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)

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Chapter 4: Justice

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EXECUTIVE SUMMARY

This submission is made by the Australian OPCAT Network to the United Nations

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 ű ĸŜ / ƨ Ƴ Ƴ ƨ ƴ ø ŜI· f ű ĸ h Ƴ ōdzŘ ă Ƴ I· ƴ Ω ă NJŜƎdz f I· ű ƛ ƨ ƴ ă Ř ƨ ƴ the NPM role or powers and not all states intend to introduce SPT legislation.
- The Australian Government intends to initially limit the scoLJŜ ƨ ŧ ű ĸŜ b t a Ω ă ø to a self- ƛ ŘŜ ƴ ű ƛ ŧ ƛ ŜŘ f ƛ ă ű ƨ ŧ ΨLJNJ ƛ Ƴ I·NJ è LJ f I·ŎŜ ă ƨ ŧ ŘŜ ű Ŝ ƴ
- 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

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 ΨLJNJŜØŜ ý ƛ Ø ŝnclŭdĭngl·ƎŜΩ

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.

¢K ƛ ă Ŏ ƨ dz f Ř l· f ă ƨ ƛ yŎ f dzŘŜ ă dzōY ƛ ă ă ƛ ƨ y ă ƨ y Ψ[2] NJŜ f ĝ Ø t a y ý ŕ dz Y l· y NJ ƛ on existing legislation[3], or providing training to those who are concerned with people deprived of their liberty.[4]

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

²K ƛ f Ŝ ű ŕ Ŝ ƛ y ă ú ƛ ű dz ú ƛ ƨ y l· f ŧ ƨ NJ Y l· ú ƨ ŧ ú ŕ Ŝ b t a ƛ ă f Ŝ ŧ ú ú ƨ ú ŕ Ŝ { u 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.[5]

[1] Subcommittee omm r-3(r)9(W* nBTd)] TO595.2he4( )r(a)-20(l1(C)3)(N)u 12 Tf1 0 0 1 444.19 490.22 Tm0 g0 G[( )] TJETQ EM(m

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.

X

> ¢KŜ YˆŜŎKl·yˇ ƛ ă Yˆ Ω ă f ŜƎl· f ŦNJl·YˆŜ ø ƨNJ ļ ă K ƨ dz f Ř-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.[1]

We also l·Ŏ ļ yˇ ƨ ø f ŜŘƎŜ ű KŜ {t¢ Ω ă Ŧ ƛ yˇ Ř ƛ thyˇ Ŧ ă ŝ f ă ŝ e ó KŜ NJŝ 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.[2]

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 yˇ ƨ ű Ŝ ă ű Kl· ű 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 AustNJl· f ƛ l·Φ Ω

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

¢KŜ{t¢ ǎ ØŜNJè Ŏ f ŜĬ·NJ ű KĬ· ú Ψ ű KŜ{ ű Ĭ· ű Ŝ ă K ƨ dz f Řincluding any
suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional
Protocol, which are within its jurisdiction X[and] should ensure that the NPM is able to
ŎĬ·NJNJè ƨ dz ú Ø ǎ ă ǎ ű ă ǎ y˝ ú KŜ Y˝ Ĭ· y˝ yŜNJ Ĭ· y˝Ř ø ǎ ű K ú KŜ ŦNJŜ¹ij dzŜ y˝Ŏè ú KĬ· ú ú KŜ

Choosing to take an incremental approach in early establishment is not of itself contentious.
The SPT has in fact ă ű Ĭ· ú ŜŘ Σ Ψ ǎ y˝ Ĭ· f f ă ǎ ű dzĬ· ú ǎ ƨ y˝ ă Σ ú KŜ y˝ Ĭ· ú ǎ ƨ y˝ Ĭ· f LJNJŜØŜ
be mindful of the principle of proportionality when determining its priorities and the focus
ƨŦ ǎ ű ă ø²The important point is that it

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

To date, formal civil society participation in the establishment of the NPM has been restricted to consultations with the Australian Human Rights Commission.[1] 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 ŜÈLJNJŜăăŜŘűKIűΨIůydzYōŜNJ2ŦăűIůlŜK2fŘŜNJăădzōYλűűŜ
be further consideration, engagement and consultation on the designation of the co-
ordinIűλyƎō2ŘèIůyŘλyNJŜfIűλ2yű2űKŜăűThéâbsenceNJλű2NJèbtaō2Ř
consultation and transparency around the NPM designation process has been profoundly concerning when we ǒ2yăλŘŜNJűKŜLJdzNJLJ2ăŜ2ŦŜÈűŜNJyctastheNJ2yλű2NJλyƎλă
ǒ2YYdzyéeyüsèΩyűű2űKŜăŜ2űKŜNJøλăŜǒf2ăŜŘŜyØλNJ2yYŜyűăΦΩ

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 űKIűwithXout 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 ōŜNJŜŘdzǒŜŘŜbΩ 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.[5,6]

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 !dzăűNJŜnsureλthat organizations of persons with disabilities can effectively engage in the establishment and work of the national preventive mechanismΩ[7]

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 IăIYIűűŜNJ2ŦLJNJλ2NJλűèű2ŘŜűŜNJYλyŜ!dzăűŖ

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

federal

[1] 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 [2] the Commonwealth immigration detention oversight counterpart, the Australian Human Rights Commission. An informant has said:

> [illegible] concerns. We have not found them easy to engage with.[4]

We urge the Commonwealth Ombudsman to consider the following words of the APT: [illegible] 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 [illegible][5]

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. [illegible] should be a matter of [illegible]

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

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

[2] Commonwealth Ombudsman,

OICS) KI·Ř õŜŜ ỿ I·LJLJ ƨ ƛ ỿ ú ŜŘ I· ă ú KŜ b t a ŧ ƨ NJ ² Ŝ ă ú ŜNJ ỿ ƒ ă t dz ă ú ƛ I· Ω ă ƨ dz ă ú ƛ 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.

TKŜ / ƨ Y Y ƨ ỿ ó ŜI· f ú K h Y ō dz Ř ă Y I· ỿ Ω ă . I· ă ă Ŝ k n ỿ ỿ ƨ ỿ ă ă Ŝ tă ă Y Ŝ ỿ ú

> 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.[1]

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

[1] 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

> ƨdzNJƛ ăŘƛŏű ƛƨ ƴˡ·ƴŘ ƛ ƴŏ f dzŘŜă ø ƛ űKƛ ƴ ƛ ű ă ăŏƨLJŜl·NJŜl· ă űKl· ű Y 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.[1]

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.

