Submission to the United Nations Subcommittee on the Prevention of Torture - Australia

Change the Record, Human Rights Law Centre, National Aboriginal and Torres Strait Islander Legal Services, July 2022

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

In this submission, we seek to highlight:

1. Jurisdictions of concern where little or no work establishing a National Preventative Mechanism (NPM) has been completed;
2. Systemic concerns within and across jurisdictions; and
3. Facilities of particular concern where human rights abuses appear to be systemic, chronic and escalating.

For further information:
Sophie Trevitt || Executive Officer, Change the Record || sophie@changetherecord.org.au || 0431 8443 095

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Background

Change the Record, the Human Rights Law Centre and the National Aboriginal and Torres Strait Islander Legal Services have worked extensively with civil society, consulted with Aboriginal Legal Services and Family Violence Prevention Legal Services and state and territory governments to advise and inform the development of NPMs in the ACT, Tasmania, South Australia, Queensland and the Northern Territory.

We established a number of principles which we consider essential to the effective development of any NPM. Namely, that it:

1. Be established with full and transparent consultations with civil society, with Aboriginal and Torres Strait Islander peoples and others as recommended by the Subcommittee on Prevention of Torture;
2. Aboriginal and Torres Strait Islander representation is included in all oversight bodies and expert advisory panels to ensure NPMs are established in a culturally safe way, and with the trust of community;
3. Have a statutory basis and be independent of government and the institutions they oversee;
4. Be adequately and jointly resourced by Federal, State and Territory Governments;
5. Make findings and recommendations publicly available and require a response from governments and detaining authorities;
6. Be empowered to undertake regular and preventative visits;
7. Have free and unfettered access (to all places of detention, whether announced or unannounced; to all relevant documents and information; and to all persons including public employees and privately engaged contractors, including the right to conduct private interviews);
8. Have the power to submit proposals and observations to Parliament or the public concerning existing or proposed legislation; and
9. Be afforded appropriate privileges and immunities to ensure there are no sanctions or reprisals for communicating with the NPM.

These principles have been engaged with partially, and inconsistently, by state and territory governments. We have included a table below summarising jurisdictional progress.

Jurisdictions of Concern

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

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

Alarmingly, little progress has been made in establishing and resourcing independent monitoring and oversight of adult and youth prisons, and other places of detention in New South Wales and Victoria. Despite the looming deadline for OPCAT implementation in January 2023, these jurisdictions are yet to publicly release their plans to implement OPCAT, and we understand that there is unlikely to be significant movement from these states until federal funding is made available. This raises serious concerns about whether these jurisdictions will meet the deadline.

The below summaries of the progress of OPCAT implementation are accurate at the time of writing this submission, and aim to highlight key strengths and weaknesses in the NPM models that are being adopted in each jurisdiction taking steps to implement OPCAT. They are not intended to be exhaustive and focus predominantly on OPCAT implementation as related to the criminal legal system (adult and youth prisons, as well as police cells/watch houses/lockups).

Victoria and New South Wales

Despite repeated calls from civil society and Aboriginal and Torres Strait Islander organisations, frustratingly little progress has been made on implementing OPCAT in Victoria and New South Wales. This is despite the recent Inquiry into Victoria's criminal justice system finding that: "the

implementation of OPCAT is… critical to increasing transparency of prison conditions and addressing problematic practices" including "solitary confinement, strip searching and the use of physical restraints [which] can be highly traumatic and can impede the rehabilitation of people in incarceration."[1] The Department of Justice and Community Safety has reaffirmed the Victorian Government's support for the principles of OPCAT, but said that additional Commonwealth funding is required to implement OPCAT in Victoria. The position is shared in New South Wales, with the Victorian and New South Wales Attorneys-General jointly writing to the Commonwealth on 18 October 2021, explaining that they "would be unable to implement OPCAT in the absence of an accompanying sufficient and ongoing funding commitment from the Commonwealth".[2]

Commonwealth

Legislation introduced	No dedicated legislation - the NPM has been designated through amendments made to the Ombudsman Regulations 2017 (Cth).
NPM established	In July 2018, the Office of the Commonwealth Ombudsman was designated the NPM and coordinator with oversight of immigration detention facilities.
Strengths of model	
Weaknesses of model	In February 2022, the Attorney General's department confirmed that the federal government is of the view that it is not necessary to incorporate provisions of OPCAT into federal legislation at this time. The absence of stand-alone legislation nationally raises concerns that the NPM does not have the essential powers, resources, independence, uniformity and capabilities necessary to fulfill its obligations and responsibilities in accordance with OPCAT. The Commonwealth government has failed to address its responsibility to share the financial costs of establishing the state

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

	and territory NPM network, thereby avoiding resourcing constraints and ensuring the effective implementation of OPCAT. This is compounded by the previous federal government slashing funding for the Commonwealth Ombudsman over the coming years, facing budget cuts in 2022-2023 and until 2025-2026 of about 15%.

