



Australian  
Human Rights  
Commission

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# Current issues in prison management

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Submission to United Nations Special Rapporteur on Torture

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16 November 2023

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## 1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to provide this submission to the United Nations Special Rapporteur on Torture’s consultation on her fourth report focusing on current issues and good practices in the management of prisons, including pre-trial detention facilities.<sup>1</sup>
2. The Commission is Australia’s National Human Rights Institution, with recognised independent status and roles in United Nations human rights fora. The Commission’s purpose is to provide independent and impartial services to promote and protect human rights and fundamental freedoms.
3. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia’s human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.
4. From the outset, the Commission wishes to stress that due to time constraints, this submission provides a summary of some issues of concern within Australia; and does not constitute an in-depth assessment covering every aspect relevant to the Special Rapporteur’s thematic investigation.

## 2 Adult custodial corrections system

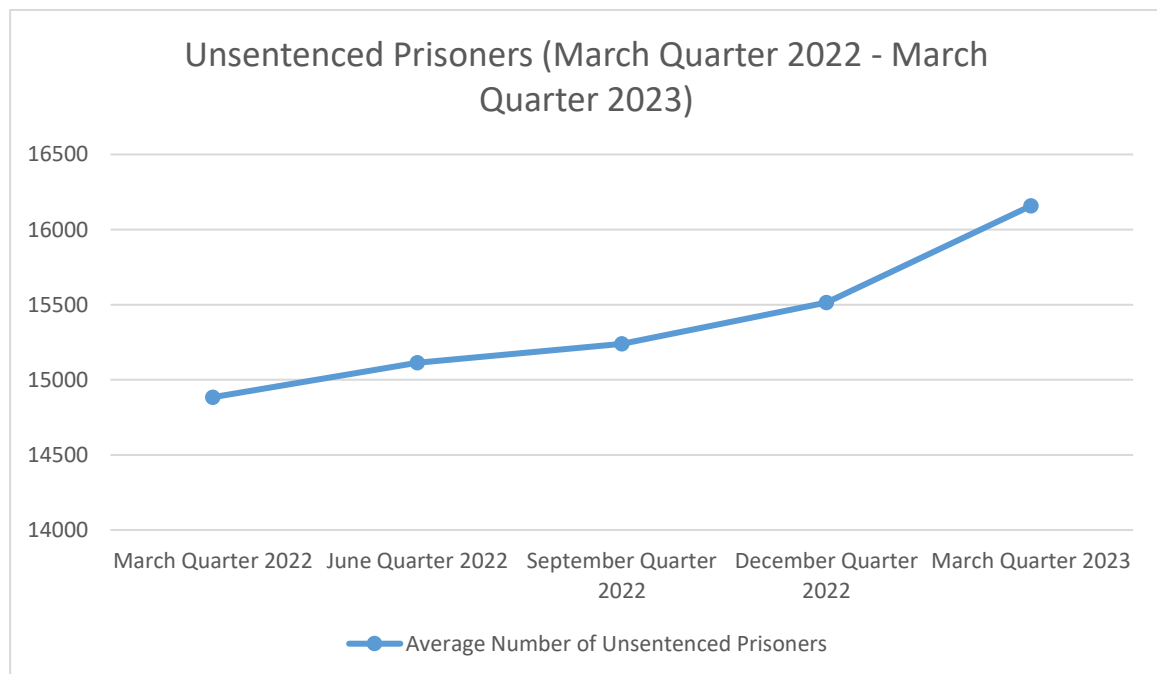
5. In December 2022 the Cultural Review of the Adult Custodial Corrections System (Victoria) reported that:

While much has changed in corrections environments in the last few decades, they remain, in part, places that are influenced by a punitive orientation and that can be devastatingly unsafe both for the staff who work there and the people in custody who live there.<sup>2</sup>

6. The Commission supports this observation, adding that it is equally applicable in all other Australian jurisdictions. As previously noted in the Commission's *Wiyi Yani U Thangani (Women's Voices) Report*:

Prisons impose rigid rules and absolute obedience enforced by authority figures; allow only controlled and supervised access to family, services and support networks; and create environments in which criticism and belittling of prisoners is normalised.<sup>3</sup>

### 2.1 High numbers of incarceration



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7. The Commission is concerned about the high numbers of people incarcerated in Australian prisons overall and, in particular, unsentenced prisoners. In the first quarter of 2023, the Australian Bureau of Statistics reported there were 41,833 persons in custody, up 2% from the final quarter of 2022.<sup>5</sup> The rate of

unsentenced prisoners also rose by 4% for the quarter to 16,158 (39% of the total prison population).<sup>6</sup>

8. The Western Australian Inspector of Custodial Services has reported that the daily average unsentenced population in Western Australia has progressively increased from 18% of the daily average detention population in 2011 to nearly 31% in 2022, despite a decrease in the total detention population over the past decade.<sup>7</sup> Consequently, many unsentenced prisoners are placed in prisons intended for sentenced prisoners. For example, Casuarina Prison has seen a 358% increase in the number of unsentenced prisoners placed there, Broome Regional Prison (256%), Greenough Regional Prison (189%), Albany Regional Prison (99%) and Bunbury Regional Prison (99%).<sup>8</sup>
9. The New South Wales Inspector of Custodial Services has likewise characterised the upward trend in unsentenced prisoners in New South Wales as ‘remain[ing] stubbornly high in both adult and youth justice facilities’.<sup>9</sup>
10. The Tasmanian Inspector of Custodial Services has reported a 21% increase in the number of people imprisoned between June 2022 and June 2023.<sup>10</sup> The Inspector has observed that the increasing numbers are, in part, contributed to by the increasing number of prisoners who are eligible for parole but not released due to not having suitable accommodation.<sup>11</sup>

## **2.2 Limited opportunities for rehabilitation and preparation for release**

11. The Cultural Review of the Adult Custodial Corrections System (Victoria) has noted that:

Creating a custodial environment that provides opportunities for people to build pathways and skills that will interrupt the cycle of offending is squarely in the community interest and in line with a long-term preventive response to crime. This can only be achieved in a safe environment that treats people with dignity, respect and prioritises rehabilitation and return to community life.<sup>12</sup>
12. Despite a shift towards rehabilitative models in recent decades, the Commission remains greatly concerned about the lack of appropriate services and programs in Australian prisons tailored to the diverse needs of the prison population. Our *Wiyi Yani U Thangani (Women’s Voices) Report* consultations, for example, found ‘many women and girls in incarceration reported a lack of available services, restricted access to existing services and a substandard level of care provided by services within prisons and detention centres’.<sup>13</sup>