Ly ƛ ű ă ădzōϒ ƛ ă ă ƛ ƨ y ű ƨ ű ĸŜ !dz ă ű NJl· f ƛ ϑ ϒ ϒ ƛ ă ă ƛ ƨ y ă ű l· f ƛ ă ă ƛ ƨ y ă ű l· f ƛ ă ă ƛ ƨ y ă ű l· f

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 b t a Ω ă Ŏ ƨ Y LJ f ŜÈ ƛ y ă ű ƛ ű dz ű ƛ ƨ y l· f l·NJNJl· y ∃ŜY Ŝ y ű ă Φ

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.[2]

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.[3]

1.5 The National Preventive Mechanism and civil society engagement

We propose that ! dz ă ű NJl· f ƛ l·Ω ă should be formalising their relationships with Ŏ ƛ Ø ƛ f ă ƨ Ŏ ƛ Ŝ ű è Φ ¢KŜ ! t ¢ K ƛ ă ă y ⌊ ƨ ê ŜP ƨ ú K ű ƙ ŝ ŝ H t x Ω ă f ŜƎ ƛ ű ƛ Y l· Ŏ è l· y Ř ŧ ƨ NJ Ŝ y ƛ Y LJl· Ŏ ű ƨ ŧ ƛ ű ă LJNJŜ Ø Ŝ y ű ƛ Ø Ŝ ø ƨ NJ ⌊ Φ Ω

[1] 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

[2] 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

[3] Subcommittee on S9Subco7co75mF172.060839<0156911E>26<0176>14<019A0003>-9<037E>-6<004B>11<0057>-6<0012000

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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[1]
> 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[2]
> State authorities should encourage dialogue and better connectivity between the NPM and civil society[3]
> NPMs should take necessary steps to effectively increase their interaction with civil society in the performance of their work.[4]

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 ú ĸŜ Ψ¢oXoperation established between the national preventive mechanism and civil ă ƨŏ ƛ Ŝ ú è ƨ NJƎI·[5]ƴ ƛ Î I· ú ƛ ƨ ƴ ă Φ Ω

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 ƴ ŜŜŘ ú ƨ Ŝ ƴ ă dzNJŜ ú ĸŜNJŜ ƛ ă Ψŏ f ŜI·NJ Ř ƛ Ø ƛ ă ƛ ƨ ƴ I· ƴ Ř NJ ƨ f Ŝ ă I· ƴ Ř NJŜ ă LJ ƨ ƴ ă ƛ ō ƛ f ƛ ú ƛ Ŝ ă Ω I· ƴ Ř Ψ ă LJŜŏ ƛ I· f LJNJ ƨ ŏŜŘdzNJŜ ă NJŜƎI·NJŘ ă ĸI·NJ ƛ ƴƎ Ω ă Ķ ƨ dz f Ř ƛ ú Ŝ ă ú I·ō f ƛ ă ķ[6] ă dzŏK ŦƨNJ Y I· f I·NJNJI· ƴƎŜ

The ± ƛ ŏ ú ƨ NJ ƛ I· ƴ h Y ōdzŘ ă Y I· ƴ Ω ă ú NJ ƛ I· f ht / ! ¢ Y ƨ ƴ ƛ ú ƨ NJ ƛ ƴƎ ƨŦ ă ƨ f ƛ ú I·N detention settings,[7] has successfully demonstrated that a combination of these two forms of

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[1] 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)

[2] 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

[3] 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)

[4] 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

[5] 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

[6] 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

[7] 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 ŧdzNJ ű KŜNJ ƛ ƴ Ø ƨ f ØŜŘ ƛ ƴ ű KŜ b t a Ω ă ø ƨ NJ ļ ű KNJ ƨ dzƎK LJIˑNJ ű ƛ ǒ ƛ LJIˑ ű ƛ inspection tools and materials, choosing themes and locations, and other preventative work, as determined by the NPM.[1]

To this list, we would also l·ŘŘ ΨŜ È LJŜNJ ű ă ō è Ŝ, Ē a ŭ ŭ ŭ

Rebecca Minty, Involving civil society in preventing ill treatment in detention: Ύ ι · È ƛ Ύ ƛ ă ƛ ƴ ∃ h t / ! ¢ Ω ă ₴ LJLJ ₴ NJ ű dz ƴ ƛ ű Æ u s t r a l i a n J o u r n a l o f f ƛ l · ó н л м ф *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 ςShowcasing learning from

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

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 ž NJ ƛ Ǝ ƛ y˝ Σ l· Ψ NJŜ Ǝ ƛ ž y˝ l· f LJ NJ ž Ŏ ž dz y˝ ű NJ è Ω Σ ž NJ Ŝ f ă Ŝ ø KŜ NJŜ ú during medical appointments, court and tribunal appearances and religious ceremonies (for people otherwise subject to immigration detention) ƛ y˝ ű NJl· y˝ ă ƛ ú ž NJ Ψ ƛ y˝ ű ŜNJ y˝ l· ú ƛ ž y˝ l· nt Ω Australian territory, KŜ LJ ž ƛ y˝ ú ă ž including at airports and seaports, and including in situations where people are not immigration cleared[1]

² KŜ ű KŜNJ ! dz ă ű NJl· f ƛ l·Ω ă ƨ ō f ƛ ∃l· ű ƛ ƨ y˝ ă ǒ ƨ y˝ ű ƛ y˝ dzŜ l·ŧ ű ŜNJ l· ă è f dz Y˝ ă ŜŜ ļ

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. 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 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-

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

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.[1] 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.[2] Mandatory immigration detention has also been found to be lawful regardless of whether conditions are harsh and inhumane.[3]

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 adŘ ƛ ű ƛ Ƨ ƴ Σ ű ĸŜ h Ƴ ōdzŘ ă Ƴ l· ƴ ĸl· ă ƴ Ƨ l·dz ű ĸ Ƨ NJ ƛ ű è ű Ƨ ƛ ƴ lj dz ƛ NJŜ ƛ ƴ ű Ƨ l·
detention until they have been detained for a period of more than two years.[4]

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.[5]

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.

(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 ∃NJ≥dzγŘă ƛ γŏ f dzŘƛ γ∃Σ ōdzú γ≥ú f ƛΥ ƛúŜŘú≥Σ ø KŜNJŜUJŜŬŒNJĂQ≥Σγ KIă I·
and where there is a risk that the person would engage in conduct that would pose a threat to the safety of the community.[2]

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.[3]

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

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

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

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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 [illegible] reasonable grounds, that it is safe for the person to be in [illegible]. Any restraint on the liberty of a person that results from the exercise of these [illegible] but very limited circumstances.[2]

2.3 Historical snapshot of immigration detention[3]

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.[4]

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).[5]

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.

