover aged care facilities and some such legislation, for example Victoria's *Disability Act 2006*, explicitly excludes conditions relating to ageing.



is much evidence to indicate that they are often being used as a ‘routine management tool’ in residential aged care facilities, predominantly where facilities are understaffed. This was found by multiple inquiries into the Oakden Older Persons Mental Health Service in South Australia (which sparked the 2018 Royal Commission into Aged Care Quality and Safety).<sup>1</sup> One of the Oakden inquiries explicitly referred to the possibility that the use of restrictive practices at Oakden constituted ‘torture’.<sup>2</sup>

In 2019, a parliamentary inquiry into the July 2019 closure of an (understaffed) aged care facility in Queensland (Earle Haven) found that chemical restraint was used for 71 per cent of the 69 residents and that physical restraint was used for 50 per cent of the residents.<sup>3</sup>

The Interim Report of the Royal Commission into Aged Care Quality and Safety has noted the prevalence of restrictive practice based on both empirical and anecdotal evidence.<sup>4</sup>

The Royal Commission’s inquiry has revealed instances where the use of restrictive practices in aged care has been *inhumane, abusive and unjustified*. Restraining a person, whether through physical or pharmacological means, is dehumanising and disempowering. It is an affront to dignity and personal autonomy. The overwhelming weight of evidence confirms that restrictive practices have questionable success in minimising so-called ‘challenging behaviours’. They also carry risks of serious physical and psychological harm, including health complications and premature death.<sup>5</sup>

The Royal Commission has noted the relevance of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment in the context of restraints in residential aged care<sup>6</sup> and it has noted that ‘a residential care home where people may not be free to leave could fall within the scope of a ‘place of detention’ under OPCAT.<sup>7</sup>

The evidence points to the *unlawful* and *unnecessary* use of restrictive practices in residential aged care facilities in Australia.<sup>8</sup> It also points to their widespread and systematic use such that they might be considered a fundamental and defining feature of the practices

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<sup>1</sup> Groves A., Thompson D., McKellar D., Procter NG. *The Oakden report*. Department for Health and Ageing (2017), 109; Carnell K. and Paterson R. *Review of National Aged Care Quality Regulatory Processes* (2017), 115

<sup>2</sup> This was the report of the SA Chief Psychiatrist – see Groves A., Thompson D., McKellar D., Procter NG. *The Oakden report*. Department for Health and Ageing (2017), 103.

<sup>3</sup> Parliament of Queensland, Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, *Investigation of the close of Earle Haven residential aged care facility at Nerang (Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying)*, November 2019, viii.

<sup>4</sup> The Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect, Volume 1* (31 October 2019), 198 [www.agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx](http://www.agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx)

<sup>5</sup> The Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect, Volume 1* (31 October 2019), 193 [www.agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx](http://www.agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx) (emphasis added)

<sup>6</sup> The Royal Commission into Aged Care Quality and Safety, *Restrictive practices in residential aged care in Australia*, Background Paper 4 (May 2019), 20.

<sup>7</sup> The Royal Commission into Aged Care Quality and Safety, *Restrictive Practices in Residential Aged Care in Australia*, Background Paper 4 (May 2019), n 141

<sup>8</sup> Royal Australian and New Zealand Association of Psychiatrists. Professional Practice Guideline 10: Antipsychotic medications as a treatment of behavioural and psychological symptoms of dementia (August 2016).

and cultures of residential aged care facilities. For these reasons, it is particularly urgent to ensure they are considered places of detention and monitored accordingly.

### **5.4.3 Unlawful use of restrictive practices**

The use of restrictive practices is the subject of state (and some federal) regulation. State regulation requires that there is lawful authority, either through the prior informed consent of the resident or their legally authorised representatives. Unlawful use of restrictive practices effectively constitutes a form of unlawful detention because these practices are designed to restrict the liberty and mobility of the resident.

There is evidence that the need for lawful authority is often misunderstood or ignored by staff in residential aged care facilities. For example, in regard to the Oakden Older Persons Mental Health Service in South Australia, inquiries found that many staff did not understand the need for lawful authority for the use of such restrictive practices.<sup>1</sup> Furthermore, the inquiries found that staff had failed to report the use of such practices, contrary to mandatory reporting requirements.<sup>2</sup> A culture of non-compliance was prevalent.

This practice at Oakden is not isolated. Research by Human Rights Watch into residential aged care homes in three Australian states found numerous instances where chemical restraints were administered without lawful consent.<sup>3</sup> Families only became aware that chemical restraints had been used when they received pharmacy bills.

All this evidence points to:

- inadequate staff training
- few sanctions for the use of restraints without lawful authority
- inadequate oversight of mandatory reporting requirements and few sanctions for the failure to report the use of such practices.

In sum, it points to the fact that residents in aged care facilities are exposed to a high risk of cruel, inhuman or degrading treatment or even torture, and to the need for OPCAT monitoring by the NPM and by the SPT.

### **5.4.4 Unnecessary use of restrictive practices**

The use of restrictive practices must be to the extent necessary and proportionate to the risk of harm. Staff must first exhaust all alternatives according to a facility policy that promotes alternatives, mandates limits and requires monitoring and reporting. The use of restrictive practices must be subject to regular review.

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<sup>1</sup> South Australian Independent Commissioner Against Corruption, *Oakden: A Shameful Chapter in South Australia's History*. [https://icac.sa.gov.au/system/files/ICAC\\_Report\\_Oakden.pdf](https://icac.sa.gov.au/system/files/ICAC_Report_Oakden.pdf) (2018), 113

<sup>2</sup> Groves A., Thompson D., McKellar D., Procter NG. *The Oakden report*. Department for Health and Ageing (2017), 113.

<sup>3</sup> Human Rights Watch, *'Fading Away': How aged care facilities in Australia chemically restrain older people with dementia* (2019), 23

The Royal Commission into Aged Care Quality and Safety heard evidence from a panel of experts from across the health and aged care sectors, and the Australian Government's Aged Care Clinical Advisory Panel, that 'only about 10% of antipsychotic medications and benzodiazepines used in residential aged care was clearly justified in the treatment of mental illness and some rare, acute psychotic, manifestations of dementia'.<sup>1</sup> In the view of one expert, the over-prescription of 'anti-psychotics as a first line treatment for behavioural and psychological symptoms of dementia is 'a major, systemic industry-wide issue'''.<sup>2</sup>

The extent of the practice of chemical restraints in residential aged care suggests widespread breaches of Professional Practice Guideline 10, developed by the Royal Australian and New Zealand Association of Psychiatrists. This Guideline seeks to ensure appropriate and minimal use of chemical restraints, that is, only where symptoms are severe, and by adopting a person-centred approach. A tendency towards under-reporting by aged care facilities of their use of psychotropic medications as a form of restraint indicates the need for robust oversight mechanisms under OPCAT.

These findings all point to the unnecessary use of restrictive practices in a context where there is insufficient oversight and where the relevant regulations lack clarity and consistency. While the problems appear to be systemic and industry-wide, at the same time there is significant variability between residential aged care facilities.

#### **5.4.5 Federal regulation of restrictive practices is inadequate**

In mid-2019, the Australian Government introduced new regulations on the use of chemical and physical restraints in aged care.<sup>3</sup> This was a response to the recommendations of the Oakden inquiries and other inquiries which have all called for greater clarity and consistency in how aged care providers use restrictive practices.

The new regulations were scrutinised by the Parliamentary Joint Committee on Human Rights (PJCHR) in light of Australia's international human rights obligations. The PJCHR concluded that the new regulations have 'created widespread confusion around the legal obligations of approved providers in relation to the use of restraint in residential aged care facilities' and 'created an increased risk that both physical and chemical restraint might be used in residential care facilities without the informed consent of residents, or their legally authorised representatives, and without first exhausting all alternatives.'<sup>4</sup> The PJCHR further concluded:

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<sup>1</sup> The Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect, Volume 1* (31 October 2019) 200. [agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx](https://agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx)

<sup>2</sup> Prof Joseph Ibrahim quoted by The Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect, Volume 1* (31 October 2019), 200

<sup>3</sup> *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* [F2019L00511]

<sup>4</sup> Parliamentary Joint Committee on Human Rights, *Inquiry Report, Quality of Care Amendment (Minimising the Use of Restraints) Principles*, (13 November 2019), 53. The Australian Government has chosen not to take up the 2017 recommendation of the Australian Law Reform Commission to amend the primary legislation, the *Aged Care Act 1997*, to include the regulation of such practices.

As a result, the instrument may engage and limit a number of human rights, including the absolute prohibition on torture, cruel, inhuman or degrading treatment or punishment.<sup>1</sup>

It is our view that the poor oversight and inadequate regulation of restrictive practices in Australia's residential aged care facilities heightens the risk of cruel, inhuman or degrading treatment taking place in locked units of aged care facilities. The Aged Care Act and regulations do not act as an effective mechanism for reducing or regulating the use of unnecessary restrictive practices in residential aged care facilities.

#### 5.4.6 Existing complaints and auditing mechanisms

Complaints mechanisms exist at both federal and state levels. Evidence indicates that in the past these mechanisms have been ineffective because complaints bodies have not communicated with each other and, more critically, they have been underutilised by residents and their families. In addition, there was no 'process in place to determine, escalate and report possible incidents of elder abuse'.<sup>2</sup> These problems have been confirmed by multiple inquiries into Oakden.<sup>3</sup> According to these inquiries, the main reason for the non-raising of complaints is an institutional culture of 'intimidation' where families feel 'threatened and vulnerable about lodging complaints'.<sup>4</sup>

Since the Oakden inquiries, the Australian Government has acted to improve its system of auditing and complaint handling by:

- establishing the Aged Care Quality and Safety Commission (ACQSC), a single federal body for complaints, compliance and accreditation of aged care providers
- establishing a proper complaints process for elder abuse complaints
- making ACQSC accreditation visits unannounced and of at least two days duration.

At the federal and state/territory level, mechanisms for handling complaints, auditing and monitoring are not guided by human rights standards, with the exception of Victoria and the ACT (and soon Queensland) where public authorities must act compatibly with human rights standards. Many state monitoring schemes, such as the Community Visitor Scheme, use volunteers with no specific training in applying human rights standards or in identifying the unlawful or unnecessary use of restrictive practices.

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<sup>1</sup> See above, 53-54

<sup>2</sup> Groves A., Thompson D., McKellar D., Procter NG. *The Oakden report*. Department for Health and Ageing (2017), 64.

<sup>3</sup> Senate Community Affairs References Committee. *Effectiveness of the Aged Care Quality Assessment and Accreditation Framework for protecting residents from abuse and poor practices and ensuring proper clinical and medical care standards are maintained and practised: Interim Report*. (2018) [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/AgedCareQuality/~/\\_media/Committees/clac\\_ctte/AgedCareQuality/Interim\\_Report/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AgedCareQuality/~/_media/Committees/clac_ctte/AgedCareQuality/Interim_Report/report.pdf), 41; Carnell K. and Paterson R. *Review of National Aged Care Quality Regulatory Processes* (2017), 49

<sup>4</sup> Human Rights Watch, *'Fading Away': How aged care facilities in Australia chemically restrain older people with dementia* (2019), 34; Principal Community Visitor, *The South Australian Community Visitor Scheme Principal Community Visitor Special Report: Mental Health Services 2016–17* (2018), 33 [communityvisitorscheme.sa.gov.au/\\_\\_data/assets/pdf\\_file/0006/72357/2016-17-Special-Report-of-Principal-Community-Visitor-on-Mental-Health-final-edit-20180308.pdf](http://communityvisitorscheme.sa.gov.au/__data/assets/pdf_file/0006/72357/2016-17-Special-Report-of-Principal-Community-Visitor-on-Mental-Health-final-edit-20180308.pdf)

#### 5.4.7 People living with dementia in residential aged care facilities

According to the peak body Dementia Australia, more than half of the people in Australian Government-funded residential aged care facilities have dementia.<sup>1</sup> Of the 447,115 people living with dementia in Australia, it estimates that ‘up to 1 per cent of people with dementia have very severe behavioural and psychological symptoms of dementia (BPSD)’ while 10 per cent have severe to extreme BPSD.<sup>2</sup>

Specialist dementia care units (SDCUs) are generally code-locked units within residential aged care facilities and hence people (mostly those with very severe BPSD) living in these units are detained and segregated. These locks are designed so that people living with dementia will find them very difficult to unlock. The rationale is that locking provides safety for those people living with dementia who present a risk to themselves and others. This understanding of safety is limited to physical safety and overlooks emotional safety which can be negatively impacted through confinement.<sup>3</sup> Importantly, detention and segregation through locks and separate units are routine design conventions in residential aged care facilities that, from the outset, are embedded within facilities, irrespective of staffing levels or cultures.<sup>4</sup> This is of particular concern in light of the projected increased demand for residential aged care facilities and the likely construction of new facilities that will simply perpetuate and legitimate the architectural and material conditions for torture and cruel, inhuman or degrading treatment.