13. The Australian Capital Territory Inspector of Correctional Services has reported concern that '[e]xtended lock-ins and staff shortages'<sup>14</sup> have resulted in a 'lack of meaningful activities [at the Alexander Maconochie Centre, which] had the potential to contribute to unrest, and significantly limited rehabilitation and preparation for release'.<sup>15</sup> In its *Healthy Prison Review 2022*, the Inspector noted 'many detainees have no routine or daily responsibilities and as a result lack motivation to participate in their own rehabilitation and preparation for release. There is little incentive for people to get out of bed and participate in daily activities.'<sup>16</sup>
14. The New South Wales Inspector of Custodial Services has reported that the COVID-19 pandemic has continued to cause significant impacts, including to the delivery of services and programs to people in custody and to staff shortages.<sup>17</sup> Likewise, the Victorian Ombudsman has also noted '[s]taff shortages across the corrections sector continue to have an ongoing impact',<sup>18</sup> including reduced out of cell hours, family contact and affecting services such as meal options and laundry.
15. The Western Australian Inspector of Custodial Services has also noted that 'the most common issue that [they] are seeing across all facilities that [they] visit or inspect is the impact of staffing shortages'.<sup>19</sup> These shortages have invariably resulted in 'reduced or cancelled activities such as: employment, recreation, education, visits and programs'.<sup>20</sup> The Inspector notes that as of May 2023, there were 1,835 prisoners who collectively had been assessed as requiring 3,440 offending-related treatment programs. However, only 35% of these programs had been completed.<sup>21</sup>

## 2.3 First Nations overrepresentation

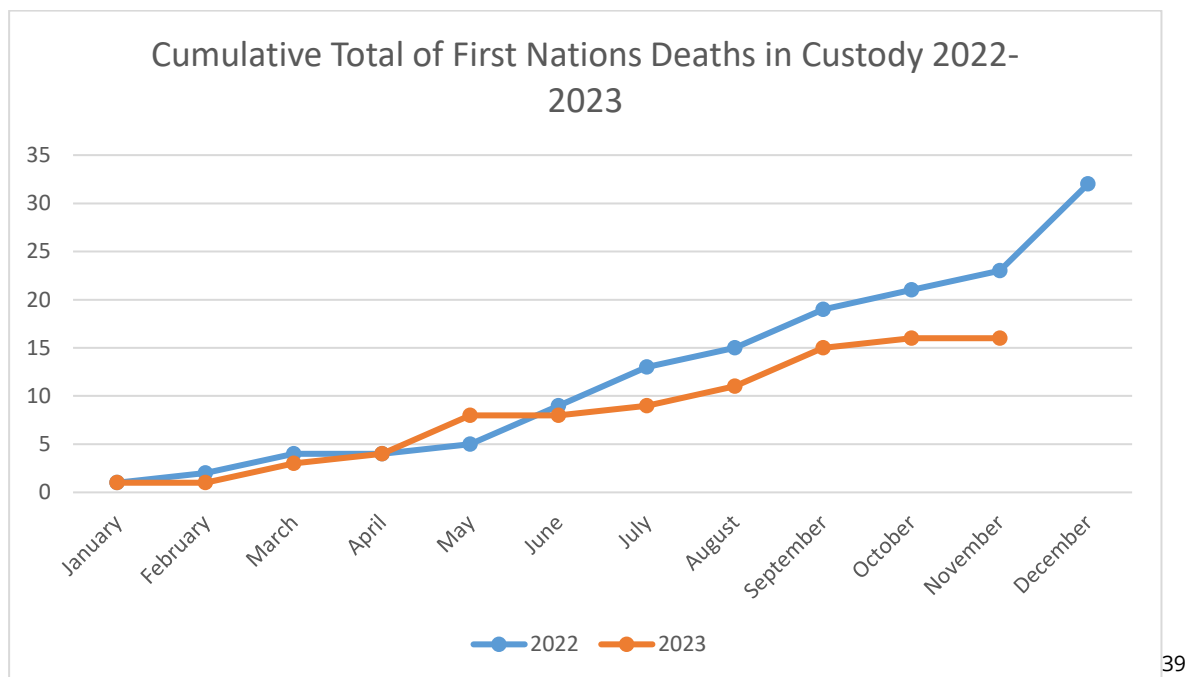
16. First Nations people continue to be significantly overrepresented in prisons in Australia. The Royal Commission into Violence, Abuse, Neglect & Exploitation (Disability Royal Commission) recently reported that the 'over-representation of First Nations Australians with cognitive impairment in the criminal justice system is a national crisis'.<sup>22</sup>
17. Reasons for over-incarceration of First Nations people include both legal and policy factors, and socio-economic factors such as cultural displacement, trauma and grief, alcohol and other drug misuse, cognitive disabilities and poor health and living conditions.<sup>23</sup> Institutional racism, and a 'legacy of dispossession, marginalisation and exclusion have created conditions in which First Nations peoples experience serious and multiple forms' of disadvantage and inequality.<sup>24</sup>