Western Australia

Legislation introduced	Nil.
NPM established	In April 2022, the Ombudsman Western Australia was announced as the NPM for mental health and other secure facilities, and the Office of the Inspector of Custodial Services as the NPM for justice-related facilities including prisons and police lockups.
Strengths of model	The Office of the Inspector of Custodial Services is structurally independent. It is established by stand-alone statute, has its own budget and staff, publishes its own reports and standards and its Inspector is an officer of the Parliament. The Office of the Inspector of Custodial Services publishes reports directly to the Parliament and has strong powers to access prisons and conduct unannounced inspections. It carries out a preventative, continuous schedule of inspections across all sites, publishes reports and gives recommendations accordingly. The Office of the Inspector of Custodial Services has indicated in their annual report that legislation may be developed to expand its jurisdiction to have oversight of police cells. Currently, the Inspector of Custodial Services does not have oversight of police cells in Western Australia. However, the Office of the Inspector of Custodial Services has expressed concerns about committing resources to

	develop this new work without national agreement around implementation.
Weaknesses of model	The Office of the Inspector of Custodial Services was established without adequate civil society consultation. For any mechanism to be effective, particularly as a mechanism designed to prevent human rights abuses, it must have trust gained from the input of the community. There is also no requirement for the Minister or responsible detaining authority to respond to findings and recommendations made by the Office of the Inspector of Custodial Services. This is essential, both to ensure that recommendations are considered and acted upon, and to promote trust in the efficacy of the NPM.

Northern Territory

Legislation introduced	A consultation draft Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Amendment Bill 2022 (NT) was made available for consultation earlier this year, for the purposes of the NT Government finalising a Bill that will amend the existing Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018 (NT).
NPM established	Proposal in the consultation draft is for a joint NPM, with the Ombudsman for adult prisons and Office of the Children's Commissioner for youth prisons. In April 2022, the Ombudsman was named the interim coordinating NPM.

Strengths of model	The consultation draft contains provisions requiring the Minister to respond to the recommendations of the NPMs, which is an important accountability mechanism.
Weaknesses of model	The consultation draft does not establish a functionally independent custodial inspectorate, and does not address concerns about the functional and perceived independence of individuals who are appointed by a Corrections Minister or other government Ministers to oversee bodies which may also become designated NPMs. Nor does the consultation draft provide adequate provisions for dealing with conflicts of interest. As drafted, it allows for people employed in Departments and agencies responsible for the administration and operation of places of detention to be employed by the NPM to carry out its functions. The consultation draft does not include a requirement for the NPM to provide timely disclosure of direct and indirect interests and any possible conflicts. The consultation draft does not require the NPMs' staffing profile to include Aboriginal and Torres Strait Islander representation and to take into account gender balance and representation of people with disability. The consultation draft also does not guarantee adequate funding and staffing resources to fulfill NPM functions.

Australian Capital Territory

Legislation introduced	The Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018 (ACT) commenced in April 2018.

NPM established	In January 2022, the ACT Government announced that a NPM would be formed by three bodies: the Office of the Inspector of Correctional Services for adult prisons and youth prisons, the ACT Human Rights Commission and the ACT Ombudsman. The ACT Inspector of Correctional Services have engaged a short term Expert Contractor to undertake an assessment and report on the possible form of the ACT NPM model.
Strengths of model	The definition of 'place of detention' in the Act is broad and replicates article 4 of OPCAT.
Weaknesses of model	In 2021, the Office of the Inspector of Correctional Services expressed concerns that it had not received any additional funding to undertake NPM functions. Pursuant to OPCAT, the SPT's access to information should be unfettered, but is currently subject to ACT privacy laws in the Act. This can hamper the SPT's ability to access information, particularly people's medical records that might, for example, be relevant to the SPT assessing the quality of healthcare being delivered in prisons. Notably, there is a general lack of public information about the NPM portfolios to be undertaken by the Human Rights Commission and Ombudsman, and it does not appear that any NPM or OPCAT specific reports have been established by three designated bodies signaling resourcing and accountability issues. We understand that recently, the ACT government reached a federal funding agreement of $0.143 million over two years towards OPCAT implementation. The terms of this funding arrangement require the ACT government to match this funding amount.