Article 14 of the CRPD requires that State Parties ensure that people with disabilities ‘[e]njoy the right to liberty and security of person’ and ‘[a]re not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that existence of a disability shall in no case justify a deprivation of liberty’. Article 15 of the CRPD reiterates the prohibition on torture and cruel, inhuman or degrading treatment and that State Parties ‘shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities’ being subjected to such treatment. Article 20 of the CRPD requires State Parties to take effective measures to ensure the personal mobility of persons with disabilities.

The UN Special Rapporteur on the Rights of Persons with Disabilities has recently stated that ‘[d]eprivation of liberty on the basis of impairment is not a “necessary evil” and that ‘detention of persons with disability based on “danger to self or others”, “need of care” or “medical necessity” is unlawful and arbitrary’.<sup>5</sup>

While dementia-related services in an aged care context are regulated by federal aged care standards, in these circumstances federal and state regulation is intertwined. One problem is that the federal government has no accreditation process specific to aged care facilities

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<sup>1</sup> Dementia Australia, *Specialist Dementia Care Units: A response from Dementia Australia* (January 2018), 3

<sup>2</sup> Dementia Australia, *Specialist Dementia Care Units: A response from Dementia Australia* (January 2018), 4

<sup>3</sup> Linda Steele et al. Questioning segregation of people living with dementia in Australia: an international human rights approach to care homes (2019) 8 *Laws* 18

<sup>4</sup> Linda Steele et al. Questioning segregation of people living with dementia in Australia: an international human rights approach to care homes (2019) 8 *Laws* 18

<sup>5</sup> Special Rapporteur on the Rights of Persons with Disabilities, *Report of the Special Rapporteur on the Rights of Persons with Disabilities* (11 January 2019), UN Doc A/HRC/40/54, paras 86, 62

with SDCUs. It is questionable whether it is appropriate for services for those with very severe or extreme dementia in an aged care context to be regulated by federal aged care standards.<sup>1</sup> A Senate Committee Inquiry has recommended a change in standards so that 'all dementia-related and other mental health services being delivered in an aged care context must be correctly classified as health services not aged care services, and must therefore be regulated by the appropriate health quality standards and accreditation processes'.<sup>2</sup> This change in classification would be beneficial in requiring a higher staff-to-resident ratio and, in turn, an improvement in the staffing ratio could mean a decrease in the use of restrictive practices.

We question whether segregated units where residents are detained are necessary. While they may be lawful under Australian law, we question whether they are discriminatory under Australia's obligations under international law on the basis that they predominantly discriminate against residents with disabilities. It is important to note that a recent Human Rights Watch report highlighted the widespread use and abuse of chemical restraint in Australian residential aged care facilities and concluded that legislation prohibiting (rather than merely regulating) chemical restraint was necessary.<sup>3</sup> More broadly, in the context of disability and mental health services, advocates and scholars have argued that restrictive practices per se (regardless of whether they are deemed 'necessary' or 'lawful') are discriminatory and violent because they are non-consensual and apply only to people with disabilities on the basis of the denial of legal capacity.<sup>4</sup>

#### 5.4.8 Young people in residential aged care

According to the Royal Commission, almost 6,000 people under 65 live in residential aged care facilities.<sup>5</sup> People with disability in residential care die at least 25 years earlier than the general population.<sup>6</sup>

In the absence of a federal database on these people, the Royal Commission has set out that most of these young people fall into four broad categories: (1) people with disability; (2) people with palliative and end-of-life care needs; (3) people with age-related conditions

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<sup>1</sup> Senate Community Affairs References Committee. *Effectiveness of the Aged Care Quality Assessment and Accreditation Framework for protecting residents from abuse and poor practices and ensuring proper clinical and medical care standards are maintained and practised: Interim Report* (2018), 52 [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/AgedCareQuality/~media/Committees/clac\\_ctte/AgedCareQuality/Interim\\_Report/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AgedCareQuality/~media/Committees/clac_ctte/AgedCareQuality/Interim_Report/report.pdf)

<sup>2</sup> Senate Community Affairs References Committee. *Effectiveness of the Aged Care Quality Assessment and Accreditation Framework for protecting residents from abuse and poor practices and ensuring proper clinical and medical care standards are maintained and practised: Interim Report* (2018), 68 [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/AgedCareQuality/~media/Committees/clac\\_ctte/AgedCareQuality/Interim\\_Report/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AgedCareQuality/~media/Committees/clac_ctte/AgedCareQuality/Interim_Report/report.pdf)

<sup>3</sup> Human Rights Watch, *'Fading Away': How aged care facilities in Australia chemically restrain older people with dementia* (2019)

<sup>4</sup> For example, see Cadwallader JR., Spivakovsky C., Steele L., Wadiwel D. Institutional violence against people with disability: Recent legal and political developments. *Current Issues in Criminal Justice*. (2018) Mar 1;29(3):259-72. [www6.austlii.edu.au/cgi-bin/viewdoc/au/journals/CICrimJust//2018/5.html](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/journals/CICrimJust//2018/5.html)

<sup>5</sup> The Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect, Volume 1* (31 October 2019), 233 [agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx](http://agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx)

<sup>6</sup> NSW Ombudsman. *Report of Reviewable Deaths in: 2014 and 2015, 2016 and 2017, Deaths of people with disability in residential care* (2018) NSW Ombudsman, Sydney

such as early onset dementia; and (4) people assessed as having early need for aged care services such as people who have experienced homelessness and Aboriginal and Torres Strait Islander people.<sup>1</sup>

Many young people with disability, including participants in the National Disability Insurance Scheme (NDIS), are forced to live in institutions, residential, congregate care, and aged care facilities<sup>2</sup> in order to receive social and personal care supports.<sup>3</sup> More than 1 in 20 younger people in residential aged care who have applied for NDIS funding have been deemed ineligible.<sup>4</sup> Many people with disability do not have access to the supports they need and cannot afford the support they need.<sup>5</sup>

The Younger People in Residential Aged Care—Action Plan only outlines a plan to reduce the number of persons, including persons with disabilities, under the age of 65 years living in aged care facilities, but does not end the practice. An announcement<sup>6</sup> has been made to revise the Younger People in Residential Aged Care—Action Plan significantly to ensure that no person aged under 65 years should enter or live in residential aged care by 2025.<sup>7</sup>

Action to remove younger people from residential aged care facilities ideally should occur in a broader discussion of transformative alternatives to aged care institutionalisation per se.

#### **5.4.9 Those who are re-institutionalised in aged care facilities**

The negative effects of detention and confinement in residential aged care facilities can be particularly pronounced for parts of the population who have previously experienced institutionalisation, for example, through child welfare policies. For example, the Northern Territory Council of Social Services explains that ‘placing a member of the Stolen Generation [Aboriginal and Torres Strait Islander children forcibly removed from their families] in a residential facility can risk re-traumatisation and cause further harms to the individual.’<sup>8</sup>

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<sup>1</sup> The Royal Commission into Aged Care Quality and Safety, *Interim Report: Neglect, Volume 1* (31 October 2019) 234-235 [agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx](https://agedcare.royalcommission.gov.au/publications/Pages/interim-report.aspx)

<sup>2</sup> For example, in June 2015, there were 6,252 young people in nursing homes around Australia, comprising 555 young people aged 0-49 years and 5,697 aged 50-64 years. See: Senate Community Affairs References Committee. 2015. *Adequacy of existing residential care arrangements available for young people with severe physical, mental or intellectual disabilities in Australia*. See also: Norman J. *The young people forced to live in aged care homes and the push to get them out*. (24 Mar 2019) ABC News

<sup>3</sup> Including the right to choose freely where and with whom they live

<sup>4</sup> Aged Care Guide, *The issue facing younger people with disability in aged care* via [www.agedcareguide.com.au/talking-aged-care/younger-people-with-disability-in-aged-care](http://www.agedcareguide.com.au/talking-aged-care/younger-people-with-disability-in-aged-care)

<sup>5</sup> National CRPD Survey. Findings, *Disability Rights Now 2019: Australian Civil Society Shadow Report to the United Nations Committee on the Rights of Persons with Disabilities: UN CRPD Review 2019*

In response to the list of issues prior to the submission of the combined second and third periodic reports of Australia [CRPD/C/AUS/QPR/2-3]

<sup>6</sup> Department of Prime Minister and Cabinet. 2019. *Response to Aged Care Royal Commission Interim Report*. [www.pm.gov.au/media/response-aged-care-royal-commission-interim-report](http://www.pm.gov.au/media/response-aged-care-royal-commission-interim-report)

<sup>7</sup> A recommendation was made to the Australian Government to revise the Younger People in Residential Aged Care—Action Plan by the Committee on the Rights of Persons with Disabilities in the *Concluding observations on the combined second and third reports of Australia* [CRPD/C/AUS/CO/2-3], 10

<sup>8</sup> NTCOSS, *NTCOSS Submission to the Royal Commission of Inquiry* (2019) 5.

The experience of being a care leaver has had an especially profound effect on those who are now facing the prospect of aged care. In 2019, the federal Department of Health produced resources which included interviews with care leavers about their experiences of being in other institutions, having long left 'care' settings as a child. One care leaver stated that:

It would frighten me a lot to go into a home. A lot. Because it would remind me of being in a home. Three homes. Another home, I couldn't handle it. I just couldn't handle it.

Another care leaver said:

I don't know. I'd kill myself I think if I had to go in a home, because I don't think I could. I wouldn't handle it.<sup>1</sup>

Representatives of the association representing care leavers – Care Leavers Australasia Network (CLAN) – have reported that the experiences of some of their members of being in institutionalised care, including foster care, have resulted in traumas that make them particularly fearful of being placed in residential aged care, to the extent that they would be unable to cope with the associative memories of institutional abuse.

## 5.5 Recommendations

During its visit to Australia, we recommend that the SPT and the Working Group on Arbitrary Detention (WGAD):

- incorporate visits to aged care facilities given:
  - the substantiated and sustained evidence of torture, cruel, inhumane and degrading treatment
  - inadequate oversight mechanisms
  - inadequate and unclear consent procedures
  - widespread use of physical and chemical restraint and deprivation of liberty
- visit sites where young people are being held in aged care facilities
- request detailed demographic information from the Australian Government on young people in aged care, including the sites where they reside and the reason for their residency in aged care
- inquire into oversight mechanisms relating to the use of chemical and physical restraint and ask the Australian Government to respond to recent criticisms of the regulatory frameworks in this area
- visit Specialist Dementia Care Units and request details on the number and location of these units
- seek details from the Australian Government of its commitment to addressing the concerns raised by the Royal Commission into Aged Care Quality and Safety,

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<sup>1</sup> Department of Health, Care Leavers Resources, 15 December 2016, Australian Government [agedcare.health.gov.au/support-services/people-from-diverse-backgrounds/care-leavers-resources](https://agedcare.health.gov.au/support-services/people-from-diverse-backgrounds/care-leavers-resources)



specifically those relating to segregation of dementia patients into locked wards, the use of chemical and physical restraints, and the issue of consent to medical treatment.