18. The Productivity Commission has reported that First Nations people represented 31% of the daily average prison population over 2021–2022,<sup>25</sup> despite making up only 3.2% of the total Australian population.<sup>26</sup> The Productivity Commission has also reported that the *Closing the Gap* target with respect to First Nations overincarceration is not on track to be met, with worsening metrics against the age-standardised rate in New South Wales, Queensland, South Australia, and the Northern Territory.<sup>27</sup>
19. The Western Australian Inspector of Custodial Services has reported that the number of unsentenced First Nations prisoners in Western Australia (51.3% for 2022) has now exceeded non-First Nations prisoners.<sup>28</sup> Between 2011–2016 unsentenced First Nations prisoners represented between 46–47% of the total population, however the reasons for the surge are unclear to the Inspector.<sup>29</sup>
20. The Tasmanian Inspector of Custodial Services has reported that in 2022, 22.7% of Tasmania’s prison population were First Nations people.<sup>30</sup> Despite this, there is only one First Nations identified or targeted position in the Tasmanian Prison Service, which was reported in the *Annual Report 2022–23* as being ‘vacant and has been for some time’.<sup>31</sup> The Inspector noted that more needs to be done to provide First Nations prisoners with appropriate support.<sup>32</sup> Relevantly, the Cultural Review of the Adult Custodial Corrections System (Victoria) noted there is a high level of attrition among First Nations staff because they ‘experience distinct challenges including racism, discrimination, high workloads, heavy cultural load, and burnout’.<sup>33</sup>
21. In August 2023, the *Yoorook Justice Report* (Victoria) found widespread failings in Victoria’s prison system towards First Nations people, including over-imprisonment; deaths in custody; racism and discrimination; lack of knowledge and implementation of human and cultural rights, and widespread violations of those rights; disconnection of First Peoples prisoners from family, kin and culture; a strong and disproportionate emphasis on punishment rather than rehabilitation and healing; lack of independent oversight; and lack of support on release (often into homelessness) leading to reoffending.<sup>34</sup>
22. The incarceration of First Nations people has been described in the *Yoorook Justice Report* (Victoria) as ‘causing irreparable, lifelong harm to First Peoples’.<sup>35</sup> The Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia has additionally noted that ‘[p]rison has a symbolic significance in the lives of Aboriginal people as a reinforcement of the absolute power of the State. This contributes to feelings of vulnerability and powerlessness. Hope and the restoration of dignity is needed to change behaviours.’<sup>36</sup>

23. The Commission echoes this sentiment and continues to advocate that 'sustainable investments must be made into resourcing and supporting [First Nations] communities to lead, design, implement and evaluate the solutions they know work instead of investments into additional punitive measures such as policing and prison systems'.<sup>37</sup>

## 2.4 First Nations deaths in custody

24. The Australian Institute of Criminology reports that there have been 81 deaths in prison, police, and youth custody since 1 January 2023 (inclusive of 16 First Nations people).<sup>38</sup>



25. The number of First Nations deaths in custody since the Royal Commission into Aboriginal Deaths in Custody (RCADIC) currently totals 556.<sup>40</sup> The Australian Institute of Criminology has noted that the rate of First Nations deaths in custody 'has consistently been lower in the most recent 10-year period compared with the previous two decades'.<sup>41</sup>

26. Notwithstanding this trend, the Commission acknowledges that 'the regularity with which these [First Nations] deaths occur, and the publicity that attaches to them, especially when the death has been the result of misconduct, neglect or other egregious behaviours, breeds a deep fear of incarceration in the community'.<sup>42</sup>



27. The Commission also acknowledges the observation of the *Yoorook Justice Report* (Victoria), that 'First Peoples are dying at higher rates in custody not because they are more likely to die once they are in custody, but because of the staggering rates at which governments are arresting and jailing Aboriginal people'.<sup>43</sup>

28. Moreover, the Commission remains significantly concerned at what the *Yoorook Justice Report* (Victoria) has described as 'failures to implement recommendations made over many years and by many inquiries'.<sup>44</sup> As exemplified in a recent review of the Western Australian Inspector of Custodial Services into the implementation of Coronial recommendations:

it was hard not to form the view that in several cases the focus was more about closing the outstanding recommendation rather than implementing sustained change in a way that met the spirit and intent of the recommendation.<sup>45</sup>

29. In January 2023, the Victorian Coroner released its findings into the Inquest into the death of Veronica Nelson, an Aboriginal woman held in custody at the Dame Phyllis Frost Centre, Victoria. The coroner commented that, 'had the RCADIC recommendations been successfully implemented by the Government and its agencies, Veronica's passing would have been prevented'.<sup>46</sup> The Coroner also noted that, to date, the implementation of the RCADIC recommendations has 'achieved too much policy, and not enough change'.<sup>47</sup>

30. The Victorian Government has announced legislative and policy changes in response to recommendations made by the Victorian Coroner including:

- The decision to cease out-sourcing medical services for female prisoners to private health-care providers<sup>48</sup> – although the Commission notes that the Victorian Government has not decided to mirror this change in the men's prison system.
- Legislative reform to loosen requirements for bail in Victoria – although civil society groups have criticised these changes as failing to meet minimum human rights standards under the Victorian Charter.<sup>49</sup>

31. In July 2023, the Western Australian Coroner released its findings into the Inquest into the death of Stanly John Inman, an Aboriginal man held in custody at the Acacia Prison, Western Australia. The coroner commented that 'the overall quality of Mr Inman's supervision, treatment and care was of a lower standard than it should have been because his level of risk was not properly understood',<sup>50</sup> and that, 'had ... culturally safe care ... been available at Acacia, Mr Inman's life journey may well have been different'.<sup>51</sup>

32. In October 2023, 16-year-old Aboriginal youth, Cleveland Dodd, became the first death of a young person in Western Australian custody. A few months prior to his death, the Western Australian Inspector of Custodial Services had reported (June 2023) that the young people detained at Unit 18 at Casuarina Prison, had 'spent a considerable amount of time secured in their cell'.<sup>52</sup> In that same report the Inspector reiterated it had 'previously observed a correlation between extended time spent in cell and incidents of self-harm by young people'.<sup>53</sup>

## 2.5 Overrepresentation of people with disability

33. The Commission remains concerned about the high number of people with disability in Australian prisons. As noted by the Disability Royal Commission in October 2022, '[p]eople with intellectual, cognitive and psychosocial disabilities are overrepresented in the criminal justice system' and, 'are more likely to have difficulty coping with the prison environment and to experience a higher rate of comorbid mental health disorders and physical conditions ... increased risk of being disadvantaged and socially isolated... [and] also at higher risk of returning to custody'.<sup>54</sup>

34. In its *Final Report*, the Disability Royal Commission stated that:

It is clear from the evidence that the disproportionate rate of imprisonment of people with disability is not the result of any inherent causal relationship between disability and crime. Rather it reflects the disadvantages experienced by many people with disability, such as poverty, disrupted family backgrounds, family violence and other forms of abuse, misuse of drugs and alcohol, unstable housing and homelessness.<sup>55</sup>