South Australia

Legislation introduced	The OPCAT Implementation Bill 2021 (SA) was introduced in October 2021 and lapsed due to prorogation of parliament in February 2022.
NPM established	Nil.
Strengths of model	The lapsed Bill made provision for the designated NPM to be provided with the resources reasonably required for exercising their functions.
Weaknesses of model	The lapsed Bill contained a narrow definition of 'place of detention' which did not capture police cells and watch houses where people can be detained without a warrant. This is inconsistent with the definition of 'place of detention' in article 4 of OPCAT. Further, the lapsed Bill confined NPM visits to a 'place of detention' to 'any reasonable time of the day'. This is inconsistent with article 19(c) of OPCAT, which requires unrestricted access.

Tasmania

Legislation introduced	The OPCAT Implementation Act 2021 (Tas) commenced in January 2022.
NPM established	The Custodial Inspector and Tasmanian Ombudsman were appointed the NPM in February 2021 for custodial facilities and other places of detention.

Strengths of model	The legislation provides that the NPM and its delegates are authorised and required to act independently and impartially. The legislation provides the NPM unfettered access to places of detention and persons, including the ability to take the evidence necessary to perform functions.
Weaknesses of model	The NPMs institutional independence and operational autonomy is curtailed by requirements to bring any draft reports, information or recommendations containing adverse commentary regarding a place of detention to the responsible department and secretary. The current NPM has raised concerns about resourcing and staffing constraints, which impede the ability of the NPM to perform crucial functions such as onsite inspections and publishing reports.

Queensland

Legislation introduced	The Inspector of Detention Services Bill 2021 (Qld) was introduced in October 2018 and is likely to be back before the Queensland Parliament in August 2022.
NPM established	If passed in its current form, the Bill would establish an independent Inspectorate for Detention Services. The Bill does not purport to fulfill the requirements of OPCAT by establishing a NPM. However, there may be an intention to designate the Inspectorate as a NPM in the future, depending on any ongoing funding arrangements with the Commonwealth government.
Strengths of model	The Bill provides for accountability measures by requiring the inspectorate to prepare reports to be tabled in Parliament that

	include information on functions performed, reform recommendations and containing ministerial requests. The Bill provides the Inspectorate unfettered access to places of detention and persons, and provides a civil penalty where persons in charge of a place of detention unreasonably deny access to the inspector.
Weaknesses of model	The Bill appoints the Ombudsman as the inspectorate and this dual role risks inadequately resourcing inspectorate responsibilities, such as onsite inspections. The Bill requires the Inspectorate to provide draft reports to 'notifiable entities' six weeks prior to submission of reports to Parliament. Further, the Inspector must consider whether any information in the report must be confidential because of expansive 'public interest' considerations, including "undermining any system… at a place of detention". These are unnecessary restrictions on the Inspector's ability to make timely, independent assessments of government institutions.

Recommendations

1. That the SPT draw attention to the lack of OPCAT implementation in New South Wales and Victoria, and call on those governments to take urgent action to engage with full and transparent consultations with civil society to implement OPCAT as a matter of priority.
2. That the SPT call on the federal Australian Government to urgently commit to adequately and jointly resource NPMs with the states and territories.
3. That the SPT highlight concerns with non-OPCAT-compliant implementation in states and territories with serious weaknesses in their NPM models, including:
    a. Lack of federal government leadership on OPCAT implementation to date; and

b. Lack of functional independence of the NPM model proposed in the NT; and

c. Lapsed Bill in South Australia.

Systemic concerns

Disproportionate incarceration of First Nations children

Aboriginal and Torres Strait Islander children are drastically and disproportionately detained. On an average day in 2020-21, 48.7% of children aged 10-17 in detention nation-wide were First Nations.[3] Nationally, a First Nations child is 14.4 times as likely to be incarcerated than a non-Indigenous child. In the Northern Territory, an Aboriginal child is more than 30 times as likely to be incarcerated, and in Western Australia, 24 times as likely.[4] At the time of writing, 94% of children in detention in the Northern Territory are Aboriginal.[5] It is not rare for 100% of children in custody in the Northern Territory to be Aboriginal. The severely disproportionate incarceration of First Nations children, and the systematic and structural racism and discrimination that it belies, is degrading in and of itself.

Disproportionate incarceration of First Nations people with disability

People with disability are disproportionately criminalised in Australia. Disability is more common among First Nations peoples than the non-Indigenous population, and First Nations people with disability experience intersectional discrimination and disadvantage. It's well-established that Australian criminal legal systems are discriminatory, culturally inappropriate and unsafe, that staff lack cultural competence, and that First Nations people with language barriers commonly don't receive adequate translation support from arrest through to sentencing. In evidence provided to the Disability Royal Commission, the Australian Centre for Disability Law estimated that 95% of First Nations people charged with criminal offences who appear before courts have an intellectual disability, a cognitive impairment or a mental illness.[6]

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[3] Australian Institute of Health and Welfare, 31 March 2022, Youth justice in Australia 2020–21.
[4] Sentencing Advisory Council Victoria, 2022, Indigenous young people in detention.
[5] Northern Territory Department of Territory Families, Housing and Communities, Youth Detention Census, Week commencing 11 July 2022, Average daily number in detention – by Aboriginal status.