We also recommend that the SPT and WGAD also seek to engage constructively with the Commissioners from the Royal Commission into Aged Care Quality and Safety in relation to the role of the NPM in preventing and monitoring places and practices of residential aged care where many people are being effectively detained and at a high risk of torture, cruel, inhuman or degrading treatment.

## 6 PERSPECTIVE OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

### Key points

- Indigenous people are significantly over-represented in Australia's criminal justice system and make up 28 per cent of Australia's adult prison population despite making up only 2 per cent of the total adult population.<sup>1</sup> Indigenous Australians are the most incarcerated people in the world.<sup>2</sup>
- Within prisons and detention centres, Indigenous adults and young people experience a lack of care, physical and psychological abuse, racist taunts and alienation. Many experience multiple and compounding health issues for which treatment is currently inadequate.
- Reasons for over-incarceration and harm inflicted on Indigenous Australians in prisons and detention centres include institutional racism in the criminal justice system and related systems such as child protection and housing, the ongoing impacts of colonisation and dispossession, and continuing socioeconomic disadvantage.

### 6.1 Introduction

Indigenous incarceration has, and continues to be, a key feature of Australia's history of colonisation that saw Indigenous people dispossessed without treaty, subjected to military and settler occupation, and subsequently apartheid-like policies of racial segregation, including children being systemically separated from their families on the basis of race.<sup>3</sup> Many of these policies resonate with contemporary discriminatory policies, legislation (for example, *Stronger Futures in the Northern Territory 2012* (Cth)) and practices. The state of Western Australia has the highest rate of Aboriginal incarceration and this is no doubt linked to its colonial past.<sup>4</sup> In Western Australia, the colony's first public building – the 'Round house', which remains today in Fremantle – was built specifically to house Aboriginal prisoners who resisted the colonial laws that imposed on them contracts of indentured servitude to white settlers. The Aboriginal men who resisted this form of slavery were chained together, removed to Perth from their country throughout Western Australia, and shipped off to Rottnest Island where they were put to hard labour and subject to execution if they resisted. Women and children were left isolated and vulnerable.<sup>5</sup>

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<sup>1</sup> Australian Productivity Commission, *Corrective Services Report* (2019), 8.3  
[www.pc.gov.au/research/ongoing/report-on-government-services/2019/justice/corrective-services/rogs-2019-partc-chapter8.pdf](http://www.pc.gov.au/research/ongoing/report-on-government-services/2019/justice/corrective-services/rogs-2019-partc-chapter8.pdf)

<sup>2</sup> Thalia Anthony, FactCheck: are Indigenous Australians the most incarcerated people on Earth?, *The Conversation*, 6 June 2017, [theconversation.com/factcheck-ganda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528](http://theconversation.com/factcheck-ganda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528)

<sup>3</sup> McGlade H. The continuing nature of human rights violations in West Australian jail cells. *The Routledge Handbook of Disability Activism* (2019), 274-289

<sup>4</sup> Harry Blagg and Thalia Anthony, *Decolonising Criminology: Imagining Justice in a Postcolonial World*, (Palgrave, 2019), 141

<sup>5</sup> McGlade H. The continuing nature of human rights violations in West Australian jail cells. *The Routledge Handbook of Disability Activism* (2019), 274-289

Over a century later, increasing concern around Australia about the rates of Aboriginal incarceration and deaths in custody led to the establishment in 1987 of the Royal Commission into Aboriginal Deaths in Custody. The Royal Commission found that the most significant factor contributing to the over-representation of Aboriginal people in custody was their disadvantaged and unequal position in Australian society – socially, economically and culturally. The imposition of past government policies had a drastic impact on Aboriginal people and their culture and directly relates to their unequal position in society today. The Royal Commission made numerous recommendations to address underlying causes of incarceration and ensure that imprisonment was only a measure of last resort. These recommendations have not been implemented across Australia,<sup>1</sup> and indeed many of the recommendations – such as in relation to reducing imprisonment and promoting self-determination – have been flouted.<sup>2</sup>

More recently, the Australian Law Reform Commission (ALRC) reviewed Aboriginal over-incarceration in its inquiry 'Pathways to Justice' (2019).<sup>3</sup> Aboriginal incarceration has not declined since the Royal Commission but, rather, has increased significantly.<sup>4</sup> According to the Australian Productivity Commission, the rates of Indigenous incarceration have risen 77 per cent in the last 15 years.<sup>5</sup>

## 6.2 Context

This section provides – very briefly – contextual information about the experience of Aboriginal and Torres Strait Islander people since colonisation. It also highlights the influence of discriminatory past policies on decision-making today by Australian governments at both the federal and state levels that may be implicated in arbitrary deprivation of liberty. These include lack of a treaty, lack of parliamentary representation, institutional and interpersonal racism, and erosion of self-determination – issues implicated in the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system and the poor indicators of their health and wellbeing.

The human rights issues facing Aboriginal people were the subject of reports by the UN following a visit to Australia by the UN High Commissioner for Human Rights and reviews by the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of the Discrimination Against Women and the Committee on the rights of the Child. The human rights of Aboriginal peoples relating to discrimination, incarceration, inequality, denial of self-determination and other issues were raised with important recommendations. However, there is still no clear indication that government is responding appropriately.<sup>6</sup>

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<sup>1</sup> Jordan K., Anthony T., Walsh T., Markham F. *Joint response to the Deloitte Review of the implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, (2018), 6. [openresearch-repository.anu.edu.au/bitstream/1885/154725/1/Topical\\_issue\\_4\\_2018\\_Jordan\\_et\\_al\\_final\\_KJ2.pdf](https://openresearch-repository.anu.edu.au/bitstream/1885/154725/1/Topical_issue_4_2018_Jordan_et_al_final_KJ2.pdf)

<sup>2</sup> Ibid

<sup>3</sup> Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Summary Report* (2017) No 133

<sup>4</sup> Ibid

<sup>5</sup> Australian Productivity Commission, *Justice Report* (2016), 8.2 [www.pc.gov.au/research/ongoing/report-on-government-services/2016/justice/rogs-2016-volumec-justice.pdf](https://www.pc.gov.au/research/ongoing/report-on-government-services/2016/justice/rogs-2016-volumec-justice.pdf)

<sup>6</sup> [www.abc.net.au/news/2017-11-27/australias-race-relations-will-be-examined-by-un-in-geneva/9198272](https://www.abc.net.au/news/2017-11-27/australias-race-relations-will-be-examined-by-un-in-geneva/9198272)

### 6.2.1 Powerlessness perpetuated

Australia's first peoples, the Aboriginal and Torres Strait Islander peoples are acknowledged as the world's oldest cultures. Careful intergenerational transfer of knowledge contributed to highly developed systems of caregiving for lands, waterways and all beings. Colonisation of Australia by British forces a little over 230 years ago forever disrupted these systems. Forces of colonisation are visible today, still often based on the presumption of Aboriginal and Torres Strait Islander racial and cultural inferiority, as well as denial of sovereignty, and destruction of lands, waterways, knowledge systems and social processes.<sup>1</sup> These powerful forces of oppression<sup>2</sup> 'submerge itself in a society'<sup>3</sup> and are perpetuated in current Australian policy processes and content, institutions and perceptions of the mainstream voting Australian public.

The result is the relative powerlessness of Aboriginal and Torres Strait Islander people. This is reinforced by demographics: while there are still 500-plus first nations with an estimated 650,000 people, Aboriginal and Torres Strait Islander people are only approximately 3 per cent of the Australian population.<sup>4</sup> Aboriginal and Torres Strait Islander people have not yet regained population numbers at the time of colonisation, which rapidly declined due to massacres, other acts of violence, the introduction of diseases, and other factors.<sup>5</sup> As a minority in Australia, Aboriginal and Torres Strait Islander people have very limited political representation and, unlike in many other countries, there is no legislated representative body. Further, half of all Aboriginal and Torres Strait Islander people are under the voting age of 18.<sup>6</sup>

Despite constant advocacy, no treaty or other process of shared decision-making has occurred between Australia's federal, state or local governments and Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people are not recognised in the Australian Constitution. The 'Uluru Statement from the Heart' – which sets out a process of engagement between governments and Aboriginal and Torres Strait Islander people and was the outcome of the Australian Government's own Referendum Council – has not been adopted or implemented by the Australian Government.<sup>7</sup>

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<sup>1</sup> Jackson Pulver L., Williams M. & Fitzpatrick S. Social determinants of Australia's First Peoples: A multi-level empowerment perspective. In P. Liamputtong (Ed.). *Social Determinants of Health*. Melbourne: Oxford University Press (2019).

<sup>2</sup> Fanon F. *A dying colonialism* (1967) New York: Grove Press

<sup>3</sup> Hilton B. T. Frantz Fanon and colonialism: A psychology of oppression. *Journal of Scientific Psychology*, (2011) December, 45-59

<sup>4</sup> Australian Bureau of Statistics. *Aboriginal and Torres Strait Islander population* (2017) (Cat. no. 2071.0) <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features102016>

<sup>5</sup> Pulver J. and Rae L. *An argument on culture safety in health service delivery: Towards better health outcomes for Aboriginal peoples* (2003)

[https://www.researchgate.net/publication/279462144\\_An\\_argument\\_on\\_culture\\_safety\\_in\\_health\\_service\\_delivery\\_towards\\_better\\_health\\_outcomes\\_for\\_Aboriginal\\_peoples](https://www.researchgate.net/publication/279462144_An_argument_on_culture_safety_in_health_service_delivery_towards_better_health_outcomes_for_Aboriginal_peoples)

<sup>6</sup> Pulver, Williams, & Fitzpatrick (2019), *ibid*

<sup>7</sup> First Nations National Constitutional Convention. *Uluru Statement from the Heart*. Uluru: Author. (2017) [www.referendumcouncil.org.au/event/first-nations-regional-dialogue-in-uluru](http://www.referendumcouncil.org.au/event/first-nations-regional-dialogue-in-uluru)

## 6.2.2 Damage from deficit discourse

Discourse about health and social inequity ‘gaps’ has persistently and erroneously apportioned responsibility on Aboriginal and Torres Strait Islander people as having a genetic cultural predisposition to illness, as well as apathy and negligence.<sup>1</sup> For several decades, government allocation of funding and delivery of services focused on deficits rather than cultural strengths, despite some rhetoric about intentions to do so.<sup>2</sup> Governments fail to address contributing socioeconomic factors<sup>3</sup> and systemic racism in healthcare.<sup>4</sup>

Policies ‘continue to be made for and to, rather than with, Aboriginal and Torres Strait Islander people’, resulting in the continued subjugation of First Peoples now as in the past.<sup>5</sup> It is the experience of Aboriginal and Torres Strait Islander leaders that recommendations for system reform are consistently ignored,<sup>6</sup> as have been recommendations arising, for example, from the 1991 report of the Royal Commission into Aboriginal Deaths in Custody some 30 years ago.<sup>7</sup> In fact, deaths in custody are reported at substantially higher rates now than in the period before the Royal Commission.

