



Australian
Human Rights
Commission

The Australian Federal Police's review on its use of spit hoods

Submission by the Australian Human Rights Commission

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1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Australian Federal Police's internal review of its use of spit hoods.
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 foster greater understanding of human rights in Australia and to address the human rights concerns of a broad range of individuals and groups. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia's international human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.
3. The Commission has long held the view that spit hoods are 'clearly a method of restraint that is degrading' and their use is 'contrary to the right to be treated with humanity and with respect for the inherent dignity of the human person.'¹
4. A recent example of this was in March 2022 when the National Children's Commissioner, along with other members of the Australian and New Zealand Children's Commissioners and Guardians (ANZCCG), acknowledged the detrimental and significant trauma and/or re-traumatisation for children subjected to spit hood usage. They collectively called for alternative measures to be mandated through 'clearly articulated legislative provisions banning the use of spit hoods and MRC [mechanical restraint chairs].'²
5. Similarly, in our written submission to the United Nation's Committee Against Torture (UN CAT) that was made in November 2022 as part of the sixth periodic review of Australia's compliance with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), the Commission further emphasised that the use of spit hoods should be 'banned Australia-wide,'³ in all circumstances and on all people.
6. This view was repeated in the opening statement that the Human Rights Commissioner made in Geneva to the UN CAT on 14 November 2022. The

Commissioner again emphasised that the Commission considers the use of spit hoods 'to be inherently dehumanising and to pose significant risks of injury and even death' and that it 'recommends that Australia bans spit hoods by law, for all people of all ages and in all settings'.⁴

2 Relevant human rights laws, standards, and findings

7. The UN CAT has noted concern about the use of spit hoods, particularly in the Australian policing context, drawing a direct correlation between their use and Australia's responsibilities under Article 2 of the Convention against Torture which states:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.⁵

8. Reinforcing the incompatibility of spit hood use with Article 2 of the Convention against Torture, the UN CAT remarked in its discourse with the Australian delegation at the recent sixth periodic review, that 'the use of spit [hoods] was an archaic practice that amounted to ill-treatment'.⁶ It went on to recommend in its concluding observations with respect to Australia that:

'The State party should also take all necessary measures to end the use of spit hoods in all circumstances across all jurisdictions and to provide adequate and regular training for those involved in detention activities on legal safeguards and monitor compliance and penalize any failure on the part of officials to comply.'⁷

9. The right to freedom from 'ill-treatment' is also contained in Article 37 of the Convention on the Rights of the Child⁸, Article 15 of the Convention on the Rights of Persons with Disabilities⁹ and Article 5 of the Code of Conduct for Law Enforcement Officials, which stipulates that:

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any

law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.¹⁰

10. During a visit carried out to the United Kingdom in 2016, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) observed 'inconsistencies in rules and practices' surrounding the use of spit hoods in the policing context. In some services, the device was used regularly whereas in others it had been withdrawn from use entirely.¹¹ The CPT ultimately concluded that '...spit [hoods]', 'ERBs' and 'velcro-/fixation straps', especially when used in combination, are not appropriate in a secure place of safety, such as police custody¹² and called on the UK Government to review the safety of their use.

3 The safety of spit hood usage and the circumstances surrounding their use

11. There are very few published studies on the safety of spit hood usage. In 2018 the University of California, San Diego School of Medicine, conducted a study focusing on whether there was a clinically significant impact on breathing and ventilation in subjects wearing a spit hood. It found 'in healthy subjects there were no clinically significant changes in the physiologic parameters of breathing while wearing a spit [hood].'¹³
12. The study however recognised its own limitations. The researchers noted the 'circumstances of the study do not replicate circumstances in which spit [hoods] are usually used, which are situations of conflict with law enforcement or health care personnel, with the subject often already restrained, possibly injured, lying down, and with spit or other body fluids on the spit [hood].'¹⁴
13. The typical use of multiple forms of restraint in conjunction with a spit hood is well evidenced in detention settings. In the Ombudsman South Australia's 2019 investigation into the use of spit hoods in youth detention, an analysis of use of force incidents found that 'between October 2016 and June 2019, approximately 48 per cent involved the use of one or more

forms of mechanical restraint, including 12 per cent which involved the use of a spit hood.¹⁵