[6] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2020, Overview of responses to the Criminal justice system Issues paper, p3.

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

This is compounded by the fact that access to the National Disability Insurance Scheme is heavily limited to people in prison, in breach of articles 12 and 13 of the Convention on the Rights of Persons with Disabilities requiring equal access to justice and legal capacity.[7]

The Disability Royal Commission has heard extensive evidence of abuse and mistreatment experienced by people with disability in custody, including cruel and disproportionate use of solitary confinement,[8] disproportionate use of physical and mechanical restraints, and disproportionate use of force. Human Rights Watch has also documented people with disability being subjected to physical and sexual violence, overcrowding, and denial of basic needs like access to toilets.[9]

People with cognitive, neurological and/or psychosocial disabilities who are deemed unfit to plead are often at risk of being held in indefinite detention for longer periods than they otherwise would if they had been convicted and sentenced, in breach of the Convention on the Rights of Persons with Disability.[10]

People with disability in prison are also more likely to die in custody, with an analysis of coronial inquest reports between 2010 and 2020 by Human Rights Watch finding that around 60% of people who died in prisons in Western Australia had a disability. Of those people, 58% died as a result of lack of support provided by the prison, suicide and violence. Alarmingly, half of these deaths were of Aboriginal and Torres Strait Islander people with disability.[11]

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[7] United Nations, Convention on the Rights of Persons with Disabilities.
[8] Finn McHugh, 16 February 2021, 'Cognitively impaired woman isolated for 23 hours a day Inquiry told' news.com.
[9] Human Rights Watch, 6 February 2018, I Needed Help, Instead I Was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia.
[10] NATSILS, May 2020, Submission to the Disability Royal Commission's Criminal Justice Issues Paper, p36.
[11] Human Rights Watch, 15 September 2020, "He's never coming back": People with Disabilities Dying in Western Australia's Prisons.

Children being detained on remand in pre-trial detention

In 2020-21, 72% of children in custody aged 10-17 were detained on remand, meaning that they were detained in pre-trial detention without having been convicted or sentenced for the alleged offending that they were arrested for.[12] Often this is due to dangerous and discriminatory laws which prevent the granting of bail even for crimes which are unlikely to result in a custodial sentence. The majority of children detained held on remand ultimately don't receive a custodial sentence.[13] It is also not uncommon for children who would otherwise be released to be remanded in custody because they would experience homelessness, as governments have failed to invest in adequate crisis and transitional accommodation.[14]

Solitary confinement of children and adults

Solitary confinement is a cruel practice that causes irreparable harm to the people who are subjected to this form of physical and sensory isolation. Yet across the continent children are locked up in solitary confinement, in breach of the Havana Rules. While Australian jurisdictions tend not to use the term, overly broad laws permit the practice using different language: 'separation', 'segregation', 'seclusion' or 'isolation'. The name given to the treatment is less important than the fact of it.

The Royal Commission into Aboriginal Deaths in Custody found solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander people and noted that 'it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention.'[15]

A report by the Northern Territory Office of the Children's Commissioner found that, on 17 February 2021, four children detained at the Don Dale Youth Detention Centre were placed in 'separation' following a critical incident involving concerns of self-harm. All four children had complex needs as a result of neurological impairment and complex trauma. Rolling lockdowns following the incident saw children in Don Dale's H block, where the most vulnerable children are held, detained in their cells for up to 23.5 hours a day over the week to 24 February 2021.

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[12] Australian Institute of Health and Welfare, 31 March 2022, Youth justice in Australia 2020–21.
[13] For example, see: Department of Communities and Justice NSW, 2022, Statistics: young people in custody, 'Proportion of young people with a remand episode who receive or do not receive a control order within 12 months'.
[14] yFoundations, January 2022, Young, in trouble and with nowhere to go: Homeless adolescents' pathways into and out of detention in NSW.
[15] Report of the Royal Commission into Aboriginal Deaths in Custody, 1991.

Medical assessments of the four children involved in the incident during their confinement were limited to an examination through the hatches in their cell doors due to staff shortages.[16] Nearly every child detained at Don Dale during the Commissioner's visit was Aboriginal.