35. The Disability Royal Commission assessed that approximately 40% of people entering prison in Australia have a mental health condition, and that people with cognitive disability who have more than one disability have the highest rates of contact with the criminal justice system.<sup>56</sup>

36. The Disability Royal Commission also noted that 'relatively little attention has been paid by governments to the disproportionate number of people with cognitive disability who are in custody'.<sup>57</sup> Governments generally relied heavily on self-reporting during face-to-face screening interviews and regarding First Nations prisoners, no agencies use a culturally-validated screening tool.<sup>58</sup>

37. Furthermore, the Disability Royal Commission also identified that no agencies 'collect or record adequate data about disability among their prison and youth detention populations. This means they cannot identify the prevalence, types and degree of disability among these populations, nor their support needs'.<sup>59</sup>

## 2.6 Fitness to be tried and indefinite detention

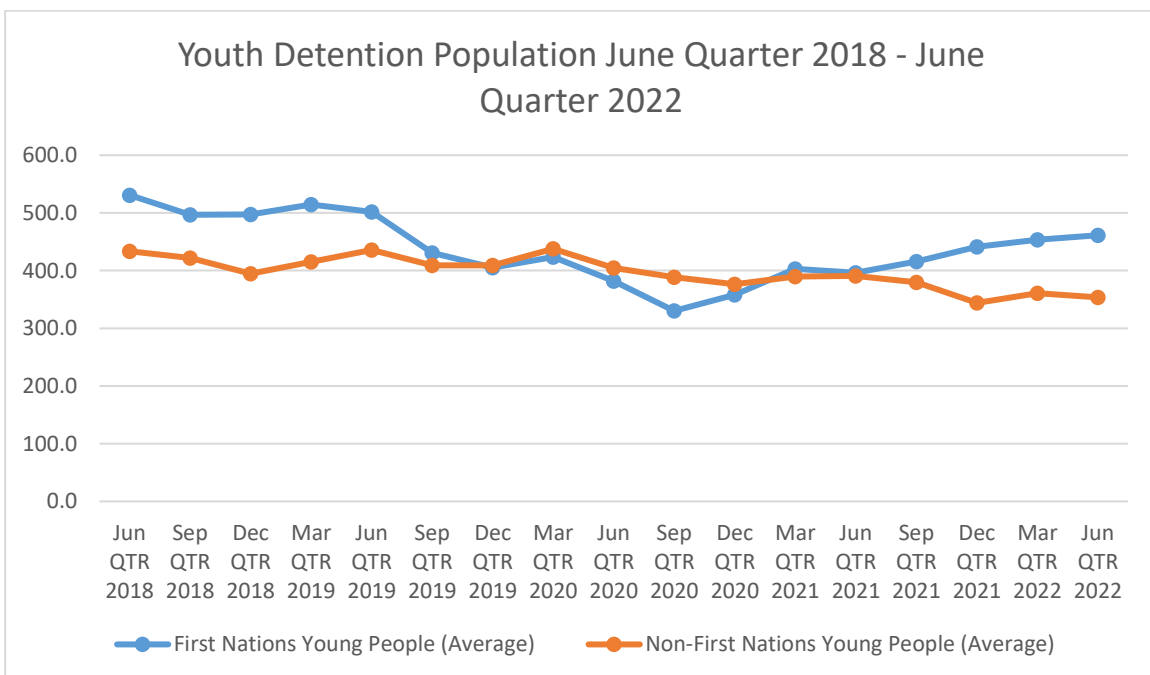
38. The Commission continues to be concerned by the lack of government action in repealing legislation and withdrawing policies and practices that can lead to the indefinite detention of unconvicted people, including children, with disability. Children with Foetal Alcohol Spectrum Disorders are at particular risk of being held in indefinite detention and are overrepresented in the juvenile justice system.<sup>60</sup> Little progress has been made in addressing the indefinite detention of people with disability who are assessed as unfit to stand trial or not guilty by reason of mental impairment. Indefinite detention was raised as a serious concern in the Concluding Observations of the Committee on the Rights of Persons with Disability review of Australia in 2019.<sup>61</sup>
39. A person who is found to be unfit to plead can spend a longer time in detention than if they pleaded guilty and were sentenced to imprisonment for the offence.<sup>62</sup> The Commission has previously reported on several cases where First Nations people who have been found unfit to plead have, as a result, been detained for a period longer than the maximum sentence if they had been found guilty.<sup>63</sup>
40. The Disability Royal Commission has stated that '[n]o forensic patient should be subjected to a period of detention beyond the period they would have been sentenced had they been found fit to plead and convicted of an offence.'<sup>64</sup>
41. The Disability Royal Commission also recommended that 'legislation should enshrine the principle that prison is a place of last resort for people who have been found unfit to plead or not guilty by reason of cognitive or mental health impairment, and only to be used if all possible alternative options have been investigated'.<sup>65</sup> In addition, the Disability Royal Commission noted that '[e]nding indefinite detention will require states and territories to provide step-down options for people in the forensic system to facilitate their progressive transition to less restrictive environments'.<sup>66</sup>

## 3 Youth justice system

42. The Commission holds grave concerns about the state of Australia's youth justice systems and has repeatedly called 'on all Australian governments to urgently address the national crisis in youth justice to prevent further harm to children in detention, and to reduce youth offending through effective systems of support'.<sup>67</sup> The Australian National Preventive Mechanism has

likewise encouraged ‘all governments to address the deeper issues pervading youth justice as a matter of urgency’.<sup>68</sup>

43. The National Children’s Commissioner is currently conducting a project to investigate opportunities for youth justice reform across Australia, based on evidence and the protection of human rights. The project’s findings and recommendations will be reported to the Commonwealth Attorney-General through a National Children’s Commissioner’s Statutory Report under section 46MB of the *Australian Human Rights Commission Act 1986* (Cth). This report will be presented to the Attorney-General in the first half of 2024.
44. This project is gathering information through a range of processes, including a review of existing literature and research, submissions from experts and organisations, and a series of stakeholder interviews and roundtables across Australia. It is also holding targeted, face-to-face consultations with children and young people at risk of, or in contact with, youth justice systems across the country.
45. As has been noted by the Disability Royal Commission, ‘[t]he overriding approach in youth detention should be person-centred and recovery-based rather than punitive. A rights-respecting approach is needed to provide humane conditions of detention.’<sup>69</sup> The Commission of Inquiry into Child Sexual Abuse has also stated ‘an effective youth detention system is one that provides children and young people in detention with timely access to high-quality, developmentally appropriate therapeutic supports, education and health care, as well as support to address the underlying causes of their offending’.<sup>70</sup>