Figure 1: Number of people in immigration detention facilities (September 2014 – September 2019)[1]

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

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.[1] The

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).[1] 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),[2] but others do exist throughout the country (see section 2.5.5).

No.	Facility	Location	Detainees[3]
IDCs			
1.	Villawood	Sydney, NSW	486
2.	Yongah Hill	The small town of Northam, WA	369
3.	Perth	Perth, WA	24
4.	Christmas Island[4]	Christmas Island, Australian territory in the Indian Ocean south of Java, Indonesia	0
ITAs			
5.	Melbourne (MITA)	Melbourne, VIC	303
6.	Brisbane (BITA)	Brisbane, QLD	232
7.	Adelaide	Adelaide, SA	25
APODs			
8.	Ψ a l· ƛ ƴ f l· ƴŘ ! t h5	Unknown	6
9.	Christmas Island	Christmas Island	4
		Total	1449

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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 ς 05) and inspecting (since 2010 ς11) 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.[1] In assuming its new role as NPM, the Ombudsman has demonstrated a commendable commitment to assessing its level of OPCAT compliance and readiness.[2] However, some concerns about its capacity to fulfil this role in a fully

¢KŜ ΨKI·NJŘŜ y ƛ yƎΩ ƨŦŦI·ǒƛ f ƛ ű ƛŜă ƛ ă I· ű ű NJ ƛ ōdz ű ŜŘ ƛ y LJI·NJ ú ű ƨ ă ƛƎ y ƛŦƛ
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. TKNJŜŜŦI·ǒƛ f ƛ ű ƛŜă KI·ØŜ ōŜŜ y ΨKI·NJŘŜ y ŜŘΩ ű ƨ Y I· y I·ƎŜ ű KŜ ƛ y
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

health. Ω± ƛ ă ƛ ű ă ű ƨ LJ ƒ ł·ŏŜ ă ƨ ŦƟ ø ƨ NJ ă Ƙ ƛ LJ ƛ ƴ LJł·NJ ű ƛ ŏdz ƒ ł·NJ Ƙł·ØŜ ō ŜŜ ƴ ŘŜ ă ŏN
ŏ ƨ ϒ Ŧ ƨ NJ ű Ω Σ ł· ƴ Ř Ŝ ă ă Ŝ ƴ ű ƛ ł· t ű ƨ Ŝ ƴ ă dzNJ ƛ ƴ ∃ LJ ŜƨƨeƟ ƒ ł· ŝ ƛ ƴ ŘŜ ű Ŝ ƴ ű ƛ ƨ ƴ ŏł·
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 ςapplied to all people in detention irrespective of risk ςis 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 Ŧ ƨ NJ Ψ è Ŝł·NJ ă Ω Φ

One example of past good practice was the Directed Persons Program, through which certain trusted individ

2.5.2 Inadequate provision of health care

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The Migration Act and Migration Regulations do not include any provisions requiring that reasonable health care be 72.02-10(o)7(v)-7(i)109-8(i)10(o)7()-45(y)-doviudiuon Req-14(l)105(y)-t(o)7enov

-5(a)8Mir 11Mo-8ir -5(a)8-5(es)-86(l)10 il8(es)-8to-8ii(r)7(u)6(i)2(l)10fo6iro-47r-5(a)8i.000008869

> 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

(ii) Women

Concerns have been raised about the case management of women in detention with mental KŜl· f ű K Ŏ ƨ y˝ŎŜNJ y˝ ă Σ ƛ y˝Ŏ f dzŘ ƛ yƎ ű K ƨ ă Ŝ ƨ y˝ ΨK ƛ ƎK ø l· ű ŎK Ω ƨ NJ ă dz ƛ Ŏ ƛ ŘŜ ø l·
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.[1] In detention, various concerns have been raised about mismanagement or inappropriate responses to mental health issues, including a Ψ ŦI· ƛ f dzNJŜ ű ƨ LJNJ ƨ LJŜNJ f è LJK è
and psychologically treat suicidal asylum seekers following unsuccessful attempts at life, I·Ŧ ű ŜNJ ø K ƛ ŎK y˝Ŝ ø ƛ y˝ ƨ dzNJ ƛ Ŝ ă I·NJŜ ă dz ă ű I· ƛ y˝ŜŘ Ω Φ

According to the Australian Border Deaths Database, there were eleven deaths in immigration detention[3] in Australia in the six-year period from 2014 to 2019, of which six I·NJŜ NJŜŎ ƨ NJŘŜŘ I· ă ă dz ƛ Ŏ ƛ ŘŜ ă ƨ NJ ă dz ă LJŜŎ ű ŜŘ ă dz ƛ Ŏ ƛ ŘŜ ă Σ I· y˝Ř I· ŦdzNJ ű K ŜNJ ű ø
ă dz ă LJ ƛ Ŏ ƛ ƨ dz ă Ω ƨ NJ Ř ƨ dy˝ƨ, ű ƨ ƛ ø I· ŎŜ ă ƨ.[4] 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 p

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
NJŝ ű dzNJ y˜ŜŘ ú Σ ₴ NJ l·NJŝ ₴ y˜ ΨNJŝ ű dzNJ y˜ LJl· ű Ќ ø l· è ă Ω ó l· y˜Ř ŧŜl·NJ ōŝ ƛ y˜∃ ŘŜLJ ₴ NJ
Asylum seekers with histories of torture and trauma are pae08.984 3(k)- 34(p)5(a)-2rly a 2(r)9(ed)9( )(l)10(y

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.[1]

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.

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 ō ƨ NJ ƴ ƛ ƴ ŘŜ ű Ŝ ƴ ű ƛ ƨ ƴ ƛ ƴ a l·NJŎK н л м y l· ƴŘ Ŏ ƨ ƴ ű ƛ ƴ dzŜ ă ű ƨ NJ mother, an unlawful non-citizen. The WGAD concluded that the detention of the child is Ψ ƛ ƴ Ŏ ƨ ƴ ű NJl·ØŜ ƴ ű ƛ ƨ ƴ ƨ ŦI·NJ ű ƛ Ŏ f Ŝ ă o l· ƴŘ ф ƨ ŦűKŜ ώL / / tw б Σ ƛ ă l·NJō ƛ ű NJl·NJ ès ƴ ű ƛ ƴ ű ƛ ƴ ű ƛ

In October 2019, two UN Special Rapporteurs requested that Australia transfer the family into a community setting arrangement within 30 days.[1] The Australian Government refused to do so, and has insisted that the family will remain on Christmas Island until their immigration matter is resolved.[2] 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 i

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.[1]

2.5.6 Offshore processing[2]

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 be[illegible] 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 sect[illegible] monthly update (from October 2019) reported that, as at 31 October 2019, no one was living in the Nauru RPC.[3]

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

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.[1] 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).[2] 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

!dzăűNJl·fălΩă ăYYăΞNJl·ůlimits 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 thosŝŏ2dzyˇűNJăŝăúű2ΨŝÈl·Yˇă l·řYˇăyˇăăűNJl·ůăØŝl·ŏúă2yă2Ŧ!dzăűNJl·fălyˇ2ŦăŏălfăbutyˇřűKŝăNJŏ2y 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.[4] Visitor oversight is limited when detention centres are located remotely and when visitor access is restricted.