## 6.2.3 Results of mainstream policy periods

For these reasons and more, the experience of colonisation in Australia is a deeply rooted structure and ongoing process— not merely an event.<sup>8</sup> Lack of cultural awareness training and cultural safety frameworks of Australian Government and other mainstream service employees have been identified as contributing factors to the perpetuation of stereotyping, inequity and power dynamics, as has lack of political leadership.<sup>9</sup> Instead, tenets of discriminatory past policies continue to be evident now, including federal government powers to make special laws for Aboriginal and Torres Strait Islander people,<sup>10</sup> with ongoing processes to keep Aboriginal and Torres Strait Islander people in some areas segregated

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<sup>1</sup> Siggers S., & Gray D. *Aboriginal Health and Society: The Traditional and Contemporary Aboriginal Struggle for Better Health*. (1991) Crows Nest: Allen & Unwin, 6

<sup>2</sup> Fogarty W., Bulloch H., McDonnell S., & Davis M. *Deficit discourse and Indigenous health*. (2018) Melbourne: Lowitja Institute [www.lowitja.org.au/sites/default/files/docs/deficit-discourse.pdf](http://www.lowitja.org.au/sites/default/files/docs/deficit-discourse.pdf)

<sup>3</sup> Carson B., Dunbar T., Chenhall R., & Bailie R. (Eds.). *Social determinants of Indigenous health* (2007) Sydney: Allen & Unwin

<sup>4</sup> Paradies Y., Ben J., Denson N., Elias A., Priest N., Pieterse A., Gupta A., Kelaher M. and Gee G. Racism as a determinant of health: a systematic review and meta-analysis. *PloS one*, (2015) 10(9), C1 [www.ncbi.nlm.nih.gov/pmc/articles/PMC4580597/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4580597/)

<sup>5</sup> Arbon V. *Arlathirnda Ngurkarnda Ityirnda: Being-Knowing-Doing: De-colonising Indigenous tertiary education* (2008) Teneriffe, QLD: Post Pressed

<sup>6</sup> National Congress of Australia’s First Peoples. *National Congress intervention at the United Nations* (2018, April 24) [Press Release] [nationalcongress.com.au/wp-content/uploads/2018/04/National-Congress-UN-Intervention-24-April-2018.pdf](http://nationalcongress.com.au/wp-content/uploads/2018/04/National-Congress-UN-Intervention-24-April-2018.pdf)

<sup>7</sup> Johnston E. *Report of the Royal Commission into Aboriginal Deaths in Custody*. (1991) Canberra: Australian Government Publishing Service

<sup>8</sup> Wolfe P. Settler colonialism and the elimination of the native. *Journal of Genocide Research*, (2006) 8(4), 387-409. doi:10.1080/14623520601056240

<sup>9</sup> Jackson Pulver, Williams, & Fitzpatrick, 2019, *ibid*

<sup>10</sup> Altman J. The debilitating aftermath of 10 years of the NT Intervention. *Land Rights News Northern Edition*, (2017) July, 20-21 [www.nlc.org.au/media-publications/land-rights-news-northern-edition-july-2017-edition](http://www.nlc.org.au/media-publications/land-rights-news-northern-edition-july-2017-edition)

from the general community, just as protectionist and assimilationist policies in the period from 1890 to the 1960s did.<sup>1</sup>

High rates of government-enforced child removals that characterised the assimilationist policy period of the 1950s to the 1960s and resulted in the so-called Stolen Generations and complex intergenerational trauma<sup>2</sup> are regularly described as even higher now.<sup>3</sup> This era of policy was assimilationist, but also segregationist, including through the restriction of access to social security until 1966, which has eroded the foundations of health, social and financial capital of current generations.<sup>4</sup>

The successful 1967 referendum enabled the federal government to make laws for Aboriginal people, as well as providing for their inclusion in the national census.<sup>5</sup> However, this has not meant that the laws are necessarily for the benefit of Aboriginal people. For instance, the Federal Government enacted legislation – such as the *Northern Territory National Emergency Response Act 2007* (Cth) – that suspended the *Racial Discrimination Act 1975* and contravened the United Nations Convention on the Elimination of All Forms of Racial Discrimination. Moreover, there continue to be tensions between federal and state responsibilities. For example, states are responsible for the criminal justice system and health policy in general, but the health of Aboriginal and Torres Strait Islander people is a federal responsibility. The result is under-developed state care and the lack of access for Aboriginal and Torres Strait Islander people in prison to a reasonable standard of health care.<sup>6</sup> This is a threat to achieving the Mandela Rules for the Treatment of Prisoners, especially with respect to the health care of prisoners (Rules 24-35).<sup>7</sup>

This reality also reflects the former and short-lived policy era of integration (1967–1972) in which Aboriginal and Torres Strait Islander people were to access mainstream services, with little attention to culturally relevant care and their particular needs. Community frustration in the 1970s with inaction by the federal government led to the development of the Aboriginal community-controlled services sector and a short policy period of self-determination (1972–1975). However, this was quickly deemed a failure and a conservative phase of self-management began in which the community-controlled sector developed but with severe restrictions that continue today.<sup>8</sup>

From 1989–2005, Aboriginal and Torres Strait Islander people had a form of political participation through directly elected statutory authority – the Aboriginal and Torres Strait

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<sup>1</sup> Siggers & Gray, 1991, *ibid*.

<sup>2</sup> Human Rights and Equal Opportunity Commission. *Bringing them home: Report of the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (1997) Sydney.

<sup>3</sup> Australian Institute of Family Studies. *Child protection and Aboriginal and Torres Strait Islander children*. (2016) Canberra: Australian Government

<sup>4</sup> Jackson Pulver, Williams, & Fitzpatrick, 2019, *ibid*

<sup>5</sup> Madden R. & Jackson Pulver L. Aboriginal and Torres Strait Islander population: more than reported. *Australian Actuarial Journal* (2009) 15(2), 181-208 [www.actuaries.asn.au/Library/AAJ\\_Vol15\\_Iss2\\_web.pdf](http://www.actuaries.asn.au/Library/AAJ_Vol15_Iss2_web.pdf)

<sup>6</sup> Bell K., Couzos S., Daniels J., Hunter P., Mayers N. and Murray R. Aboriginal community controlled health services. *General practice in Australia* (2000), 74-103

<sup>7</sup> United Nations. *United Nations standard minimum rules for the treatment of prisoners (the Nelson Mandela Rules)* (2015) New York

<sup>8</sup> Sullivan P. *Belonging together: Dealing with the politics of disenchantment in Australian Indigenous policy*. (2011) Canberra: Aboriginal Studies Press

Islander Commission (ATSIC). It recognised First Peoples' unique place in 'the Australian social and political system ... it also legitimised an approach that acknowledged difference on the basis of equality'.<sup>1</sup>

However, ATSIC was abolished in 2005 in the 'normalisation' policy period of mainstreaming actions related to Aboriginal and Torres Strait Islander health and social services into general government services.<sup>2</sup> Little investment in the development of the community-controlled sector has occurred despite evidence for the greater success of these services.<sup>3</sup>

#### 6.2.4 Racism

The above policy periods reflect the consistent dominance of non-Indigenous people and organisations in making policies and decisions for Aboriginal and Torres Strait Islander people. This is despite the collective rights of Indigenous peoples to self-determination under international law and customs.<sup>4</sup>

Today, Aboriginal and Torres Strait Islander peoples' experiences of interpersonal racism in mainstream services are frequent, both as service users<sup>5</sup> as well as staff.<sup>6</sup> The Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar has been listening to Aboriginal women and girls across Australia as part of the 'Wiyi Yani Uthangani' (women's voices) project. She has indicated that a key theme emerging from the consultations is the continued structural and institutional racism that Aboriginal women and girls experience.<sup>7</sup> Racism and structural discrimination in the prison and health sectors have long been recognised.

As well as lacking parliamentary representation, institutional bias and racism is witnessed in:

- discrimination in the workforce contributing to exclusion from jobs and careers and low levels of Aboriginal and Torres Strait Islander employment rates<sup>8</sup>
- under-representation of Aboriginal and Torres Strait Islander people in all government and education workforces, producing an inherent bias in decision-making structures including police and legal professions

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<sup>1</sup> Mazel O. Self-determination and the right to health: Australian Aboriginal Community Controlled Health Services. *Human Rights Law Review* (2016) 16, 323-355. doi:10.1093/hrlr/ngw010. P. 341-342

<sup>2</sup> Sullivan (2011) *ibid*

<sup>3</sup> Panaretto K., Wenitong M., Button S. & Ring I. Aboriginal community controlled health services: Leading the way in primary care. *Medical Journal of Australia*, (2014) 200(11), 649-652. doi: 10.5694/mja13.00005

<sup>4</sup> United Nations. *United Nations Declaration on the Rights of Indigenous Peoples* Geneva (2008), 4

<sup>5</sup> Paradies Y. & Cunningham J. The DRUID study: Racism and self-assessed health status in an indigenous population. *BMC Public Health*, (2012) 12(1), 131

<sup>6</sup> NSW Public Service Commission. People matter employee survey (2019) [www.psc.nsw.gov.au/reports---data/people-matter-employee-survey](http://www.psc.nsw.gov.au/reports---data/people-matter-employee-survey)

<sup>7</sup> [www.humanrights.gov.au/about/news/commissioner-june-oscar-shares-personal-experiences-racism-senate-committee](http://www.humanrights.gov.au/about/news/commissioner-june-oscar-shares-personal-experiences-racism-senate-committee)

<sup>8</sup> Australian Bureau of Statistics, Labour Force Participation, 2076.0 - *Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians 2016* (2018) [www.abs.gov.au/AUSSTATS/Abs@.Nsf/7d12b0f6763c78caca257061001cc588/5f17e6c26744e1d1ca25823800728282!OpenDocument](http://www.abs.gov.au/AUSSTATS/Abs@.Nsf/7d12b0f6763c78caca257061001cc588/5f17e6c26744e1d1ca25823800728282!OpenDocument)

- few Aboriginal and Torres Strait Islander people in executive-level decision-making positions, resulting in limited control of policy-making and resource allocation
- limited cultural safety training of decision-makers and service providers, with few evaluations of effectiveness
- minimal measures of wellbeing or success from Aboriginal and Torres Strait Islander perspectives
- minimal accountability of government frameworks and programs, particularly from Aboriginal and Torres Strait Islander perspectives
- competition between Aboriginal and Torres Strait Islander organisations and mainstream services, forced by current Indigenous Advancement Strategy for resource allocation, despite lack of progress made by this approach.<sup>1</sup>

### 6.2.5 Poor health and wellbeing and risk for Aboriginal people

Poor health and wellbeing and risk of contact with the criminal justice system have shared determinants including those listed above. Of particular concern are Aboriginal and Torres Strait Islander people with health issues being held in detention, rather than receiving health care. One profound example is the experience of Ms Dhu, detained for unpaid fines despite having health issues requiring urgent attention, resulting in her death.<sup>2</sup> Another is the death of Aunty Tanya Day, which occurred after her detention for public intoxication, rather than receiving the required health care.<sup>3</sup>

Other cases which have not been independently investigated include the 2019 police shooting of a young Aboriginal mother, Ms Joyce Clarke, in Geraldton, regional WA.<sup>4</sup> The family of Joyce had contacted police for assistance due to mental illness, as she needed treatment in hospital. According to her family she had been recently released from a Perth psychiatric hospital before she was fatally shot. More than six months have now passed, and the police have not announced any charges for the officer responsible. Chad Riley, a father of three, was detained by the police when he was unwell in 2017. Although taken to the hospital, his treatment is not yet known. On the morning of his death, he collapsed outside a store, an ambulance and the police were called, a scuffle occurred and he was Tasered by several police officers, resulting in his death. Nearly three years later there has been no official outcome.<sup>5</sup>

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<sup>1</sup> Australian National Audit Office. *Evaluating Aboriginal and Torres Strait Islander programs* (2019) Canberra [www.anao.gov.au/work/performance-audit/evaluating-indigenous-programs](http://www.anao.gov.au/work/performance-audit/evaluating-indigenous-programs)

<sup>2</sup> McInerney M. Inhumane treatment: Ms Dhu findings demand urgent response from justice, police, health systems (2016) [media report] [croakey.org/inhumane-treatment-ms-dhu-findings-demand-urgent-response-from-justice-police-health-systems/](http://croakey.org/inhumane-treatment-ms-dhu-findings-demand-urgent-response-from-justice-police-health-systems/)

<sup>3</sup> Whittaker A. Aboriginal woman Tanya Day died in custody. Now an inquest is investigating if systemic racism played a role. *The Conversation*, (2019) August 28 [theconversation.com/aboriginal-woman-tanya-day-died-in-custody-now-an-inquest-is-investigating-if-systemic-racism-played-a-role-122471](http://theconversation.com/aboriginal-woman-tanya-day-died-in-custody-now-an-inquest-is-investigating-if-systemic-racism-played-a-role-122471)

<sup>4</sup> [www.theguardian.com/australia-news/2019/sep/19/geraldton-shooting-questions-raised-over-wa-police-decision-to-use-lethal-force](http://www.theguardian.com/australia-news/2019/sep/19/geraldton-shooting-questions-raised-over-wa-police-decision-to-use-lethal-force)

<sup>5</sup> [www.watoday.com.au/national/western-australia/cops-who-fatally-tasered-man-denied-lawyers-wa-police-union-20170517-gw6scq.html](http://www.watoday.com.au/national/western-australia/cops-who-fatally-tasered-man-denied-lawyers-wa-police-union-20170517-gw6scq.html)



Aboriginal and Torres Strait Islander people who are incarcerated have health care needs related to alcohol and other drugs.<sup>1</sup> Many Aboriginal prisoners have untreated mental health issues, due to trauma, family violence and systemic racism. In many instances Aboriginal prisoners suffering mental health distress without appropriate support and interventions have taken their lives. Seventy-five per cent of Aboriginal people in Australian prisons have been there before.<sup>2</sup> This data shows that the Australian system inadequately addresses underlying and compounding risk factors for incarceration such as poor health and its determinants.