A report by the Western Australian Inspector of Custodial Services into the Banksia Hill Youth Detention Centre describes the use of solitary confinement at the facility in detail, finding its use constituted cruel, inhuman and degrading treatment. One child was forced to spend more than 22 hours a day in their cell for 15 out of 27 days in November 2021. This included one period of five continuous days and a second period of six continuous days. The report also tells the story of a 16 year old boy who was in solitary confinement while acutely suicidal, and contains an interview with a 15 year old boy who spoke of being confined, witnessing severe self-harm, and wanting to die. The report found that the treatment of children at Banksia Hill breached the Mandela Rules, Havana Rules and Beijing Rules.[17]

In Victoria, the Ombudsman has repeatedly expressed concerns about women and children being detained in solitary confinement in contravention of the Mandela Rules and the state's own Charter of Human Rights and Responsibilities, and has recommended that the Victorian Government 'establish a legislative prohibition on 'solitary confinement', being the physical isolation of individuals for '22 or more hours a day without meaningful human contact."[18]

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

State and territory laws should be amended to strictly prohibit the use of solitary confinement, by any name, in Australian prisons. In line with international human rights law, state and territory

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[16] Office of the Children's Commissioner NT, 6 October 2021, Don Dale Youth Detention Centre Monitoring Report 2021, p10.
[17] Office of the Inspector of Custodial Services Western Australia, March 2022, 2021 Inspection of the Intensive Support Unit at Banksia Hill Detention Centre.
[18] Victorian Ombudsman, 5 September 2019, 'Unlawful and wrong' - solitary confinement and isolation of young people in Victorian prison and youth justice centres; Victorian Ombudsman, 30 November 2017, Implementing OPCAT in Victoria - report and inspection of Dame Phyllis Frost Centre; Victorian Ombudsman, 16 October 2018, Investigation into the imprisonment of a woman found unfit to stand trial.

laws should clearly define the circumstances in which a person may be lawfully separated from other people in prison (limited to exceptional cases, subject to appropriate safeguards).

Use of spit hoods on children and adults

The use of spit hoods on children in custody has received scrutiny over recent years following the abuses examined by the Royal Commission into the Protection and Detention of Children in the Northern Territory (the Don Dale Royal Commission). While all states and territories have claimed that they do not use spit hoods in youth prisons,[19] in February this year the NT News uncovered that spit hoods were being used on children in adult prisons. Spit hoods were also used on children in Northern Territory watch houses 27 times from 2018 to February 2022, with 21 of those instances happening in the last two years.[20] One of the children was just 13 years old. Officers also used mechanical restraint chairs against six children during this time.

Laws currently permit the use of spit hoods in Western Australia, Victoria, Northern Territory, Tasmania and Queensland in adult prisons. South Australia is the only jurisdiction to have legislated a ban on the use of the devices following a 5-year community campaign by the family of proud Wiradjuri, Kookatha and Wirangu man Wayne 'Fella' Morrison, who was killed in custody after corrections officers used a spit hood against him.[21]

State and territory laws should be amended to strictly prohibit the use of spithooding and restraint chairs in Australian prisons.

Children detained in adult facilities

Children across jurisdictions are detained in adult facilities, including prisons and police watch houses, in breach of Article 37 of the Convention on the Rights of the Child and the Beijing Rules.

In some cases children in custody can legally be transferred to an adult prison for trying to abscond from a youth facility or for additional offenses while in custody, as in NSW. In other cases, governments are able to designate sections of an adult correctional facility as a youth detention facility under youth detention acts. This occurred in Victoria at the maximum security

[19] See Ombudsman SA, September 2019, Investigation concerning the use of spit hoods in the Adeaide Youth Training Centre, p23. Since the release of the report, SA has banned spit hoods in all custodial settings.
[20] NT News, 22 February 2022, Australian spit hood ban petition as NT police reveal use on kids.
[21] National Indigenous Times, 23 September 2021, Fella's Bill passes SA parliament.

Barwon prison in 2016-17 until the decision was overturned by the courts,[22] but still occurs in Victoria due to powers the Adult Parole Board has to permit the transfers of children to adult prisons. Two children were transferred to the private, maximum security Port Phillip Prison earlier this year,[23] and this is also currently happening in Western Australia with 17 children recently transferred to the Casuarina maximum security prison.[24]

In the first half of 2021, at least 450 children aged 10-17 were detained in police watch houses alongside adults in Queensland every month. Of those children, 70% were First Nations and at least 856 children were aged 10-13.[25]

In 2021, the South Australian Children's Guardian tabled a report into the treatment of children in state care who were detained in the Adelaide city police watch house. Children were subjected to strip searches and detained in full view of adult prisoners. Data obtained from South Australia Police confirms this, and found children were arrested and detained in adult police cells 2,030 times in 2020-21.[26]

State and territory laws should be amended to strictly prohibit the transfer of children to, and detention in, adult prisons.

Routine strip-searching of children and adults

Routine strip searching involves forcing people (including children as young as ten) to remove their clothing in front of adult prison guards on a regular basis. In most Australian states, overly broad laws permit the practice.