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46. The Australian Institute of Health and Welfare reports that, on an average day in 2021–22, 18% (822) of young people aged 10 and over who were under youth justice supervision were in detention and almost 3 in 4 were unsentenced (76%). More than half (452 or 55%) of the young people in detention on an average day in 2021–22 were First Nations young people.<sup>72</sup>

### 3.1 Criminal age of responsibility

47. The Commission considers the minimum age of criminal responsibility in Australia, of 10 years, to be too low. While offending by young children should not go unaddressed, criminalising children for their behaviour at such a young age is ineffective at preventing future offending behaviour while also running counter to human rights.

48. Raising the age of criminal responsibility alone will not solve the problem of youth offending. However, it is hoped that raising the age will open the door to a new approach to dealing with the younger cohort of offenders, one that focuses on their welfare, and which aims to prevent future offending and reduce recidivism. As has been noted by the Australian and New Zealand Children's Commissioners and Guardians, what is required in Australia is for 'all jurisdictions to prioritise the twin actions of legislating to raise the age of criminal responsibility and implementing holistic systems of early intervention and diversion'.<sup>73</sup>

49. In March 2022, the Queensland Legislative Assembly's Community Support and Services Committee examined the *Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021*, which seeks to raise the age of criminal responsibility from 10 to 14. The Committee did not recommend the Bill be passed; but recommended the Queensland Government continue to work on raising the minimum age of criminal responsibility to 12.<sup>74</sup> The Bill subsequently failed to pass in August 2022.

50. In June 2022, the Tasmanian Government committed to raising the age of detention from 10 to 14 by the end of 2024.<sup>75</sup> In July 2023, the Commissioner for Children and Young People (Tasmania) released a Memorandum of Advice to the Tasmanian Government to assist the transition of raising the age and better promote the wellbeing of children.<sup>76</sup> In September 2023, the Commission of Inquiry into Child Sexual Abuse recommended the Tasmanian Government '[i]ntroduce legislation to increase the minimum age of criminal responsibility to 14 years, without exception'.<sup>77</sup>

51. In November 2022, the Northern Territory Legislative Assembly passed the *Criminal Code Amendment Act 2022*, that raised the age of criminal responsibility from 10 to 12, coming into effect on 1 August 2023.<sup>78</sup> The

amendment also expunges the criminal record of children under 12 years old who have a previous criminal history.<sup>79</sup>

52. In November 2022, in response to Counsel Assisting the Disability Royal Commission recommending raising the age, the Western Australian Government noted the recommendation ‘appears to be unnecessary given that this reform is being considered already by various jurisdictions, including Western Australia, via the Standing Council of Attorneys General’.<sup>80</sup> In the same month, the then Premier of Western Australia stated he did not ‘support raising it to 14 under any circumstances’.<sup>81</sup>
53. In December 2022, in response to Counsel Assisting the Disability Royal Commission recommending raising the age, the New South Wales Government noted it would await the report of the Age of Criminal Responsibility Working Group (Working Group).<sup>82</sup>
54. In February 2023, the Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia recommended the South Australian Government raise the minimum age of responsibility to 14.<sup>83</sup> In April 2023, the South Australian Government was quoted as stating it ‘continues to consider its position’ regarding raising the age of criminal responsibility.<sup>84</sup>
55. In April 2023, the Victorian Government announced plans to raise the age of criminal responsibility to 12 in late 2024, and then to 14 by 2027.<sup>85</sup> The Victorian Government signalled it would introduce legislation for the first stage of reform later this year.<sup>86</sup> The *Yoorook Justice Report (Victoria)* has however recommended the amendments be made more urgently and without exceptions; and to prohibit the detention of children under 16 years.<sup>87</sup>
56. In May 2023, the Australian Capital Territory Government tabled the *Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023*, that would see the age of criminal responsibility raised from 10 to 12 years old, and eventually to 14 years by 2025.<sup>88</sup> In July 2023, the Standing Committee on Justice and Community Safety recommended the Bill be passed.<sup>89</sup> The Bill passed in November 2023.<sup>90</sup>
57. In September 2023, the Standing Council of Attorneys-Generals noted the finalised report of the Age of Criminal Responsibility Working Group (Working Group) which focuses on how jurisdictions may support children diverted from the criminal justice system, particularly First Nations children.<sup>91</sup> The Standing Council of Attorneys-General agreed to return to the December 2023 meeting with a position or update on minimum age of criminal responsibility reform and agreed-in-principle that the Working Group’s report would be released publicly after the December meeting.<sup>92</sup>

58. Also in September 2023, the Disability Royal Commission recommended in its *Final Report* that 'States and territories that have not already done so should introduce legislation to raise the minimum age of criminal responsibility to 14'.<sup>93</sup>

### 3.2 Children and young people detained in adult facilities

59. In July 2022, 17 young people were moved from the Banksia Hill Youth Detention Centre in Western Australia to the adult Casuarina Prison due to 'disruptive behaviour at the youth detention centre'.<sup>94</sup> The Commission noted at that time that the move was 'not a safe or suitable option for these young people' and emphasised the need for immediate assessments for mental health concerns and appropriate, ongoing care.<sup>95</sup> In November 2022, the Western Australian Inspector of Custodial Services criticised the 'brazen overuse of lockdowns' on young people at Banksia Hill and Casuarina Prison while revealing his greatest fear was that a child would take their own life while in custody.<sup>96</sup> Following the death of Cleveland Dodd in October 2023, the Inspector noted he was 'shocked but ultimately not surprised' given warnings had been raised by advocates for over a year.<sup>97</sup>