### 6.3 Treatment of Aboriginal and Torres Strait Islander people in custodial settings

#### 6.3.1 Racism in criminal justice institutions

Direct and implicit systemic racism in Australian criminal justice institutions is demonstrated by the levels of over-representation of Aboriginal and Torres Strait Islander men, women and children,<sup>3</sup> and the treatment of Aboriginal and Torres Strait Islander people in custodial settings across Australia. Figure 9 shows the rates of over-representation in all Australian jurisdictions.

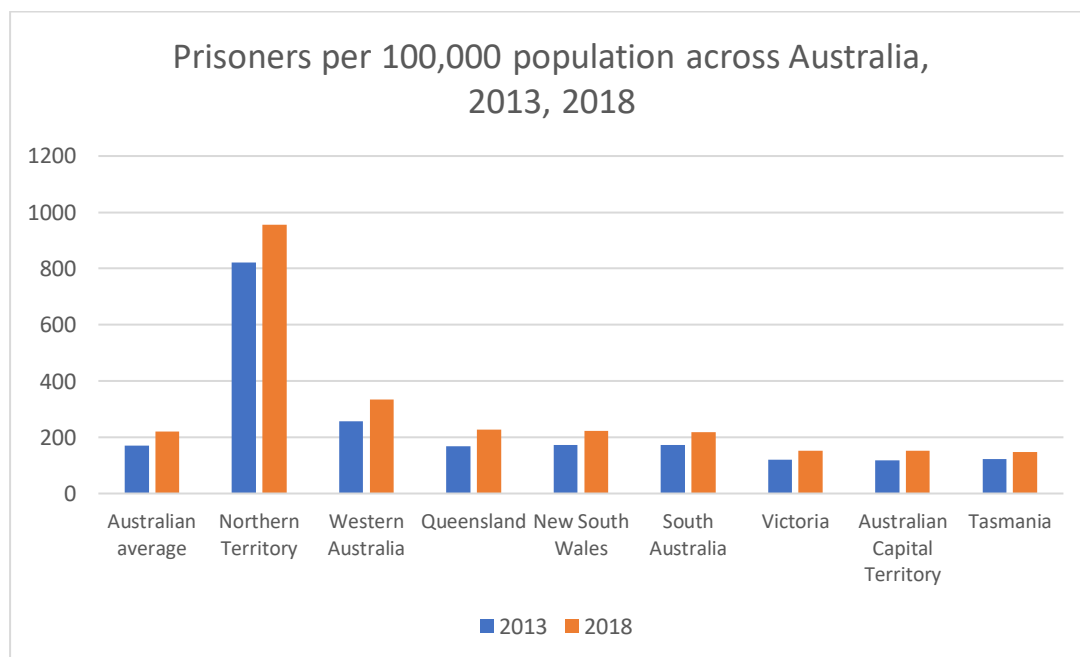


Figure 9: Imprisonment rates per 100,000 in Australia 2013, 2018. Data extracted from Australian Bureau of Statistics 4517.0 — Prisoners in Australia 2013, 2018

<sup>1</sup> Australian Institute of Health and Welfare. The health of Australia's prisoners 2018. Canberra: AIHW (2019)

<sup>2</sup> Australian Bureau of Statistics. *Prisoners in Australia*. Cat. No. 4517.0 (2018) Canberra: Commonwealth of Australia

[www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13)

<sup>3</sup> Thalia Anthony, FactCheck: are Indigenous Australians the most incarcerated on Earth?, *The Conversation*, 6 June 2017 [theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528](https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528)

In 2017, the Royal Commission into the Detention and Protection of Children in the Northern Territory revealed ‘systemic and shocking failures’ in the youth detention system that ‘occurred over many years and were ignored at the highest levels’.<sup>1</sup> Among these failures were ‘institutional racism’ resulting in over-representation in the criminal justice and child protection systems.<sup>2</sup> The Royal Commission also found that detainees were ‘frequently subjected to verbal abuse and racist remarks’.<sup>3</sup> The Royal Commission received evidence from a youth justice officer that ‘racist language was an “everyday thing” and that it was accepted as part of the [detention] culture.’<sup>4</sup>

Aboriginal and Torres Strait Islander people in all Australian jurisdictions are disproportionately punished for summary offences and breaches of justice orders. This demonstrates that the principle of ‘prison as a sanction of last resort’ is not afforded to Aboriginal and Torres Strait Islander Australians. They are also more likely to be subject to mandatory sentencing and standard non-parole conditions, and they are less likely to receive bail. Aboriginal women are especially criminalised and imprisoned for minor traffic and property offences, breaches of court orders and protection orders and disorderly conduct.<sup>5</sup> Aboriginal people with disability are 14 times more likely to be imprisoned than the rest of the population in Australia.<sup>6</sup>

Aboriginal young peoples’ levels of over-representation are even higher than for Aboriginal adults. In New South Wales, Aboriginal youth detention has increased from 14 times the non-Indigenous rate in 2013–14 to 18 times in 2017–18.<sup>7</sup> Aboriginal and Torres Strait Islander young people, like adults, are disproportionately remanded in custody, are less likely to receive a police caution, and are less likely to be referred to a youth justice conference.<sup>8</sup> Moreover, the minimum age of criminal responsibility – which in Australia is 10 years’ old – has a particularly adverse effect on Aboriginal children, with Aboriginal children entering prisons at increasingly young ages.<sup>9</sup> Prison has a devastating effect on the social, cultural and emotional wellbeing of Aboriginal people in prison and their families.

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<sup>1</sup> Final Report, Vol. 1, 9

<sup>2</sup> Ibid, 174

<sup>3</sup> Final Report, Vol. 2A, 159

<sup>4</sup> Ibid. Also see Aboriginal Justice Unit, *NT Government, Pathways to the Aboriginal Justice Agreement* (2019), 71, 92-94 [justice.nt.gov.au/\\_data/assets/pdf\\_file/0009/728163/Pathways-to-the-northern-territory-aboriginal-justice-agreement.pdf](https://www.justice.nt.gov.au/_data/assets/pdf_file/0009/728163/Pathways-to-the-northern-territory-aboriginal-justice-agreement.pdf)

<sup>5</sup> MacGillivray P. and Baldry E. *Australian Indigenous Women’s Offending Patterns*, Indigenous Justice Clearinghouse Brief 19 (2015); Anthony and Blagg, *STOP in the Name of Who’s Law? Driving and the Regulation of Contested Space in Central Australia* (2013) 22(1) *Social and Legal Studies* 43). See also Cunneen C. and Tauri J. *Indigenous Criminology* (2016) Ch 4; Anthony T. above (2013) Ch 2; Purdy J. Postcolonialism: the emperor’s new clothes (1996) 5(3) *Social and Legal Studies* 405; Finnane M. and McGuire J. The uses of punishment and exile: Aborigines in colonial Australia. *Punishment and Society* (2001) 3(2), 279.

<sup>6</sup> *Disability Rights Now 2019: Australian Civil Society Shadow Report to the United Nations Committee on the Rights of Persons with Disabilities: UN CRPD Review 2019*

<sup>7</sup> Australian Institute of Health and Welfare (AIHW), *Youth Justice in Australia 2013-14*. Cat no AUS 188 (2015) at 9; and AIHW, *Youth Justice in Australia 2017–18*. Cat no JUV 129 (2019) at 9

<sup>8</sup> Ibid; see also House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* (2011)

<sup>9</sup> AIHW 2018

Discrimination against Aboriginal people in the administration of the justice system was a key issue before the UN review of Australia's compliance with the Convention on the Elimination of all Forms of Racial Discrimination (CERD). The Australian NGO submission to the CERD highlighted the aspects of discrimination at play and also identified case studies of Aboriginal people impacted – sometimes fatally – by such practices.

UNCEDAW (2019) in its country review of Australia also called on Australia to respond to the ALRC inquiry on Indigenous incarceration and also the forthcoming report of the Aboriginal and Torres Strait Islander Social Justice Commissioner concerning Aboriginal women 'Wiyi Yani U Thangani (Women's Voices)'.<sup>1</sup> It was also noted that women prisoners were reporting sexual violence in prisons, there were high rates of mental health concerns, and it recommended that routine strip searching of Indigenous women in prisons should cease.

### 6.3.2 Neglect and deaths in custody

Aboriginal and Torres Strait Islander people do not receive the same level of care in custodial settings as non-Indigenous people. There is inadequate attention to their needs, including health care, in Australian detention and correctional centres. For Aboriginal and Torres Strait Islander people, over-representation alongside neglect in custodial settings has contributed to mental and physical harm and accelerating numbers of Aboriginal deaths in custody. Since 1991, there have been 424 deaths in custody.<sup>2</sup> The loss of Aboriginal people in custody brings with it a multitude of tragedies for families, friends and communities of those who have passed. It also impacts on the transmission of culture and compounds Indigenous inter-generational trauma.

From seven reported deaths in police custody in the Northern Territory between 2003–12,<sup>3</sup> coronial courts found police failure to adequately care for Aboriginal people in custody, including failures to check on them, contact health professionals and call an ambulance in a timely manner. It also found failures on the part of health professionals and paramedics to diagnose adequately and treat the health conditions of the deceased.

Aboriginal and Torres Strait Islander women are even less likely to receive appropriate medical care. Compared to Indigenous males, Indigenous females who died in custody over the past decade were 'less likely to have received all the care they needed' but were twice as likely to have been injured in custody.<sup>4</sup> Fifty per cent of Aboriginal and Torres Strait Islander women did not receive appropriate medical care, compared to 33 per cent of

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<sup>1</sup> Wiyi Yani U Thangani [wiyiyaniuthangani.humanrights.gov.au/](http://wiyiyaniuthangani.humanrights.gov.au/)

<sup>2</sup> As of August 2019

<sup>3</sup> *Inquest into the death of Rita Dandy* [2003] NTMC 012; *Inquest into the death of Mark Corbett* [2003] NTMC 044; *Inquest into the death of Owen King* [2003] NTMC 061; *Inquest into the death of Robert Taylor Daly* [2008] NTMC 055; *Inquest into the death of Peter Raymond Jacobs* [2009] NTMC 004; *Inquest into the death of Cedric Trigger* [2010] NTMC 036; *Inquest into the death of Terence Daniel Briscoe* [2012] NTMC 032; *Inquest into the death of Marrianna Fire Tikalaru Munkara* [2016] NTLC 017; *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016; *Inquest into the death of Adam Chandler* [2010] NTMC 054

<sup>4</sup> Allam A., Wahlquist C. and Evershed N. Half of Indigenous women who died in custody did not receive appropriate medical care, *The Guardian* (Australian edition), (Online) 10 September 2018.