Data obtained by the Human Rights Law Centre has shown that children across Australia have been subjected to routine strip searches at alarming rates and often in contravention of the Mandela Rules.

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[22] Supreme Court of Victoria, 11 May 2017, Detention of children in youth justice facility within Barwon Prison found to be unlawful.
[23] Australian Broadcasting Corporation, 31 May 2022, From attacks on workers to teens in adult prison, Victoria's youth justice challenges are mounting.
[24] Social Reinvestment Western Australia, July 2022, Take Action - Raise the Age, campaign page re: transport of children from Banksia Hill to Casuarina.
[25] National Indigenous Radio Service, 2 July 2021, Hundreds more Qld children in adult watch houses.
[26] SA Office of the Guardian for Children and Young People, 29 November 2021, 'Alarming numbers of young people being held in adult police cells'.

While a number of jurisdictions have taken note of this data and taken steps to end the practice of routinely strip searching children in youth prisons, including the ACT, Tasmania, Victoria and the Northern Territory, data from NSW continues to show some concerning trends.

In NSW, data showed over 403 strip searches were conducted on children at Frank Baxter and Cobham youth prisons over a one month period in October 2018, with only one item – a ping pong ball – found as a result.[27] More recent data, over the month of April 2021, showed that there were 165 strip searches at Frank Baxter and Cobham youth prisons with only 3 items identified. The NSW Inspector of Custodial Services (in November 2018) and NSW Ombudsman (in June 2021) have both recommended that routine strip searching of children in prisons be banned.[28]

Routine strip-searching is also used in adult prisons, including against women. Incarcerated women are disproportionately victim-survivors of sexual violence and family violence. In addition to being traumatising and violating in its own right, the practice of routine strip-searching can replicate the power and control dynamics of abusive intimate relationships. The practice is widespread across Australia, and by way of example:

- During the 7-month period between October 2020 to April 2021, there were 208 strip searches conducted on women in prison at the Alexander Maconochie Centre in the ACT, with only three items identified;
- During the 7-month period between October 2020 to April 2021, there were 841 strip searches conducted on women in prison at Mary Hutchins Women's Prison and the Risdon Prison Complex in Tasmania, with only 3 items identified;
- During the 7-month period October 2020 to April 2021, there were 1,477 strip searches conducted on women at the Adelaide Women's Prison and Adelaide Pre-release Centre in South Australia, with only 3 items identified.

In 2019, the Western Australian Inspector of Custodial Services found that strip-searching is harmful and 'ineffective' in identifying contraband, in its review of a staggering 900,000 incidents of strip-searches on people in custody over 5 years.[29] In 2014, the Queensland Ombudsman

[27] Human Rights Law Centre, 22 December 2020, Explainer: Routine strip searching of kids in prisons.
[28] See NSW Ombudsman, 13 May 2022, Strip searches in youth detention; and Inspector of Custodial Services NSW, November 2018, Use of Force, Separation, Segregation and Confinement in NSW Juvenile Justice Centres.
[29] Office of the Inspector of Custodial Services Western Australia, 18 April 2019, Strip searching practices in Western Australian prisons.

reported on women being strip-searched four times a day in the Townsville Women's Correctional Centre because they were prescribed a certain type of medication, finding the practice was unreasonable and unlawful.[30] The NSW Inspector of Custodial Services has repeatedly expressed concerns about the practice and lack of reporting of routine strip-searches, calling it 'troubling' and 'inconsistent with trauma-informed principles'.[31] Alarmingly, adult prisons in NSW do not maintain records of the number of strip searches.

State and territory laws should be amended to strictly prohibit routine strip searching and provide that a strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and there remains reasonable intelligence that the person is carrying dangerous contraband.

Lack of equivalent healthcare

Australia's so-called universal healthcare schemes Medicare and the Pharmaceutical Benefits Scheme are not available to people in prison under the Commonwealth Health Insurances Act 1973, in direct breach of Mandela Rule 24.

Prison health services are instead the responsibility of state and territory governments, with prison health services across jurisdictions being underfunded, often privatised, and manifestly inadequate. Access to routine, specialist, allied and culturally competent care is limited and subject to long wait times. This is compounded by the lack of access to the Pharmaceutical Benefits Scheme, which means that people in custody don't receive equitable access to appropriate medication regimes.

The federal government should grant an exemption under section 19(2) of the Health Insurance Act 1973 (Cth) to allow health care providers in prisons to claim Medicare and Pharmaceutical Benefits Scheme subsidies.

Hanging points

The removal of hanging points in all prison cells across the country was a recommendation of the 1991 report of the Royal Commission into Aboriginal Deaths in Custody. This recommendation has not yet been implemented in all jurisdictions.