60. On 24 August, the Queensland Parliament legislated retrospectively to permit the indefinite detention of children and young people in police watch houses by suspending the application of aspects of the Queensland's *Human Rights Act 2019*.<sup>98</sup> The changes came after the Queensland Government received advice from the state's Solicitor-General suggesting young people may have been illegally detained for years.<sup>99</sup>

61. In August 2023, the Queensland Family and Child Commission reported that there had been 8,030 admissions of children and young people into police watchhouses or stations in 2021–22.<sup>100</sup> The Queensland Human Rights Commission additionally noted that between 15 August 2022 and 15 February 2023, there were approximately 23 newly remanded children and young people per day, 32% of whom spent more than 24 hours in the watch house, and 8% of whom (or 332 individuals over a 6-month period) spent more than 7 days. There were 10 cases of young people being detained in watchhouses for more than a month.<sup>101</sup>

62. On 6 September 2023, members of the Australian National Preventive Mechanism issued a statement saying:

Police watch houses are not designed for long-term detention, and neither watch houses nor adult correctional facilities are designed for children. We are gravely concerned about the long-term and indefinite detention of

children in Queensland in these highly unsuitable environments, noting reports of extended periods in solitary confinement, no access to necessary child-appropriate facilities, and limited natural light, fresh air, exercise, and activity opportunities. Given the significant rates of incarceration of First Nations peoples of all ages, including in Queensland, we are also concerned the Queensland Government's actions will have a disproportionate impact on First Nations children, who already face other sustained, compounded challenges.<sup>102</sup>

63. In September 2023, Commission of Inquiry into Child Sexual Abuse criticised the Tasmanian Government on its approach of transferring young people from youth detention to adult prisons 'without any oversight from a court, tribunal, parole board or other independent body'.<sup>103</sup> The Commission of Inquiry into Child Sexual Abuse noted:

This approach fails to recognise the effects of trauma on children and young people's ability to regulate their emotions and behaviour. It risks children and young people who have been abused or who have experienced neglect or other adverse childhood experiences feeling as though others consider they are beyond help. It may have the effect of punishing them for the failure of the youth justice system to support them to address their challenges.<sup>104</sup>

64. In November 2023, the Victorian Commission for Children and Young People stated that 'children should not be held in the adult prison system' following an investigation into a matter where a young person had been effectively isolated for a period of time, with no access to education and restricted access to programs; and for a short period restricted access to water after the application of the spit hood despite having not been involved in a spitting incident.<sup>105</sup>

## **4 Detention practices of concern**

### **4.1 Use of spit hoods**

65. In a submission made to the Australian Federal Police, the Commission stated it considers the use of spit hoods 'to be inherently dehumanising and to pose significant risks of injury and even death' and 'recommends that Australia bans spit hoods by law, for all people of all ages and in all settings'.<sup>106</sup>

66. In August 2023, the Special Rapporteur on Torture, made the case for the prohibition of spit hoods, in her report on the global trade in equipment that can inflict torture and other cruel, inhuman or degrading treatment or punishment.<sup>107</sup> The Special Rapporteur remarked spit hoods 'carry serious risk



of causing anxiety, agitation, acute distress and disorientation to the detainees and can trigger other adverse reactions such as panic'.<sup>108</sup>

67. These comments from the Special Rapporteur come almost a year after Australia was cautioned by the UN Committee Against Torture, that 'the use of spit [hoods] was an archaic practice that amounted to ill-treatment'.<sup>109</sup> The UN Committee Against Torture then recommending that Australia 'take all necessary measures to end the use of spit hoods in all circumstances across all jurisdictions'.<sup>110</sup>
68. On 14 April 2023, the Australian Federal Police (and Australian Capital Territory Police) announced they would no longer use spit hoods 'after an internal review found the 'risk of using spithoods outweighed the benefits of their use, given they are ineffective in protecting against transmissible diseases'.<sup>111</sup>
69. The Commission welcomes these and other operational bans which other Australian policing forces have similarly enacted (apart from Western Australia).<sup>112</sup> However, in regard to the operational bans, the Northern Territory Ombudsman made the following observation in their most recent spit hood investigation:
- An administrative policy change sends a strong message to members about the direction the organisation currently wishes to take. However, the disadvantage with this approach is that subsequent social pressures or changes in key leadership roles have the potential to result in rapid reversal.<sup>113</sup>
70. The use of spit hoods is likewise prohibited in youth detention but despite progress in these areas they are still used in some Australian prisons. South Australia remains the only jurisdiction to have passed legislation to ban spit hoods in all circumstances.<sup>114</sup>
71. In November 2023, the Victorian Commission for Children and Young People, reported on the use of a spit hood on a child under the age of 18 in adult custody.<sup>115</sup> The Commission for Children and Young People found 'a range of significant concerns' including effective isolation of the young person, restricted access to water and the application of the spit hood despite the young person not having been involved in a spitting incident.<sup>116</sup>
72. The Commission also remains concerned about continuing rhetoric that reinforces disease transmissibility as a reason not to legislate against spit hoods.<sup>117</sup> While not discounting the concern that officers may have after being bitten or spat at, as noted by the Commission and more recently by the Northern Territory Ombudsman, 'educating members on the scientific

evidence regarding the very low risk of transmission may assist to alleviate these psychological consequences'.<sup>118</sup>

73. In our submission to the Australian Federal Police, the Commission recognised that 'police officers [and other detention workers] themselves deserve protection, and have the right to a safe workplace'.<sup>119</sup> However, there is mounting evidence that 'there are a range of alternative measures already adopted in other jurisdictions that can reasonably be utilised such that the absence of spit hoods does not create an increased risk for officers'.<sup>120</sup>
74. The Commission notes the Standing Council of Attorneys-Generals agreed on 22 September 2023 to commit to reviewing 'any residual authorities to use spit hoods in their jurisdictions'.<sup>121</sup>