[www.theguardian.com/australia-news/2018/sep/10/indigenous-women-in-custody-more-likely-than-men-to-have-died-where-policy-not-followed](http://www.theguardian.com/australia-news/2018/sep/10/indigenous-women-in-custody-more-likely-than-men-to-have-died-where-policy-not-followed)

Indigenous men. This is based on data from the *Guardian* news outlet's *Deaths Inside* database, which also showed that, 'coronial findings on the deaths of Indigenous women and girls found that police or prisons had failed to follow all of their own procedures in 43.8 per cent of cases, compared to 38.1 per cent of cases involving males.'<sup>1</sup> The neglect shown to Aboriginal women in police custody was borne out in the deaths of Ms Dhu and Ms Day.<sup>2</sup>

The Victoria Police Custody manual, for example, requires custody supervisors to 'continually monitor and review' the risk category they assign to a detainee. This is a continuing and personal obligation on a watch-house supervisor. Furthermore, the minimum acceptable level of observation for detainees influenced by alcohol requires that detainees be physically checked and roused every 30 minutes. CCTV cannot be substituted for physical checks.<sup>3</sup>

The evidence before the Coroner appears to be that, for (well) over two hours, while Ms Day was in police custody and during which time she fell, resulting in an ultimately fatal injury, not one in-cell check was performed. She was not roused or physically checked (that is, touched or had her face closely observed).<sup>4</sup>

No officer giving evidence at the inquest appeared to have a problem with the way Ms Day was treated in custody. No supervisor or investigator appears to have noted that police behaviour contradicted the rules. No official apology has come from police.<sup>5</sup>

The lack of adequate health care is further highlighted in the WA case of a young Aboriginal woman in severe distress who was transported naked, menstruating and handcuffed in the back of a prison van from Bandyup Women's Prison to Graylands Hospital for treatment.<sup>6</sup>

Aboriginal people's experiences with the criminal justice and corrections system has disproportionately involved violence and resulted in unnecessary and preventable deaths. There is often a lack of independent investigation, and police and prison institutions are rarely held accountable for wrongful deaths concerning Aboriginal people.

Australia is not heeding the advice of international experts, including the Office of the United Nations High Commissioner for Human Rights (OHCHR), that independent investigation must occur for all deaths that happen in the administration of justice. Aboriginal deaths in custody are not being properly recorded by the Australian Government. This task has fallen to other institutions such as the *Guardian* news outlet which has recorded these deaths to draw public attention to the problem. Violent and abusive

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<sup>1</sup> Ibid

<sup>2</sup> [www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody](http://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody)

<sup>3</sup> Cross-examination by Mr Morrisey SC for Tanya Day's family where he read out the requirements of the Vic Pol Custody Manual to the Court and witness: 3 September 2019

<sup>4</sup> Evidence from Custody Supervisor Sergeant Neil, 3 September 2019

<sup>5</sup> [www.theguardian.com/australia-news/2019/sep/15/tanya-day-inquest-beyond-the-symbolic-police-dodge-serious-questions](http://www.theguardian.com/australia-news/2019/sep/15/tanya-day-inquest-beyond-the-symbolic-police-dodge-serious-questions)

<sup>6</sup> [www.watoday.com.au/national/western-australia/woman-prisoner-transported-naked-and-handcuffed-in-prison-van-20180325-p4z65t.html](http://www.watoday.com.au/national/western-australia/woman-prisoner-transported-naked-and-handcuffed-in-prison-van-20180325-p4z65t.html)

practices, akin to torture, have been recorded in relation to the treatment of many Indigenous prisoners, including David Dungay, and more recently Kumanjavi Walker, where the violence is regarded as causing their death.<sup>1</sup> There have been barely any disciplinary measures for officers responsible for deaths in custody, and no convictions for homicide before the criminal courts. Thus, there is little deterrence for Aboriginal deaths in custody, which amount to over 400 in the last 30 years. This reflects that their lives do not matter and are not valued in the community.

### 6.3.3 Segregation, harm and torture<sup>2</sup>

Prisons in Australia are restrictive environments, with most prisoners living behind bars in small cells. It has been recorded that 81 per cent of inmates are in secure rather than low security settings, meaning the majority spend more than half the day in their cells.<sup>3</sup> Aboriginal and Torres Strait Islander people are especially affected by classification systems that place them in segregation and highly confined environments.

The Royal Commission into the Detention and Protection of Children in the Northern Territory identified the common abuse of power by detention officers against Aboriginal children. It also noted the frequency of techniques of control and harm: solitary confinement of Aboriginal children,<sup>4</sup> routine strip searches and practices of torture in detention.<sup>5</sup> As stated in its report:

The commission heard that young people in youth detention were punished through denial of food and water, phone calls from family, hearing aids, toilet paper, clothes, mattresses, education; through transfers to adult prisons; and through segregation for indefinite periods. This could be combined with the direct use of force, including beating children, stomping on their heads, using hoods and shackles, including on mechanical restraint chairs, and spraying tear gas.<sup>6</sup>

No charges were laid against those responsible for overtly violent and racist practices in the Northern Territory despite overwhelming evidence brought to the Royal Commission.

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<sup>1</sup> [www.theguardian.com/australia-news/2019/dec/12/nt-police-shooting-officer-says-he-was-stabbed-before-alleged-of-kumanjavi-walker](http://www.theguardian.com/australia-news/2019/dec/12/nt-police-shooting-officer-says-he-was-stabbed-before-alleged-of-kumanjavi-walker)

<sup>2</sup> In Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) (1984) 1465 UNTS 85; [1989] ATS 21 the term 'torture' is defined as: '[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

<sup>3</sup> ABS, *Corrective Services, Australia*, Cat no. 4512.0, March quarter 2019, Table 6

<sup>4</sup> Also see: Willacy M. The Watch House Files: Queensland children kept in isolation in maximum security adult watch houses, *Australian Broadcasting Corporation*, 13 May 2019 [www.abc.net.au/news/2019-05-13/queensland-children-in-watch-houses-detention/11100226](http://www.abc.net.au/news/2019-05-13/queensland-children-in-watch-houses-detention/11100226), viewed 19 July 2019

<sup>5</sup> *Final Report*, 2017, vo. 1, 202-203; *Final Report* (2017, vol. 2A, 284). See also Anthony T. "They were treating me like a dog": the colonial continuum of state harms against Indigenous children in detention *State Crime Journal* (2018) 7(2), 251-77

<sup>6</sup> Anthony T. NTER Took the Children Away *Arena* 21 (2017), 23

Mistreatment, including segregation of eight Aboriginal young people, has been documented across Australia and identified as a violation of the prison standards and the human rights of the child.<sup>1</sup>

#### **6.3.4 Incarceration of Indigenous women and children**

According to a 2016 report by the Australian Institute of Health and Welfare (AIHW), Aboriginal women, although making up a small proportion of Australia's total population, comprise 35 per cent of the female prison population nationally. In Western Australia, Aboriginal women make up approximately 3 per cent of the adult female population, but almost 50 per cent of women in prison.<sup>2</sup> Aboriginal women are considered to be the fastest growing prison subpopulation in Australia. Since the 1991 Royal Commission into Aboriginal Deaths in Custody, Aboriginal and Torres Strait Islander women's incarceration has increased by a staggering 248 per cent.<sup>3</sup> This is despite recommendation 94 of the report of the Royal Commission stating that imprisonment should be used only as a sanction of last resort. Aboriginal women are now possibly the most incarcerated group of people in the world.

The increase in women's imprisonment is due to a combination of factors.

##### ***Higher maximum penalties and mandatory sentencing***

Both of these affect the most vulnerable, including Indigenous females.

##### ***Unsentenced women in custody (remand)***

The number of unsentenced Indigenous female prisoners in 2014 was the highest it has been since 2004. Of the female prisoner population, 28 per cent were unsentenced at the time of the prison census in 2014; this rate increased in 2015 to 32 per cent of the female prisoner population.

##### ***Non-payment of fines***

In Western Australia, for example, people who do not pay fines upfront, often due to poverty, have three options: pay in instalments, work off the fines through community service orders, or go to jail, serving one day in custody for every \$250 they owe. Ms Dhu, a 22 year old Yamatji Aboriginal woman, died in police custody in South Hedland, WA, in 2014 within 48 hours of being incarcerated for failing to pay fines.<sup>4</sup> Since Ms Dhu's passing, Aboriginal women have continued to be arrested and incarcerated for unpaid fines,<sup>5</sup> including when seeking police assistance to escape domestic violence.<sup>6</sup> The coronial inquiry reported that both the police force and health services failed to provide the duty of care owed to Ms Dhu, as their behaviour fell below what was expected of someone in their

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<sup>1</sup> [www.sbs.com.au/nitv/article/2019/04/02/our-children-are-entitled-happiness-it-their-reality](http://www.sbs.com.au/nitv/article/2019/04/02/our-children-are-entitled-happiness-it-their-reality)

<sup>2</sup> Australian Bureau of Statistics, 2015

<sup>3</sup> Walters A. and Longhurst S. Over-represented and overlooked: The crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment (2017) *Human Rights Law Centre and Change the Record*

<sup>4</sup> [deathscapes.org/case-studies/ms-dhu](http://deathscapes.org/case-studies/ms-dhu)

<sup>5</sup> [www.nytimes.com/2019/02/24/world/australia/police-arrest-aboriginal-woman-fines.html](http://www.nytimes.com/2019/02/24/world/australia/police-arrest-aboriginal-woman-fines.html)

<sup>6</sup> [www.abc.net.au/news/2019-09-25/woman-jailed-unpaid-fines-after-violent-robbery-wa-law-changes/11543234](http://www.abc.net.au/news/2019-09-25/woman-jailed-unpaid-fines-after-violent-robbery-wa-law-changes/11543234)

position.<sup>1</sup> In 2019, the Western Australian Government promised to abolish the practice of detaining for the non-payment of fines after Ms Dhu's tragic death, but this has not translated into practice.<sup>2</sup>

### **Increase in minor offences**

Common offences for Indigenous women are related to assault and traffic.<sup>3</sup> They are also over-represented for property (especially shoplifting) and public order crimes. The growth in minor offences raises issues around policing and racism.

### **Incarceration of Aboriginal mothers**

The increased incarceration of Aboriginal women (including mothers) in Australia is undermining the central role Aboriginal women play within Aboriginal cultural kinships systems.<sup>4</sup> It is estimated that over 80 per cent of Aboriginal women in prison are mothers.<sup>5</sup>

Aboriginal and Torres Strait Islander women entering prison are more likely to have children than non-Aboriginal women (56 per cent compared with 51 per cent) and more likely to have multiple children in the community (Figure 10).<sup>6</sup> Almost 2 in 5 (38 per cent) of Aboriginal and Torres Strait Islander women entering prison have at least two dependent children in the community compared with 1 in 4 (25 per cent) for other women.

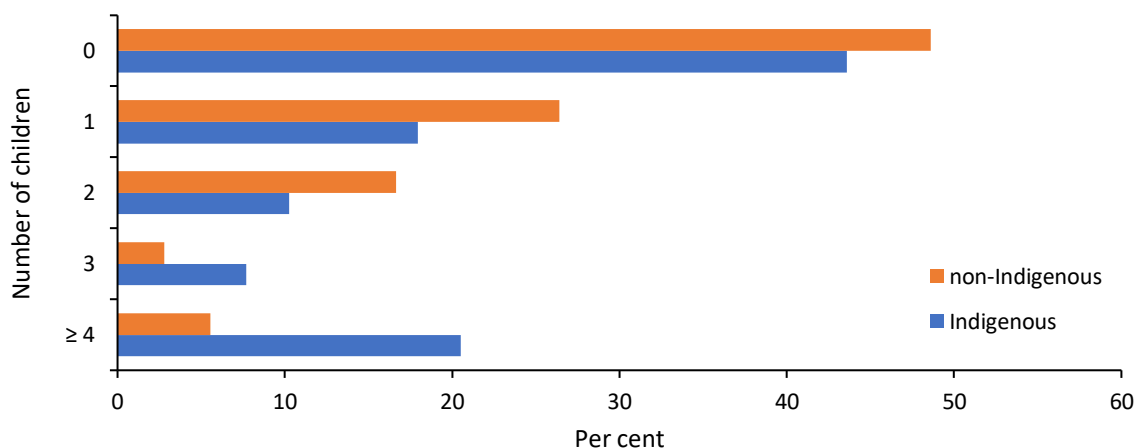


Figure 10: Number of dependent children of Indigenous and non-Indigenous women entering prison, 2018(%)

Source: Entrants form, 2018 NPHDC

As a result of increasing punitive laws and incarceration, Aboriginal children are losing their primary and/or sole caregivers.