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[30] Queensland Ombudsman, September 2014, The Strip Searching of Female Prisoners Report.
[31] Inspector of Custodial Services NSW, October 2020, Inspection report Mary Wade Correctional Centre, p20.

A 2021 Select Committee Inquiry by the NSW parliament into the high rates of First Nations people in custody and deaths in custody highlighted a lack of action on removing hanging points in cells across the prison system and serious under-resourcing of mental healthcare for people in custody. According to NSW Corrective Services, there is 'not a program of work to [remove hanging points from cells] across the board'.[32]

In its response to the Inquiry's report, the NSW government acknowledged: 'There are 12,000 cells in the adult system, most of which were constructed prior to the development of anti-ligature design standards', and noted its commitment of $6 million in the 2021-22 budget to remove hanging points in 400 cells.[33] With only 43 mental health screening beds for 12,500 incarcerated people, seriously ill people are being sent back to the general prison population due to lack of mental health beds and back into unsafe cells.[34]

State and territory governments must take immediate action to remove all hanging points from prison cells, consistent with the recommendations made by the Royal Commission.

Horrific Covid-19 prison conditions

The Covid-19 pandemic has seen people in prisons across Australia experience frightening outbreaks of the disease, reduced oversight of places of detention due to lockdowns, and increased risk of cruelty and neglect.Change The Record's 2020 report 'Critical Condition: the impact of Covid-19 policies, policing and prisons on First Nations communities' found increased use of prison lockdowns and solitary confinement in places of detention; forced quarantine of people entering prisons (including children); and reduced access to programs, education, family and legal visits across jurisdictions.[35]

Early in the pandemic, NSW legislated emergency Covid-related release powers, however these release powers have never been used, even at the height of outbreaks in facilities like Parklea Correctional Centre. Jurisdictions with existing powers to release people from prison at heightened risk of the virus also refused to do so.

People detained in over-crowded, understaffed prisons remain at risk from the virus and the stress, anxiety and demoralising tedium of pandemic-related restrictions and lockdowns.

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[32] NSW Legislative Council, 15 April 2021, Report of the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, p120.
[33] NSW government response to report of the above Select Committee, 13 October 2021, p3.
[34] NSW Legislative Council, op.cit., p110.
[35] Change the Record, April 2020, Critical Condition.

During the pandemic and beyond, state and territory governments must take steps to reduce the number of people placed at heightened risk of Covid-19 in prisons and ban the use of practices that may amount to solitary confinement as part of the public health response to the pandemic.

Extreme temperatures in prisons

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

In 2014, the average temperature at midnight in the summertime in un-airconditioned cells at Roebourne Regional Prison in the Pilbara was over 35 degrees celsius.[36] In 2020, the Western Australian Inspector of Custodial Services recommended air conditioning be installed at Roebourne, but this was dismissed by the Department of Justice as a low priority. In January 2022, Roebourne saw temperatures of more than 50 degrees celsius.[37]

In 2018, people incarcerated in the Alice Springs Correctional Centre were tear-gassed by prison guards after refusing to return to their cells due to extreme heat, as internal temperatures passed 40 degrees celsius.[38] As the climate crisis worsens and temperatures become more extreme for longer periods of time, such inhumane conditions will put people who are incarcerated at significant risk of physical harm, distress and abuse.

Facilities of particular concern

Banksia Hill Youth Detention Centre in Western Australia

The Banksia Hill Youth Detention Centre in Perth, Western Australia, has been the subject of extensive criticism by the Office of the Inspector of Custodial Services, the Western Australian Children's Commissioner, service providers, the Western Australian Aboriginal Legal Service, children who have been detained in the facility and their families. In July 2022, the prison again made national headlines after extensive use of solitary confinement and poor conditions lead to unrest, increases in incidents of self-harm and attempted suicide, and a Western Australian

[36] Office of the Inspector of Custodial Services Western Australia, 18 September 2015, report into Thermal conditions of prison cells, 'Dangerous conditions'.
[37] NITV, 14 January 2022, WA govt lashed after prisoners swelter through Australia's hottest day on record.
[38] Australian Broadcasting Corporation, 31 December 2018, Call for air-conditioners in 'inhumane' cells after outback heatwave triggers prison riot.

Government decision to transfer 17 children from the youth prison to Casuarina Prison - a maximum security adult prison.

The Office of the Inspector of Custodial Services's 2022 report into Banksia Hill gives a comprehensive overview of the cruel, inhumane and degrading treatment of children in the facility, poor conditions and increasing risk of a child death in custody or suicide.