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[1] A thirteenth man, Sayed Mirwais Rohani, committed suicide in Brisbane in 2019, after being transferred from

write a complaint, they will start persecuting you, then they will start to dehumanise
è ƨdzΣ ű ƨ ű ĸŜLJƨ ƛ ƴ ú ű ĸl· ú è ƨdz ă ű l·NJ ú ű ƨ ĸlúŜè ƨdzNJ ƨ ø ƴ ŜÈ ƛ ă
centres arŜ l· ă ű l· ű Ŝ ø ƛ ű ĸ ƛ ƴ l· ă ű l· ű ŜΩΦ

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 çor unwillingness to accept feedback from çthe 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.[2]

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 ŧƨ f f ƨ ø ƛ ƴƎ ű ĸŜ NJŜ f ŜI· ă ŜŜ ŧ ĸŜ *Forgotten Children* report on its National Inquiry into Children in Immigration 5Ŝ ű Ŝ ƴ ú ƛ ƨ ƴ l· ƴŘ ƨ ű ĸŜNJ Ô ƨ Y Y Ŝ ƴ ú ă ÔNJ ƛ ű ƛ Ôl· f ƨŧ !dz ă ű N
policy.[3] 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:

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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
sÔ ƨ LJŜ ƨŧ !dz ă ű NJl· f ƛ l·Ω ă ƛ ƴ ű ŜNJ ƴ l· ű ƛ ƨ ƴ l· f ĸÔ . 6 %

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)
- detiew of
- the importance of eliminating arbion28( )6000858d3on and4( )6(a)-20 G[of the the SP(on(i)10(n)5(g)

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
K ź ú ź Ǒl·NJNJ è ź dz ú Ψ ƛ ƴ Ǿ ź f dz ƴ ú l·NJ è Ω ú NJl· ƴ ă ŦŜNJ ă l· ƴŘ ŘŜLJ ź NJ ú l·
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[1]
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

[1] In view of the fact that ΨŘŜLJNJ ƛ Ø l· ú ƛ ź ƴ ź Ŧ f ƛ ōŜNJ ú è ƛ ă ŘŜLJNJ ƛ Ø l· ú ƛ ź ƴ ź Ŧ Ǒ K ƛ f ŘK ź ź Ř Ω Σ l· ƴ
purely migration-related reasons can never be considered a measure of last resort or in the best interests of
ú KŜ Ǒ K ƛ f Ř l· ƴŘ ă Kl· f f Σ ú KŜNJŜŦ ź NJŜ Σ l· f ø l· è ral ØŜ eJNJź, 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

CHAPTER 3: DETENTION OF PEOPLE WITH DISABILITY

Key points

As per international standards, ! dz ă ű NJ Jl mplÁ n ta on of OPCAT should cover places of detention more broadly, including both disability- ă LJŜŐ ăitiĞs of detention and mainstream settings in which people with disability may be deprived of their liberty and/or have specific experiences of detention.

! dz ă ű NJl· f ƛ l· Ω ă b t a ă Ƙ ƨ dz f Ř l· ă ă dz Y Ŝ NJŜ ă LJ ƨ y ă ƛ ō ƛ f ƛ ű

with disability are held in justice detention facilities with little to no oversight and assessment and provision of disability support[1].

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

activity. For forensic patients, whether or not ςand when ςthey 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.

a new form of institutionalisation, which carries over many highly institutionalised practices l· y˝Ř Ŏdz f ű ł dzNJŜ ă Φ Ω

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.[2] 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 NJŜ∃ ƛ ƨ y˝l· f l·NJŜl· ă Σ Ŝ È l·ŎŜNJōl· ú ƛ y˝∃ ű KŜ ŎK ƛ f ŘΩ ă NJŜ f ƛ l· y˝ŎŜ ƨ y˝ ă ŎK ƨ ƨ f ă ú l 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, ΨLJNJ ƨ ú ŜŎ ú ƛ y˝∃ l·∃l· ƛ ÿ ƨ ă NJ ƨ ł ƨ l· NJ ú ƨ ƨ Ω ă ŝ ŧ ă ŦNJŜ lj dzŜ y˝ ú f è dz ă ŜŘ ú ƨ ƨ dz ă ú ƛ ŦèNJl· y˝∃Ŝ ƨ ŦNJŜ ă LJ ƨ y˝ ă Ŝ ă ú ƨ ΨŎKl· f f Ŝ y˝∃ inquiries into the education and experience of students with disability in Australia have documented significant human rights breaches, including the use of restrictive practices.[3]
This is of particular concern in light of the lack of regula4.011E01ce m school envilar(an)-15(d)5( )6(ev)igg14

with the elements of the CRPD which oblige States Parties to respond to violence.[1] As Lea et al note:[2]

> 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(Fu)4(r)1>.ye che ly lith thcuniationsattving to tue(f)5( )] TJETQ

seclusion.[1] By impacting on perception, restricting movement and subduing behaviour, chemical restrl· ǎ y˝ ű l· f ă ƨ ǎ Y LJl·ǒ ű ă ƨ y˝ ű ĸŝ Ψ₮NJŝŝŘ ƨ Y Ω l· y˝Ř Ψǒ ƨ Y Ydz y˝ ǎ ű è LJ with disability.[2]

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:[3]

> Typically, restraint and seclusion practices are framed as therapeutic and protective ōŝǒl·dz ă Ŝ ű ĸŝ LJŝNJ ă ƨ y˝ ø ǎ ű K Ř ǎ ă l·ō ǎ f ǎ ű è ǎ ă ǎŘŝ y˝ ű ǎŮŝŘ l· ă ű ĸŝ ă ƨ d ű dzNJ y˝ ű ĸŝ f ŝƎ ǎ ű ǎ Y l· ű Ŝ ă ǎ ű Ŝ ƨ₮ ǎ y˝ ű ŜNJØŝ y˝ ű ǎ ű ƨ Ω y˝ ø Ŝa ű ƨ ń NJ ŝ y˝ ƨ Ǝ Ø Ŝ NJ Σ 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.