<sup>1</sup> [www.coronerscourt.wa.gov.au/l/inquest\\_into\\_the\\_death\\_of\\_ms\\_dhu.aspx](http://www.coronerscourt.wa.gov.au/l/inquest_into_the_death_of_ms_dhu.aspx)

<sup>2</sup> [www.sbs.com.au/nitv/nitv-news/article/2020/01/08/noongar-mother-locked-unpaid-fines-months-after-reforms-package-introduced](http://www.sbs.com.au/nitv/nitv-news/article/2020/01/08/noongar-mother-locked-unpaid-fines-months-after-reforms-package-introduced)

<sup>3</sup> [pdfs.semanticscholar.org/a4ef/6b4dfe73de60c3347ee5ab7a568ea47da5e6.pdf](https://pdfs.semanticscholar.org/a4ef/6b4dfe73de60c3347ee5ab7a568ea47da5e6.pdf)

<sup>4</sup> Jones J., Wilson M., Sullivan E., Atkinson L., Gilles M., Simpson P. L. et al. Australian Aboriginal women prisoners' experiences of being a mother: a review. *International journal of prisoner health* (2018) 14(4), 221-231

<sup>5</sup> Bartels L. Painting the picture of Indigenous women in custody in Australia. *QUT Law Justice J.* (2012) 12(2):1-17

<sup>6</sup> AIHW (2018) The health of women in Australia's prisons, 2018 *In-focus report* EMBARGOED

### **Traumatisation of women in prison**

Aboriginal women prisoners are routinely subjected to abusive practices such as strip searching, notwithstanding this practice is highly damaging to women's wellbeing. In a review of strip search practices, Western Australia's Office of the Inspector of Custodial Services found that strip searches were not an effective method of locating contraband. Out of almost 900,000 strip searches conducted on prisoners in the past five years, only 571 contraband items were found. This is less than once in every 1,500 strip searches.<sup>1</sup>

The majority of Aboriginal women prisoners are also survivors of physical and sexual violence, have mental health illness and suffer the effects of trauma.<sup>2</sup> Many struggle with housing insecurity, poverty, unemployment and access to services.

Aboriginal people who experience severe levels of violence have claims to self-defence that are not being recognised properly by the criminal justice system. This was evident in the case of Jody Gore.<sup>3</sup> Ms Gore was charged with the murder of her ex-partner for whom she was caring. The court system did not accept the high level of interpersonal violence and there was a lack of proper systematic response by the state. Jody acted in self-defence and her claims were not being fairly heard. It wasn't until a team of advocates highlighted her case in the media that her case was reviewed. The Western Australia Attorney General John Quigley exercised the Royal Prerogative of Mercy and Jody was released after serving four years of a 12-year sentence<sup>4</sup>.

Prison inspectors have an important role in monitoring the treatment of prisoners and management of custodial facilities. Most states in Australia have an inspectorate. In Western Australia, inspections of prisons where women are held are not done in accordance with international standards as outlined in the Bangkok Rules.<sup>5</sup> It is also imperative that Aboriginal staff are properly employed, especially at senior management levels.

### **Youth incarceration**

Aboriginal youth are also incarcerated at exceedingly high levels. According to a report by Amnesty International in 2015, in Western Australia, Aboriginal youth are 53 times more likely to be incarcerated and 24 times more likely at the national level<sup>6</sup>. Aboriginal children and youth are being incarcerated in confinement, and often away from their families and country, causing severe psychological harm and risk of suicide.

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<sup>1</sup> [www.oics.wa.gov.au/reports/strip-searching-practices-in-western-australian-prisons/key-findings/?doing\\_wp\\_cron=1579322670.7916738986968994140625](http://www.oics.wa.gov.au/reports/strip-searching-practices-in-western-australian-prisons/key-findings/?doing_wp_cron=1579322670.7916738986968994140625)

<sup>2</sup> McGlade H. The continuing nature of human rights violations in West Australian jail cells. *The Routledge Handbook of Disability Activism* (2019), 274-289

<sup>3</sup> [www.abc.net.au/news/2019-10-06/jody-gore-release-domestic-violence-indigenous-aboriginal-women/11570042](http://www.abc.net.au/news/2019-10-06/jody-gore-release-domestic-violence-indigenous-aboriginal-women/11570042)

<sup>4</sup> [www.abc.net.au/news/2019-09-26/jody-gore-released-from-prison-early-domestic-violence-murder/11550300](http://www.abc.net.au/news/2019-09-26/jody-gore-released-from-prison-early-domestic-violence-murder/11550300)

<sup>5</sup> United Nation General Assembly. *United Nations rules for the treatment of women prisoners and noncustodial measures for women offenders (the Bangkok Rules)* (2010) A/C.3/65/L.5

<sup>6</sup> [www.abc.net.au/news/2015-06-11/wa-chief-justice-slams-high-rate-of-aboriginal-incarceration/6538006](http://www.abc.net.au/news/2015-06-11/wa-chief-justice-slams-high-rate-of-aboriginal-incarceration/6538006)



The ALRC inquiry referred to above noted that the imprisonment of Aboriginal women is detrimental to Aboriginal and Torres Strait Islander children who are already over-represented in the youth justice and child protection systems.<sup>1</sup> A recent Western Australian study found that Aboriginal children who had contact with juvenile justice were 2.4 times more likely than Aboriginal children who did not have contact with juvenile justice to have a mother who had contact with the adult justice system.<sup>2</sup>

### 6.3.5 Brain-based disabilities

In all Australian jurisdictions, the age of criminal responsibility is 10 years of age. This is lower than in most other countries. In the rest of the world, the median age of criminal responsibility is around 14.<sup>3</sup> The United Nations Committee on the Rights of the Child has recommended that governments raise the age of criminal responsibility to 14 and that laws be changed so that children under the age of 16 can't be imprisoned.<sup>4</sup>

Despite these calls for the age of criminal responsibility to be raised, and also recommendations following inquiries in Australia – including by the Royal Commission into the Detention and Protection of Children in the Northern Territory – this continues to be only under consideration by federal and state governments.

Most countries in the world and independent experts agree that 10 years old is far too young to be held criminally responsible. The brain matures from back to front and the crucial regulation and direction of the frontal lobes does not develop efficient and mature executive function until the age of 25 years. This means that optimal self-regulation and impulse control are still 15 years away when a child celebrates his or her tenth birthday.

In addition, a study published in the *British Medical Journal*<sup>5</sup> showed that children in custody are more likely to be suffering from pervasive brain dysfunction than other children. Young people in custody at the Banksia Hill Youth Detention Centre in Western Australia (of whom 73 per cent were Aboriginal) were assessed by a multidisciplinary team of medical and allied health specialists, and 89 per cent were found to have at least one severe neurodevelopmental deficit; dyslexia or similar learning disability, receptive or expressive language disorder, attention deficit hyperactivity disorder, intellectual disability, executive function disorder, memory impairment or motor skills disorder. These conditions are aggravated as a result of detention.

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<sup>1</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133* (2017)

<sup>2</sup> Jones J. R. *Exploring the pathways to contact with juvenile justice in Aboriginal and Torres Strait Islander children: Developing a profile of the risk and protective factors to support a strategy for change* (2018) doi.org/10.26182/5c1b1a445633e

<sup>3</sup> www.sbs.com.au/news/why-australia-needs-to-raise-the-criminal-age-of-responsibility-to-14?cid=inbody:justice-system-isnt-just-campaigners-not-surprised-by-new-youth-justice-report

<sup>4</sup> United Nations Committee on the Rights of the Child, *General comment No. 24 on children's rights in the child justice system* (2019) CRC/C/GC/24

<sup>5</sup> Bower C., Watkins R.E., Mutch R. C. et al. Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia. *BMJ Open* (2018) 8:e019605. doi: 10.1136/bmjopen-2017-019605

It was found that 65 per cent of the young people incarcerated in WA had at least three areas of severe cognitive deficit and, of those, half could be diagnosed with a Foetal Alcohol Spectrum Disorder (FASD) due to a known history of prenatal exposure to alcohol. There are many causes for brain dysfunction, of course, including prenatal exposure to alcohol, amphetamines, and other toxins, difficult births (foetal distress), head injuries, seizures, and encephalitis. The cause of the problem is not really relevant to youth justice. The important fact is that 65 per cent of these young people in youth detention appeared to have suffered widespread brain injury and were demonstrating pervasive brain dysfunction.

If we consider that at least two-thirds of the children in custody are suffering from brain-based disabilities, we realise that many of the 10-year-old children brought before the Children's Courts are likely to be functioning at a five or six-year-old level, and as they age chronologically, their functional level is not improving. When they reach the age of 14 years, their adaptive functioning (level of practical living skills) and social skills may still be at a five-year-old level and their thinking skills at a six-year-old level. In Australia, the majority of the young people in custody nationwide (59 per cent) are Aboriginal; now we know that they are not only disadvantaged by the legacies of colonialism and racism, but many are suffering from an invisible and undiagnosed physical disability as well.

Brain dysfunction does not always imply intellectual disability, in the sense of low intelligence, but an intelligent child with very poor impulse control, poor language or literacy skills, or impaired executive functioning, may demonstrate immature and inappropriate behaviour, as well as anger and frustration. This can lead to arrest, criminal charges, and conviction.

We know that 42 per cent of Indigenous children in Australia are 'developmentally vulnerable', or delayed in some area, when they start school as opposed to 22 per cent of non-Indigenous children.<sup>1</sup> We also know that Aboriginal children are excluded from school at three times the rate of non-Aboriginal children.<sup>2</sup> If we understand that the vast majority of the children who are being excluded from school due to behaviour problems are children with cognitive impairments (ADHD or other disorders), that these are the children who become involved with the criminal justice system (via the school to prison pipeline), and that the majority of incarcerated children are Aboriginal, we can see how raising the age of criminal responsibility would benefit First Nations communities.

Thus, many of the young people involved in the juvenile justice system in Australia are suffering from neurodevelopmental disorders, lack of recognition of their disabilities, lack of support at school and in the community, and an almost total lack of appropriate supervision. Many are in out-of-home care. The criminalisation of children in care is a major issue which affects Aboriginal children in particular. They are ten times as likely to be in out-of-home care as non-Aboriginal children.<sup>3</sup>

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<sup>1</sup> AEDC, Australian Early Development Census. [www.aedc.gov.au/about-the-aedc/aedc-news/article/2016/03/08/progress-towards-narrowing-the-gap](http://www.aedc.gov.au/about-the-aedc/aedc-news/article/2016/03/08/progress-towards-narrowing-the-gap)

<sup>2</sup> Lang J. *School Suspensions and Aboriginal Students*, Actuarial Eye (2017) [actuarialeye.com/2017/11/19/school-suspensions-and-aboriginal-students/](http://actuarialeye.com/2017/11/19/school-suspensions-and-aboriginal-students/)

<sup>3</sup> Family Matters Report 2018. [www.familymatters.org.au/wp-content/uploads/2018/11/Family-Matters-Report-2018.pdf](http://www.familymatters.org.au/wp-content/uploads/2018/11/Family-Matters-Report-2018.pdf)

The way to prevent so many young children, especially Aboriginal children, becoming persistent offenders, is to raise the age of criminal responsibility to at least 16 years, and to mandate government funded neuropsychological assessments for children involved in antisocial behaviour, as well as support for their families in negotiating with disability services. Aboriginal people in Australia are more likely to be financially disadvantaged, and unable to access assessments or therapy in the private sector, which may cost thousands of dollars.