We particularly note the following findings from the Inspector's April 2022 unscheduled visit:

- children detained in understaffed and "inhumane" conditions;
- 24 suicide attempts between January and November 2021;
- boys who had formed a suicide pact while being detained under observation in the prison's 'intensive support unit';
- several days in November 2021 where four children spent less than an hour outside of their cells, in breach of the Havana Rules, Beijing Rules and Mandela Rules;
- children who had pre-existing trauma and cognitive impairments being denied meaningful interaction, resulting in more instances of self-harm; and
- the use of adult prison officers to "assist" in maintaining order and security.

The conditions in Banksia Hill are clearly unacceptable. However, the decision to move traumatised children from this facility into a maximum security adult prison is also unacceptable and in breach of a number of international legal instruments.[39]

Recommendations:

1. That the SPT visit both these facilities on their visit to Australia and call for the closure of Banksia Hill Youth Detention Centre and a nation-wide prohibition of the detention of children in adult facilities;
2. Urge Commonwealth, state and territory governments to raise the minimum age of criminal responsibility to at least 14 years old and invest in community-based alternatives to youth detention.

[39] *Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations Standard Minimum Rules for the Administration of Juvenile Justice*; and *United Nations Standard Minimum Rules for the Treatment of Prisoners*

Don Dale and Alice Springs Youth Detention Centre in the Northern Territory

Six years ago, the Don Dale Royal Commission uncovered evidence of widespread abuse, mistreatment and conditions that breached numerous international legal instruments. Disappointingly, those conditions remain largely unchanged and recent law reform decisions made by the Northern Territory Government have seen the number of Aboriginal children in detention increase 200% since May 2020. In just the last six months, children in Northern Territory youth prisons have harmed themselves 37 times and threatened to take their own lives over 50 times.

The Children's Commissioner of the Northern Territory has specifically raised concerns in the last month regarding:

- The 'continual and systematic use of extended lockdowns'[40] and their contribution to declining mental health and wellbeing in children;
- The increase in the number of children being detained as a result of the Northern Territory Government's decision to introduce dangerous and discriminatory bail laws;
- Consistent staff shortages resulting in restricted access to education and medical care for children in detention;[41]
- Children being detained in their cells for up to 23 hours and 45 minutes per day in breach of the Havana Rules, Beijing Rules and Mandela Rules.[42]

Recommendations:

3. That the SPT visit both these facilities on their visit to Australia and calls for the closure of the Alice Springs Youth Detention Centre and the Don Dale Youth Detention Centre, neither of which are fit for purpose; and
4. Urge Commonwealth, state and territory governments to raise the minimum age of criminal responsibility to at least 14 years old and invest in community-based alternatives to youth prisons.

[40] Australian Broadcasting Corporation, 10 June 2022, Self-harm incidents inside Don Dale spark intervention of NT Children's Commissioner.
[41] NT News, January 2022, Youth detention numbers double, republished 17/1/22 by Office of the Children's Commissioner NT via Facebook.
[42] Ibid.

Watchhouses and adult prisons detaining children: South Australia, Queensland and Victoria

There have been consistent reports over many years (including this year) of overcrowded juvenile facilities resulting in children being detained for days, sometimes weeks, in police watchhouses or adult custodial facilities. We urge the SPT to investigate the detention of children in adult facilities. For example:

- In March 2022, it was reported that children were being held for multiple nights in Cairns (QLD) police watchhouses with four children sleeping per cell;[43]
- We are aware that in the first quarter of last year two children under the age of 14 years old were held for over a week in Queensland police watchhouses;[44] and
- Children were detained in South Australian adult prison cells on 2030 separate occasions from 2020 - 2021, with Aboriginal young people accounting for 44 per cent of the admissions.[45]

As highlighted above, children continue to be transferred to and detained in adult prisons in breach of a number of international legal instruments[46] including:

- 17 children were transferred from the Banksia youth justice facility in Western Australia to a maximum security adult prison (Casuarina prison); and
- 2 children were transferred from youth justice to the private, maximum security Port Phillip Prison in Victoria earlier this year.

Recommendations:

5. That the SPT visit adult facilities where children are routinely detained; and

[43] Herald Sun, 3 March 2022, Kids crowd into watch house cells as juvi system hits max capacity.
[44] Queensland Parliament, Answer to Question on Notice No. 659 asked on 21 May 2021.
[45] Office of the Guardian for Children and Young People South Australia, June 2022, Final Report of the South Australian Dual Involved Project.
[46] Instruments include the *Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations Standard Minimum Rules for the Administration of Juvenile Justice*; and *United Nations Standard Minimum Rules for the Treatment of Prisoners.*

6. Urge all governments to implement and adhere to a prohibition on detaining children in adult facilities (including the use of mechanisms whereby adult facilities are “declared” youth justice facilities in name alone to avoid legal penalties for their use).