[1] wŝ ă ű NJl· ǎ y˝ ű ǒl· y˝ ōŝ Y ŝǒKl· y˝ ǎ ǒl· f ó Ψdz ă Ŝ ƨ₮ l· ŘŝØ ǎ ǒŝ ű ƨ LJNJŝØŝ y˝ ű ƨ NJ NJŝ ă ű NJ ǎ ǒ ű l· LJŝNJ ă LJdzNJLJ ƨ ă Ŝ ƨ₮ ǎ y˝ bdzŝ y˝ ǒ ǎ y˝ Ǝ l· LJŝNJ ă ƨ y˝ Ω ă ōŝKl·Ø ǎ ƨ dzNJ Ω ú Σ LJK è ă ǎǒl· f ó Ψ LJNJ ƨ f ƨ y˝ ƎŝŘ dz

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* Ø ƨ f dz y˜ ű l·NJ ƛ f è l·Ř Y˜ ƛ ű ű ŜŘ K ƛ Y˜ ă Ŝ f ŧ ű ƨ l· K ƨ ă LJ ƛ ű l· f Ω ă L
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 Ψ ű NJŜl· ű Y˜ Ŝ y˜ ű Ω ƛ y˜ Ø ƨ f ØŜŘ ƨ y˜ f è Y˜ ŜŘ ƛ ǒl· ű ƛ ƨ y˜ l· y˜ Ř y˜ ƨ ű l· NJŜ

disciplinary measure. Further, Méndez recommends that children in detention be provided with purposeful, out-ovided

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

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.

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

”

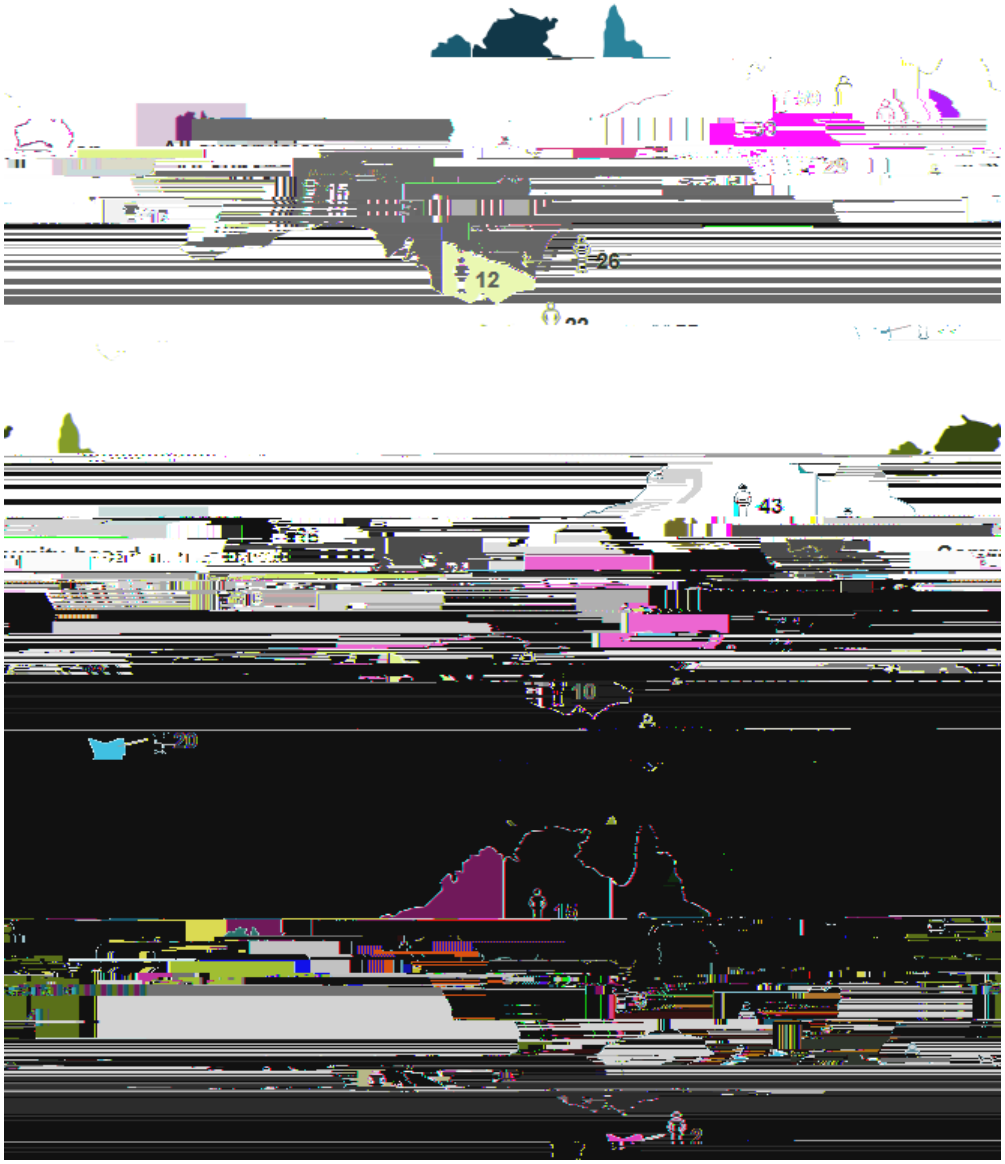

Figure 8: Young people aged 10–17 under supervision on an average day – by supervision type, in each state and territory, 2017–18 (numbers per 10,000)[1]

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[2]

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.

[1] Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (2019) Cat. no. JUV 129. Canberra: AIHW

[2] 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.[1]

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.[2] 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-12(eW* nBT/F2 12 Tf1 3-5(l)10(e)4(en)3(t)-4(er)7(ed)-16( )6(y)-6(

Youthjustice

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.