## 4.2 Routine strip searching

75. The Commission is concerned about the inappropriate and routine use of strip searching in Australian prisons and youth detention. The ineffectiveness of strip searching as a means of contraband detection is well evidenced. For example, a review into strip searching conducted by the Western Australian Inspector of Custodial Services found that between 2014 and 2019, only 571 items were found from almost 900,000 strip searches.<sup>122</sup> This equates to finding contraband in just 0.06% of occasions or less than once in every 1,500 strip searches.
76. In January 2020, 578 strip-searches of women in custody at Dame Phyllis Frost Centre in Victoria were conducted and contraband was found in only two cases – a 0.3% 'hit rate'.<sup>123</sup>
77. Between 1 June 2018 to 30 November 2018, 203 strip searches were conducted on children and young people detained at the Ashley Youth Detention Centre in Tasmania. Despite this alarmingly high number of strip searches, no contraband was recovered from any of the searches.<sup>124</sup>
78. The New South Wales Inspector of Custodial Services has also highlighted in several reports<sup>125</sup> that the routine use of strip searching on women is both 'inconsistent with trauma-informed principles and with the logic of individualised and specific assessment of risk'.<sup>126</sup> This observation is also echoed in the Commission's *Wiyi Yani U Thangani (Women's Voices) Report*, which notes that, '[g]iven the significantly high rate of women in prison having experienced sexual violence, the routine use of strip searches in prisons can contribute to the retraumatisation of women'.<sup>127</sup>
79. The Australian Capital Territory Inspector of Correctional Services has additionally reported that First Nations people are over-represented

regarding use of the practice; finding that of the 4,077 strip searches conducted in the Australian Capital Territory between 2021-2022, 30% were undertaken on First Nations males and 58% on First Nations women.<sup>128</sup>

80. Several reviews have evidenced the inefficiency and harms of strip searching to both prisoners and staff alike, and have noted that ‘there are less invasive, intelligence-based approaches that would mitigate the risks involved in routine strip-searching and be more in step with contemporary custodial practice’.<sup>129</sup>
81. Despite several jurisdictions adopting these less intrusive search methods and technologies, there remains evidence that ‘strip-searching continues to be a default response in circumstances where there is no identified risk’.<sup>130</sup> As noted by the *Yoorook Justice Report (Victoria)*, the fact that routine strip searching continues to be performed is unacceptable.<sup>131</sup>
82. The Commission additionally notes the correlation made by the Cultural Review of the Adult Custodial Corrections System (Victoria) that inappropriate strip searching ‘often occur[s] alongside other integrity concerns such as threats, verbal abuse or physical assault’,<sup>132</sup> and ‘may also be symptomatic of a more pervasive culture of disrespect’.<sup>133</sup>

### 4.3 Solitary confinement

83. The use of solitary confinement or solitary confinement-like practices in Australian prisons and youth detention remains a significant concern of the Commission. While the term ‘solitary confinement’ is generally not used in Australian legislation; many people are subjected to these conditions, as ‘segregation’, ‘isolation’, ‘lockdown’ or ‘separate confinement’.
84. The Commission notes that ‘[solitary confinement] can increase or exacerbate trauma, contribute to the deterioration of mental health and limit participation in rehabilitative programs, all of which increase the likelihood of prisoners struggling in prison and on their release. These effects are particularly felt by those that are vulnerable or have mental illnesses or cognitive disabilities’.<sup>134</sup>
85. Multiple studies also confirm that the use of solitary confinement in institutional settings is often harmful to young people. There is ‘unequivocal evidence’ that solitary confinement has a profound impact on health and wellbeing, and that children and young people are particularly susceptible.<sup>135</sup> A vast body of research confirms that young people, until around 25 years, are still developing physically, mentally, neurologically and socially, and as a result, solitary confinement poses a serious risk of long-term harm.

86. In October 2022, the Western Australian Inspector of Custodial Services reviewed the use of confinement and management regimes in that State's prisons and found, with respect to separate confinement, that:

- a. prisoners in separate confinement are provided with few opportunities to engage meaningfully with other people;<sup>136</sup>
- b. the yards available to prisoners in confinement are not always conducive to providing access to open air and exercise;<sup>137</sup>
- c. prisoners placed in separate confinement are provided with very few cell-based activities and stimulation;<sup>138</sup> and
- d. prisoners are often held in their cells for 20–23 hours a day with little sensory or mental stimulation.<sup>139</sup>

87. In October 2022, the New South Wales Ombudsman revealed it had received 1,876 separation and segregation notifications (exceeding 24 hours) in youth detention for the 2021–2022 period, a 7% and 46% increase from the 2020–2021 period.<sup>140</sup> These numbers did however fall over the 2022–2023 period to 1,712 in part due to relaxing of COVID-19 pandemic separation requirements.<sup>141</sup>

88. In February 2023, the Queensland Children's Court published evidence that a 13-year-old boy with Foetal Alcohol Syndrome and Attention Deficit Hyperactivity Disorder, was subjected to solitary confinement.<sup>142</sup> Of the last 87 days he spent in detention at the Cleveland Youth Detention Centre, he had been confined to his cell for 20 hours or more per day for 78 days. For ten of those days, he was confined to his cell for 24 hours per day.

89. In July 2023, the Western Australian Supreme Court ruled that three detainees were unlawfully subjected to 'solitary confinement [in their cells] on a frequent basis' at the Banksia Hill Youth Detention Centre and Unit 18 of Casuarina Prison.<sup>143</sup> Justice Tottle noted in his judgement that

The causes of the systemic failure are an endemic shortage of suitably qualified staff, inadequate infrastructure and a consequent inability to manage detainees with difficult behavioural problems.<sup>144</sup>

90. In July 2023, the Commissioner for Children and Young People (Tasmania) urged the Tasmanian National Preventive Mechanism to consider the use of isolation practices, including the use of lockdowns and restrictive practices for operational reasons at Ashley Youth Detention Centre, as a 'matter of priority', emphasising that '[c]hildren's rights are repeatedly trumped due to chronic staff shortages and/or workplace health and safety considerations'.<sup>145</sup>