Even more effective would be an additional proactive initiative: thorough and comprehensive assessments of the 42 per cent of Aboriginal children found to be vulnerable when they start school. Early intervention and ongoing therapy would be likely to prevent difficulties for these children and the community in the future.

### 6.3.6 Over-representation of Aboriginal and Torres Strait Islander men

Aboriginal and Torres Strait Islander men are vastly over represented in Australian prisons.<sup>1</sup> The rate of imprisonment of Aboriginal and Torres Strait Islander men varies between Australian jurisdictions (see Figure 11).<sup>2</sup>

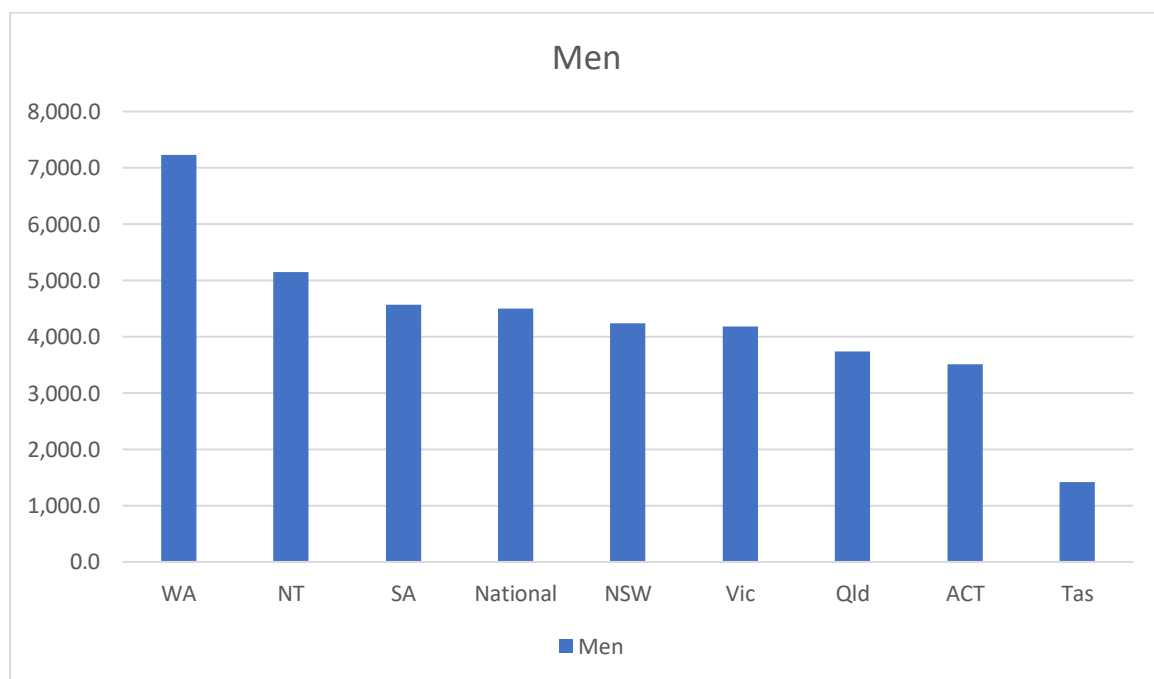


Figure 11: Rate of imprisonment of Aboriginal and Torres Strait Islander men per 100,000 population

<sup>1</sup> Australian Bureau of Statistics. *Prisoners in Australia 2018*: 4517.0 Canberra, Australia: Australian Bureau of Statistics (2019)

<sup>2</sup> Australian Bureau of Statistics. *Corrective Services 4512.0*: June quarter 2019. Canberra, Australia: Australian Bureau of Statistics (2019)

The variation in the rate of imprisonment is likely to be a function of the different criminal justice systems in each Australian jurisdiction. However, there has been no research to ascertain exactly why there are such variations. There is a possibility that some of the variation is due to differences between the Aboriginal and Torres Strait Islander populations in each jurisdiction, but this is unlikely given such variations are not seen in health and social data. If variation is a function of the criminal justice system, then reforms in Western Australia, the Northern Territory and South Australia could lead to an immediate reduction in imprisonment rates of Indigenous people. Some of the core issues in the legal system that need to be reformed include:

- imprisonment for offences which previously did not attract imprisonment, for example unpaid fines
- breaching of community-based sanctions attracting harsher punishments, including imprisonment
- difficulty in obtaining parole and then unrealistic reporting requirements while on parole, leading to breaches of parole and subsequent imprisonment.

The effect of over-imprisonment could be leading to a normalisation of going to prison among Aboriginal and Torres Strait Islander men. Intergenerational imprisonment is becoming more of an issue, with it being common for the Aboriginal men in prison to have had their father also go to prison or be currently in prison. It has been noted that 20 per cent of Aboriginal children have a parent or carer in prison.<sup>1</sup>

### **6.3.7 Alcohol and other drug use and support and treatment services**

Around three-quarters of Aboriginal and Torres Strait Islander men entering prison had used alcohol and or other drugs (AoD) while in the community on a daily or nearly daily basis. The use of AoD has been identified as a contributing factor towards the over-imprisonment of Aboriginal and Torres Strait Islander men. There is a lack of rehabilitation services in the community in general but especially in the prison environment. And there is little understanding as to how adequate or not the AoD treatment is at entry, during and after prison for Aboriginal and Torres Strait Islander men and women.

On entry to prison, new inmates undergo a triage health assessment with alcohol and drug withdrawal treated as required. Withdrawal usually occurs among remandees rather than sentenced inmates. There is currently no indication of how many Aboriginal and Torres Strait Islander people are treated for AoD withdrawal, there is also no indication of how closely withdrawal guidelines are followed or what follow-up there is. While, in theory, all people being held in custody receive, the same clinical treatment, there is a marked difference when it comes to access for behavioural treatment programs. Only the sentenced inmates – not those being held on remand – have access to behavioural treatment programs that are aimed at reducing the likelihood of relapse back to AoD use when they return to the community.

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<sup>1</sup> Quilty S., Levy M. H., Howard K., Barratt A. & Butler T. Children of prisoners: a growing public health problem. *Australian and New Zealand journal of public health*, (2004) 28(4), 339-343

This is problematic as inmates on remand make up about 32 per cent of the total Aboriginal and Torres Strait Islander male prison population. If these men were in the community, they may be able to access one-to-one counselling and or attend group treatment programs. Furthermore, there are reports that people on remand are unable to attend 12-step fellowship meetings, which are run by volunteers and not by employed staff from the corrections system. As such, these men on remand appear to be denied opportunities to access treatment and support services they could access voluntarily in the community.

Sentenced inmates can attend behavioural treatment programs if there are enough available places in the program. It is not clear if there is any kind of positive effect towards decreased AoD use and/or decreased likelihood of return to prison. There are few evaluations of the effectiveness of behavioural treatment programs in Australian prisons. It is important to evaluate these programs as much of the theoretical framework for behavioural treatment programs has either been adopted or adapted from United States models, and may not be suitable. There are few programs that are specific to Aboriginal and Torres Strait Islander people and there are no publicly available evaluations of those programs. There are post-release support programs that aim to reduce relapse to AoD use but, once again, few are specifically designed for Aboriginal and Torres Strait Islander people and there are no publicly available evaluation reports. There needs to be much more research conducted and made available to ensure the best possible AoD treatment is available in – and upon release from – Australian prisons.

## **6.4 Solutions**

Many solutions to address the over-incarceration of Aboriginal and Torres Strait Islander people have been clearly identified for decades in research, Royal Commissions, policy frameworks and also community showcasing of strengths-based solutions.<sup>1</sup> There needs to be much more research and evaluation conducted and made available to ensure, for example, the best possible culturally relevant evidence is available upon which to design AoD treatment in – and upon release from – Australian prisons.

It has been recognised for well over a decade that Aboriginal family violence is a leading driver for the incarceration of men, women and children. Aboriginal people are significantly over-represented in the rates of charge and conviction for Acts Intended to Cause Injury (AICI). There needs to be an urgent and significant investment into culturally appropriate family violence prevention and intervention programs. The Australian Law Reform Commission's Pathways to Justice inquiry provides a blueprint for reform. The Government should establish a taskforce to implement these recommendations across Australia.

One way to reduce imprisonment is to improve the overall social and economic situation of Aboriginal and Torres Strait Islander Australians, and the shared, intergenerational determinants of health and criminal justice system engagement. Unfortunately, such an overall change appears unlikely to occur in the short term.

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<sup>1</sup> Finlay, S., Williams, M., Sweet, M., McNerney, M. & Ward, M. (2016). #JustJustice: Tackling the over-incarceration of Aboriginal and Torres Strait Islander peoples (2nd Edn.). Sydney: #JustJustice.

A possibility that could deliver reduced imprisonment more quickly is reform of some of the legal frameworks of the criminal justice system, especially increasing rights to bail and non-custodial sentences and reducing bail exceptions and mandatory sentencing.

There is also some momentum for Justice Reinvestment<sup>1</sup>: shifting resources from prisons to Aboriginal communities. While initiatives have been piecemeal in Australia, they have successes in other jurisdictions and good community support in local areas in which they have been trialled.<sup>2</sup>

## 6.5 Recommendations

During their visits to Australia, we recommend that the SPT and WGAD consider:

- affirming that evaluation of government frameworks, policies and funding allocations in relation to Aboriginal and Torres Strait Islander people should be inclusive of Aboriginal and Torres Strait Islander perspectives
- recommending that cultural awareness training and anti-racism strategies be in place and evaluated among government service providers, including in prison services, with accountability mechanisms clearly identified such as for accreditation by peak industry bodies
- recommending the age of criminal responsibility be raised to at least 16, with inappropriate child behaviour addressed as a public health matter and not as a criminal matter
- recommending investment in prevention of health and social issues – recognising the shared determinants of poor health and risks for criminal justice system contact
- recommending culturally informed responses to arbitrary detention including access to community-controlled legal aid, informed consent, fair trials, legal guardianship, procedures for independent medical advice and access to community-controlled health care
- recommending inclusion of Aboriginal and Torres Strait Islander people in advisory committee/s established, such as in police, corrections and courts, that also represent diversity among Aboriginal and Torres Strait Islander people in terms of gender, age, geographical location and identity
- recommending accountability for police and corrective services officers responsible for causing harm and death in custody of Aboriginal people through disciplinary and court procedures
- recommending culturally informed assessment and treatment of Aboriginal and Torres Strait Islander people with acute health issues before detention
- recommending culturally informed comprehensive primary care health plans be made with incarcerated Aboriginal and Torres Strait Islander people, including continuity of care from in-prison to post-release

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<sup>1</sup> See Australian Law Reform Commission (2017) [www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/what-is-justice-reinvestment/](http://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/what-is-justice-reinvestment/)

<sup>2</sup> See for example: [www.justreinvest.org.au/justice-reinvestment-in-bourke/](http://www.justreinvest.org.au/justice-reinvestment-in-bourke/)

- recommending improved diversion pathways and alternatives to detention, particularly community-driven and culturally appropriate responses to offending, as well as accounting for the ongoing impact of colonisation in bail, parole and sentencing decisions and disciplinary and placement decisions by detaining authorities
- recommending an Aboriginal Inspectorate position be created within each agency designated the NPM with oversight of places of detention within the criminal justice system, focusing on Aboriginal prisoners and detainees.

## **6.6 Additional reading**

Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017)

McGlade H. The continuing nature of human rights violations in West Australian jail cells. *The Routledge Handbook of Disability Activism* (2019).