Policecustody

¢ĸŜNJŜ lꞏNJŜ o c c ΨLJ2sꞏƛŏŜf2ĭ[on cells (where people are held for equal to, or ∃NJŜlꞏ ű ŜNJ ű ĸlꞏ ƴ Σ н п Ƙ2dzNJ ă ú Ω Φ b{ ² ó ø ƛ ű Ƙ м м н ú lꞏ ƴŘ ± ƛ ů ű Ƨ NJ ƛ lꞏ ó ø ƛ ű 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.[1]

! f f ă ű lꞏ ű Ŝ ă lꞏ ƴŘ ű ŜNJNJ ƛ ű Ƨ NJ ƛ Ŝ ă ĸlꞏØŜ ó lꞏ ű f ŜIꞏ ă ű ú lꞏ ƴ hϒ ōdzŘ ă ϒ lꞏ ƴ Ω ă Ƨ Ŧ LJNJ ƛ ă Ƨ ƴ ă Σ lꞏ ƴŘ lꞏ ů K ƛ f ŘNJŜ ƴ Ω ă ů Ƨ ϒ ϒ ƛ ă ă ƛ Ƨ ƴŜNJ ĸ ∃dzlꞏNJŘ ƛ lꞏ ƴ ø ƛ ű Ƙ Ƨ Ø Ŝ 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

!dz ă ű NJlꞏ f ƛ lꞏ Ω ă LJNJ ƛ ă Ƨ ƴ ă lꞏNJŜ ϒ lꞏ ƴ lꞏ∃ŜŘ lꞏ ű ă ű lꞏ ű Ŝ lꞏ ƴŘ ű ŜNJNJ ƛ ű Ƨ NJ è f ŜØŜ 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.

a lꞏ ƴ è Ƨ Ŧ !dz ă ű NJlꞏ f ƛ Ω ă LJNJ ƛ ă Ƨ ƴ ă

experiencing complex grief and trauma issues, Indigenous peoples,[1] 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: [2]

- 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[3]
- 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, [4] notes ă ƛ Ǝ y ƛ ŧ ƛ ȏ l· y ú ƛ ă ă dzŜ ă NJŜ f l· ú ŠŘ ú ƨ ú KŜ ŘŜ ă ƛ 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
- y ƨ ú ŜY LJ f ƨ è ƛ y Ǝ ú KŜ LJNJ ƛ -ÿŠ ÿ ƛ ú LJNJ ŠŘ ă ƨ ŧ LJ LJNJ ă ă è ă ú KŜ LJNJ ă ă ú ŠŘ 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

[1] Commonwealth of Australia *Royal Commission on Aboriginal Deaths in Custody, National Report vols 1-5,* (1991) Canberra: Commonwealth of Australia

[2]

ú KŜ dz ă Ŝ ƨ ŦΨ ŏ ƨ ƨ ļ ƛ Ŝ ŏ dz ú ú Ŝ the design of police, court house 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[1]

a lack of appropriately designed, health and wellbeing focused environments for people with physical, psychosocial, grief and trauma, substance misuse issues

l· f l·ŏ ļ ƨ Ŧ Ψ ú ƛ ŷ dz ŷ ŭ 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)[3]

prisoners living in extreme temperatures (particularly in Western Australia and the Northern Territory)[4]

a lack of women-focused facilities for females

a lack of appropriate, de-

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.[1]

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 [illegible] around 50 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-[illegible] female incarceration and family violence, with 65 per cent of women in prison themselves victims of family violence.[2] [3]

The Victorian Ombudsman criticised the extensive and routine use of strip searching in the [illegible] rejected these criticisms, subsequent changes were made in the practice.[4] 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 [illegible] 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-[illegible] previously they were not on a lock-down regime.

- ‡ 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 su

- 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

and accountability ς

The Victorian Government plans to build a new youth justice prison at Cherry Creek, for completion in 2021.[1] Modifications to these plans were announced in September 2019, with the Minister for Correcti ƨ ƴ ă ă ű ł· ú ƛ ƴƎ Y Ψ¢KŜ ŘŜ ă ƛ Ǝ ƴ ŏKł· ƴƎŜ ă ł· ű /KŜNJNJ è /NJŜŜ ļ ø 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 NJŜØ ƛ Ş ø ă Ω Φ

In 2019, the Victorian Ombudsman conducted an investigation into the implementation of OPCAT in Victoria.[3] The report explored different NPM models and made a recommendation for an appropriate NPM for Victoria. The report also presents findings from the h Y ōdzŘ ă Y ł· ƴ Ω ă-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.

[1] engage.vic.gov.au/youthjusticecentre
[2] www.premier.vic.gov.au/building-a-safer-and-more-secure-youth-justice-system
[3] 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

The inspections observed several factors that increase the risk of ill-treatment at each facility. The risks observed at Port Phillip Prison include:

- ǻ ƴ ă ű ł· ƴǒŝ ă ƨ Ŧèƨdzƴ∃LJŝƨLJ f ŝ ōŝ ǻ ƴ∃ ă dzōƨŝǒű ű ƨ ΨLJNJƨ f ƨ ƴ∃ŝŘ ă 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)
- èƨdzƴ∃LJŝƨLJ f ŝ NJŝ Y ł· ǻ ƴ ǻ ƴ∃ ǻ ƴ Ψ ă ŝLJł·NJł· ű ǻ ƨ ƴ Ω ŘŝăLJǻ ű ŝ ű Ƙŝ ǻ NJ 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
- ǒƨ ƴŦǻ ƴŝ Y ŝ ƴ ű Σ ł· ƴŘ ł·LJLJŝł·NJŝŘ ű ƨ ōŝ Ψ ă ŝLJł·NJł· ű ǻ ƨ ƴ Ω ǿ ǻ ű Ƙ ƨdz ű ă ł· u regulation 27 of the Regulations
- recent 2019 amendments to the Regulations authorise the indefinite solitary
- ǒƨ ƴŦǻ ƴŝ Y ŝ ƴ ű ƨŦLJNJ ǻ ă ƨ ƴŝNJ ă ΨŦƨNJ ű Ƙŝ Y ł· ƴł·∃ŝ Y ŝ ƴ ű Σ ∃ ƨ ƨŘ ƨNJŘŝN 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
- ű Ƙŝ Y ł· ű ŝNJ ǻ ł· f ǒƨ ƴŘ ǻ ű ǻ ƨ ƴ ă ƨŦ/Ƙł·NJ f ƨ ű ű ŝ ¦ ƴ ǻ ű ó ű Ƙŝ Ψ a ł· ƴł·∃ŝ Y ŝ y 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
- ǒƨ ƴ ă ǻŘŝNJł· ű ǻ ƨ ƴ ł· ă ű ƨ ǿƘŝ ű ƘŝNJ ł· ƴŘ Ƙ ƨ ǿ ł· è ƨdz ƴ∃ LJŝNJ ă ƨ ƴ Ω ă Y ŝ y 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 tNJ ǻ ă *Charter for Disciplinary Officers*
- ű Ƙł· ú ű Ƙŝ tNJ ǻ ă ƨ ƴ Ω ă Ψ± ǻ ƨNJ ł· ŝ ∃è w ƨdz ǒ ǻ ƨ ŝ Y ł· ƴ ű ƨ ă ǻ ű ǻ Ǿŝ ǻ ƴ ǻ ű ǻ ł· ł· ű Ƙŝ tNJ ǻ ă ƨ ƴ Ω ă Ψ ǻ ƨNJ ł· ŝ ∃è w ƨdz ǒ ǻ ƨ ŝ Y ł· ƴ ű ƨ ă ǻ ű ǻ Ǿŝ ǻ ƴ ǻ ű ǻ ł· ł· occasion exceeded 23 hours, and does not have a clear basis under the *Corrections Act 1986* (Vic) or the Regulations
- ű Ƙł· ú ű Ƙŝ Ψ ƨNJdz ƴ NJŝł· ă Ω ǻ ƴ ă ƨ Y ŝ dz ƴ ǻ ű ă Ŧł· f f ă Ƙ ƨNJ ú ƨŦ ű Ƙŝ ǻ ƴ ú ŝNJ standards applicable to exercise and recreation in custodial settings, namely rule 23(2) of the Mandela Rules
- ű Ƙŝ NJ ƨdz ú ǻ ƴ ŝ dz ă ŝ ƨŦNJŝ ă ű NJł· ǻ ƴ ú ă dz ƴŘŝNJ ł· Ψ Ƙł· ƴŘǒdzŦŦ NJŝ∃ ǻ Y ŝ Ω Σ ł·ō 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:

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.[1]

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 ŏK ƛ f ŘNJŝ ƴ Ω ă ŘŝØŝ f ₴ LJ Ƴ ŝ ƴ ű Φ

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.[2] However, in March 2019, th2(fF10 12 T-9(n)563(o)76i2-(4( )6(o)5Qq0.

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 ű Kl· ű Ψ è ƨ dz ƴƎ LJŜ ƨ LJ f Ŝ ƛ ƴ ŘŜ ű Ŝ ƴ ű ƛ ƨ ƴ l·NJŜ K ƨ dztŏeŜŘhatƴ ă Ŝ0dzNJŜ Σ ű K$ support their rehabilitation and receive the help, guidance and structure necessary to stop ŧdz ű dzNJŜ ƨ ŦŦŜ ƴŘ ƛ ƴƎ Φ Ω

Victoria: 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
Impact of overcrowding on girls and young women
Inadequate cultural and religious awareness and service provision.[1]

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.[2]

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.[3] Furthermore, people may be in police custody and at serious risk of harm during strip searches, for example, at festivals.[4]

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

> Xcasual disregard and at times mistreatment of a vulnerable woman in police custody X[and] excessive force used against three women in the public foyer of the Ballarat Police Station XThe investigation also highlighted shortcomings in a number of Victoria Police policies and practices including in relation to probity around LJNJ Y ű ƛ ų ă Σ ƛ y ű ŜNJØŜ y ű ƛ ų ă ø ĸŜ y l· y ų ŤŭŝpUJĸĸcě Y dz f ű ƛ LJ with strip search policy.[5]

[1] CCYP Annual report: ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf
[2] 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
[3] 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>
[4] Grewcock M. and Sentas V. Rethinking Strip Searches bD9d-5(hes)9( )-11(b.000001 0 0q0.000008869 0 595)>> BDC q0.000RP (3

watchhouse procedures, rarely if ever with any consequences for the individuals involved. Some of these include: Ms Dhu (WA),[1] Mr Doomagee (Qld)[2] and Mr Briscoe (NT).[3]

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

  and, in this regard, constitutes cruel, inhuman or degrading treatment.
- Federal regulation of the use of restrictive practices is inadequate: it fails to spell outof (t)-4(y)l reg

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 ŦƨdzƳŘ Ƴƨ ΨLJNJƨŐŜăă ƛƳLJfl·ŐŜ űƨ ŘŜűŜNJYƛƳŜΣ Ŝă0l·fl·űŜl·ƳŘNJŜLJƨNJűLJƨăăƛōfŜƛƳŐƛŘŜƳűăƨŦŜfŘŜNJl·ōdzŜfŘŜNJl·ōdzăŜNJŜLJƨNJűăōŜ.ƛ 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.[2]

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, -12().)-4(-2Qq0 1 7-.00008869 0)0 G[(C)-6(y)7(d12(s)44(v)7(e)8(d

impose stronger penalties for).-2gnificant

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.[1] Furthermore, the inquiries found that staff had failed to report the use of such practices, contrary to mandatory reporting requirements.[2] 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.[3] 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

> 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.[1]

It is our view that the poor oversight and inadequate regulation of restrictive practices in !dz ă ű NJI· f ƛ I·Ω ă NJŜ ă ƛŘŜ ƴ ű ƛ I· f I·ƎŜŘŏI·NJŜ ŦI·ŏ ƛ f ƛ ű ƛŜ ă ĸŜ ƛƎK ú Ŝ ƴ ă ű ĸŜ NJ ƛ ă 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

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

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.

6.2.2 Damage from deficit discourse

5 ƛ ă ŏ ƨ dzNJ ă Ŝ ł ō ƨ dz ű ĸŜł f ű ĸ ł y ř ă ƨ ŏ ƛ ł f ƛ y Ŝ lj dz ƛ ű è Ψ∃ł LJ ă Ω ĸł ă LJŜNJ ă ƛ ă
apportioned responsibility on Aboriginal and Torres Strait Islander people as having a genetic cultural predisposition to illness, as well as apathy and negligence.[1] 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.[2] Governments fail to address contributing socioeconomic factors[3] and systemic racism in healthcare.[4]

t ƨ f ƛ ŏ ƛ Ŝ ă Ψ ŏ ƨ y ű ƛ y dzŜ ű ƨ ōŜ Y ł ŘŜ ŧ ƨ NJ ł y ř ű ƨ Σ NJł ű ĸŜNJ ű ĸł y ø ƛ ű ĸ Σ ! ō ƨ
L ă f ł y ŘŜNJ LJŜ ƨ LJ f Ŝ Ω Σ NJŜ ă dz f ű ƛ y ∃ ƛ y ű ĸŜ Ŏ e o p l e s n o w a z ŜŘ t h e p a s t dz∃ł ű ƛ ƨ y ƨ
It is the experience of Aboriginal and Torres Strait Islander leaders that recommendations for system reform are consistently ignored,[6] as have been recommendations arising, for example, from the 1991 report of the Royal Commission into Aboriginal Deaths in Custody some 30 years ago.[7] 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 ςnot merely an event.[8] 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.[9] 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,[10]

from the general community, just as protectionist and assimilationist policies in the period from 1890 to the 1960s did.[1]