91. On 10 August 2023, the Commissioner for Children and Young People (Tasmania) also gave evidence before the Inquiry into Tasmanian Adult Prison and Youth Detention Matters, that between 15 February 2023 and 5 August 2023, 236 advocacy requests were made about the ‘use of lockdowns, unit-bound practices, isolation of young people, and restricted movements around the [Ashley Youth Detention] centre’.<sup>146</sup>
92. In October 2023 the Tasmanian Inspector of Custodial Services also noted that ‘[s]taffing shortages seem to be a major reason for the majority of lockdowns in both adult and youth custodial centres’.<sup>147</sup>
93. In August 2023, the *Yoorook Justice Report* (Victoria) noted that, during a detention centre visit, Commissioners were ‘disturbed to hear’ from young people about conditions in the centre, including violence by staff and prolonged confinement in cells due to staff shortages.<sup>148</sup> Commissioners were told that ‘children and young people in one side of the detention centre they visited had, in the previous two months, only 30 minutes out of their room each day’.<sup>149</sup>
94. The *Yoorook Justice Report* (Victoria) recommended the Victorian Government take ‘all legislative, administrative and other steps to implement the United Nations Standard Minimum Rules for the Treatment of Prisoners ... including an express prohibition on the use of solitary confinement on children’.<sup>150</sup> It also recommended that ‘youth justice centres are adequately funded and properly operated so that the common practice of locking down prisoners in their cells for prolonged periods for administrative or management reasons in violation of their human and cultural rights is ended’.<sup>151</sup>
95. In September 2023, the South Australian Training Centre Visitor, reported that young people at the Kurlana Tapa Youth Justice Centre had been ‘spending excessive amounts of time in their rooms’ during 2022-2023.<sup>152</sup> On one occasion it was confirmed that young people had been subjected to solitary confinement due to staff shortages.<sup>153</sup>
96. Following the public hearing into conditions in detention in the criminal justice system in September and October 2022, Counsel Assisting the Disability Royal Commission (‘Counsel Assisting’) submitted that, ‘safety and security were the overriding consideration’ regarding decisions to place people with disability into solitary confinement.<sup>154</sup> Counsel also acknowledged that the practice had ‘the capacity to result in significant harm and to exacerbate safety issues’,<sup>155</sup> and proposed a recommendation that

All States and Territory Government should legislate to prohibit solitary confinement and for use of restrictive practices including isolation to be used as

a last resort. Legislation authorising isolation (to the extent jurisdictions do not already) should at a minimum provide the following protections:

- meaningful human contact and a minimum number of out of cell hours per week
- access to the community equivalence standard of health care including mental health services during the period of isolation
- adequate record keeping and data be kept of all prisoners in restrictive practices including isolation and should be made available to the Inspector of Custodial Services.<sup>156</sup>

97. In responding to the recommendation, the Western Australian Government stated that they supported it in principle, with suggestions for improved accuracy and implementation.<sup>157</sup> The New South Wales Government noted it had been given 'insufficient time to undertake the detailed consideration and scoping required for the State to reach a final determination on this recommendation'.<sup>158</sup> So far as the Commission is aware, no other State or Territory provided a response to the recommendation.

98. The Commission has in past called for 'concerted efforts'<sup>159</sup> to ensure the implementation of the Committee on the Rights of Persons with Disabilities recommendation that 'persons with disabilities cannot be held in solitary confinement' across Australia.<sup>160</sup> We endorse the recommendation made by Counsel Assisting that this prohibition should be extended to all people though note the Disability Royal Commission's final position was to only extend this recommendation to youth detention.<sup>161</sup>

99. The *Yoorook Justice Report* (Victoria) has also recommended that 'the Mandela Rules prohibition on prolonged solitary confinement for adults, and a complete prohibition for children, should be established in legislation'.<sup>162</sup>

## **5 Independent oversight of prisons and youth detention**

100. The Commission remains greatly concerned about Australia's continued non-compliance with its obligations under the Optional Protocol to the Convention Against Torture (OPCAT). To date, the states of New South Wales, Queensland, and Victoria are yet to designate a National Preventive Mechanism (NPM).

101. In December 2022, the Cultural Review of the Adult Custodial Corrections System (Victoria) recommended that the Victorian Government take priority

action to designate an NPM.<sup>163</sup> This recommendation was again repeated in the *Yoorook Justice Report* (Victoria) in August 2023.<sup>164</sup>

102. On 23 May 2023, the Queensland Attorney-General stated that

the Queensland government continues to work with the Commonwealth government to ensure there is ongoing and sufficient funding for NPMs to function effectively. Resourcing is important for effective NPM implementation ... I note that funding for NPMs remains an outstanding issue for most jurisdictions and that Victoria and New South Wales are also yet to nominate NPMs.<sup>165</sup>

103. In September 2023, the Australian National Preventive Mechanism urged the Queensland Government 'to nominate an NPM to support Australia to meet its international obligations, and help fulfil the domestic element of the visit system created by OPCAT'.<sup>166</sup>

104. In July 2023, the Australian Government stated that it is continuing to engage with New South Wales, Queensland and Victoria, and 'also continuing to work transparently and cooperatively with the Subcommittee to meet Australia's OPCAT obligations'.<sup>167</sup> In the same month, the Australian National Preventive Mechanism stated that

funding issues remain a key barrier to most Australian NPM bodies properly performing their functions. Some Australian governments have suggested that it is the Australian Government's responsibility to fully fund NPM bodies and that those states yet to nominate an NPM will not do so without full funding from the Australian Government.<sup>168</sup>

105. In September 2023, Commission of Inquiry into Child Sexual Abuse recommended the Tasmanian Government appoint a child specific NPM in addition to the Tasmanian Inspector of Custodial Services (the current NPM for Tasmania).<sup>169</sup> The Commission of Inquiry into Child Sexual Abuse noted 'that there would be considerable benefit in the Tasmanian Government appointing another National Preventive Mechanism with expertise in children and young people to focus on examining facilities where children and young people are detained'.<sup>170</sup>

106. Also in September 2023, the Disability Royal Commission made several recommendations on OPCAT ranging from enacting federal legislation, widening the definition of 'place of detention and providing adequate resourcing to NPMs and creating disability informed NPMs'.<sup>171</sup>

107. Many of the already designated NPM's responsible for oversight of prisons and youth detention have repeatedly noted they face significant challenges

arising from limited resourcing available to them both to implement and undertake this new role.<sup>172</sup>

108. The Commission urges Australian governments to fully implement OPCAT. This includes implementing the recommendations of the Commission's *Road Map to OPCAT Compliance Report*<sup>173</sup> and the recommendations contained in the Commission's submission to the Disability Royal Commission, *National Preventive Mechanisms: a formal safeguard for people with disability*.<sup>174</sup>



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