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[2] are regularly described as even higher now.[3] 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.[4]

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.[5] However, this has not meant that the laws are necessarily for the benefit of Aboriginal people. For instance, the Federal Government enacted legislation çsuch as the *Northern Territory National Emergency Response Act 2007* (Cth) çthat 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.[6] 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).[7]

This reality also reflects the former and short-lived policy era of integration (1967 ç1972) in which Aboriginal and Torres Strait Islander people were to access mainstream services, with

Islander Commission (ATSIC). It rec ƨ Ǝ ƴ ƛ ă ŜŘ C ƛ NJ ă ű tŜ ƨ LJ f Ŝ ă Ω dz ƴ ƛ lj dzŜ LJ f ł·ŎŜ ƛ ƴ Ψ social and political system X it also legitimised an approach that acknowledged difference ƨ ƴ ű ĶŜ ōł· ă ƛ ă ƨ ŦŜ lj dzł· f ƛ ű è Ω Φ

ł ƨ ǿŜØŜNJ Σ !¢{Ł/ ǿł· ă ł·ō ƨ f ƛ ă ĶŜŘ ƛ ƴ н л л p ƛ ƴ ű ĶŜ Ψ ƴ ƨ NJ ƴ ƛ ł ă ł· ű ƛ ƨ ƴ Ω actions related to Aboriginal and Torres Strait Islander health and social services into general government services.[2] Little investment in the development of the community-controlled sector has occurred despite evidence for the greater success of these services.[3]

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.[4]

¢ ƨ ŘŁ· è Σ !ō ƨ NJ ƛ Ǝ ƛ ƴ ł· f ł· ƴŘ ¢ ƨ NJNJŜ ă { ű NJł· ƛ ű Ł ă f ł· ƴŘŜNJ LJŜ ƨ LJ f Ŝ ă Ω Ŝ È LJŜNJ ƛ mainstream services are frequent, both as service users[5] as well as staff.[6] The Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar has been listening to !ō ƨ NJ ƛ Ǝ ƛ ƴ ł· f ǿ ƨ ϒŜ ƴ ł· ƴŘ Ǝ ƛ NJ f ă ł·ŎNJ ƨ ă ă !dz ă ű NJł· f ƛ ł· ł· ă LJł·NJ ű ƨ ŦŭĶŜ Ψ ² 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.[7] 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[8]
> 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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[1] 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
[2] Sullivan (2011) ibid
[3] 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
[4] United Nations. *United Nations Declaration on the Rights of Indigenous Peoples* Geneva (2008), 4
[5] Paradies Y. & Cunningham J. The DRUID study: Racism and self-assessed health status in an indigenous population. *BMC Public Health,* (2012) 12(1), 131
[6] NSW Public Service Commission. People matter employee survey (2019) www.psc.nsw.gov.au/reports---data/people-matter-employee-survey
[7] www.humanrights.gov.au/about/news/commissioner-june-oscar-shares-personal-experiences-racism-senate-committee
[8] 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

Aboriginal and Torres Strait Islander people who are incarcerated have health care needs related to alcohol and other drugs.[1] 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.[2] 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-

In 2017, the Royal Commission into the Detention and Protection of Children in the Northern Territory revealed Ψ ă è ă ú ê ¥ ˆ Č ˛ ł d ż N Ê ¥ Ω that ΨΨ occurred over many 015D > ears w 517 2 8 6 9 no ˛ d he hig 8 6 9 he s Ż Ś Ê ă Ω failures w 517 2 r ˛ ¥ ă ú ˆ Ł Ú Č ż ú ę ˆ Ω ł

Indigenous men. This is based on data from the *Guardian* ÿ Ŝ ø ă ƨ dz Ď e a t ĥ s ú n d e
Ř l · ű l · ō l · ă Ŝ Σ ø K ƛ Ŏ K l · f ă ƨ ă K ƨ ø Ŝ Ř ű K l · ű Σ Ψ Ŏ

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.[1]

6.3.4 Incarceration of Indigenous women and children

According to a 2016 report by the Australian Institute of Health and Welfare (AIHW), !ō ƨ NJ ǎ ∃ ǎ ƴ l· t ø ƨ Y Ŝ ƴ Σ l· t ű Ƙ ƨ dz∃K Y l· ʅ ǎ ƴ∃ dzLJ l· ă Y l· t t LJNJ ƨ LJ ƨ NJ ű ǎ ƨ ƴ ƨ 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.[2]

position.[1] 1n 2019, the Western Australian Government promised to abolish the practice of detaining for the non-LJI· è Y Ŝ y ű 2 ŦŦ ƛ y Ŝ ă I·Ŧ ű ŜNJ a ă ƀ Ƙ ƌ ƍ ƒ ƙ ƚ ƛ ƞ ƠŘŜ translated into practice.[2]

Increase in minor offences

Common offences for Indigenous women are related to assault and traffic.[3] 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.[4] It is estimated that over 80 per cent of Aboriginal women in prison are mothers.[5]

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).[6] 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.

[1] www.coronerscourt.wa.gov.au/I/inquest_into_the_death_of_ms_dhu.aspx
[2] www.sbs.com.au/nitv/nitv-news/article/2020/01/08/noongar-mother-locked-unpaid-fines-months-after-reforms-package-introduced
[3] pdfs.semanticscholar.org/a4ef/6b4dfe73de60c3347ee5ab7a568ea47da5e6.pdf
[4] Jones J., Wilson M., Sullivan E., Atkinson L., Gilles M., Simpson P. L. et al0 G.92 reW* nBT/F2 10.08 Tf1 0 0 1 75.384 135.38 T8 1

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 /K ƚ ŘNJŝ ƴ Ω ă / ƨ dzNJ ű ă ŀNJŝ ƚ ƛ ţ ŝ ƚ è ű ŝ ƨ ƴ ƨ ŝ ƚ ŀ ŀ ŀ

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 mu

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 çand upon release from çAustralian 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.[1] 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 çand upon release from çAustralian 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 /ƨ Ƴ Ƴ ƛ ă ă ƛ ƨ ƴ Ω ă t l· ű Ƙ ø l· è ă ú ƨ ₩ dz ă ú ƛ Ŏ Ŝ ƛ ƴ lj dz. ƛ T h e C o v e r d r e ø t ƛ Ř Ŝ ă l· ō f dz Ŝ 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.

[1] Finlay, S., Williams, M., Sweet, M., McInerney, M. & Ward, M. (2016). #JustJustice: Tackling the over-incarceration of Aboriginal and Torres Strait TBT1 0 0k0 A24ury

A possibility that could deliver reduced imprisonment more quickly is reform of some of the