14. The Ombudsman South Australia additionally found that 'the application of spit hoods to children and young people appears likely to exacerbate the risks associated with the use of prone restraint, as is the handcuffing of a child or young person's hands behind their back.'¹⁶
15. The Office of the Children's Commissioner Northern Territory investigation into the Don Dale and Alice Springs Youth Detention Centres in 2016, found evidence within this context that spit hood 'use will not always be in isolation and is most likely used in conjunction with another form of restraint.'¹⁷ Supporting this finding, the Royal Commission into the Protection & Detention of Children in the Northern Territory observed that 'spit hoods have the potential to cause distress to young persons, particularly when used in combination with other forms of restraint.'¹⁸ The Royal Commission recommended that the use of spit hoods in youth detention 'continue to be prohibited.'¹⁹
16. In a policing context, the Independent Police Conduct Authority (New Zealand) investigation into the death of Mr Alo Ngata in 2020, features an examination of the use of multiple forms of restraint being applied in addition to a spit hood. The investigation found that 'Mr Ngata was known to have a high risk of positional asphyxia and needed careful and constant monitoring. He had been tasered and pepper sprayed, his hands and feet were cuffed, he was wearing a spit hood, and he was lying face down on the floor of the van.'²⁰
17. While acknowledging that this matter is currently before a coroner, the post-mortem report found Mr Ngata had an abnormal heart rhythm brought upon by a 'combination of positional asphyxia, methamphetamine intake, an enlarged heart and possible suffocation by the spit hood.'²¹ Although the Independent Police Conduct Authority (New Zealand) did not make a finding that the use of the spit hood was disproportionate or was directly attributable to Mr Ngata's death, it found that its continued use when Mr Ngata was in a cell alone was unacceptable.²²
18. The report did not comment on the impact of Mr Ngata's methamphetamine usage or mental health state although it did note that he had been involved in a 'possible family harm incident'²³ the day before

his arrest. Contemporary media reporting into Mr Ngata's coronial inquest has confirmed he was diagnosed with 'several mental health illnesses including bipolar disorder, hypomania, and substance use disorder.'²⁴

19. These factors are particularly important. The University of California study points out that the 'donning of the spit [hood] could potentially cause excessive disorientation and anxiety in certain individuals, especially if there is an underlying medical or mental health condition, or if the subject is a child.' The environment in which spit hoods are deployed is a significant factor that needs to be considered when examining their usage.
20. The Northern Ireland Policing Board's Spit Hood Review in 2022 made a similar acknowledgement that 'the application of a Spit [hood] to a person with a mental health condition or personality disorder is likely to exacerbate the distress experienced by that person and may result in for example hyperventilation, extreme behaviour and panic attacks.'²⁵
21. The Independent Police Conduct Authority (New Zealand) investigation into the death of Mr Alo Ngata found that 'once Mr Ngata was taken to the custody unit, Police failed to assess Mr Ngata's wellbeing or responsiveness' and that an 'assessment of Mr Ngata's wellbeing was hampered at all times after the arrest by the continued presence of the spit hood covering Mr Ngata's entire face.'²⁶
22. In contrast to the findings relating to Mr Ngata, the Nova Scotia Police Review Board in reviewing the actions of police officers involved in the death in custody of Mr Cory Rogers in 2016, found 'the use of a spit hood could cause death and it did so in this case.'²⁷ Media reporting into the matter of Mr Rogers noted that during his arrest he was 'extremely intoxicated and pounded his head against a Plexiglas divider in the police car.'²⁸ Whether this was the reason the arresting officers applied the spit hood and whether other uses of force were also applied is unclear. The Nova Scotia Review Board's decision does however note the arresting officers knowingly left Mr Rogers unattended in a custody cell without supervision and were aware that he was heavily intoxicated.
23. The Nova Scotia Police Board additionally observed that 'there is no doubt in dealing with the roles of a police officer in society that he/she is held to a higher standard of conduct than the average citizen.'²⁹ As such 'the importance of showing proper concern for the safety of persons in their

custody must be impressed upon all officers. This is so especially when those persons are intoxicated and need special help.³⁰

24. Both investigations following Mr Ngata and Mr Rogers deaths make clear reference to police actions and responses implemented after the fact. These include providing subsequent training for officers in the risks associated with spit hood use, recognising and responding to vulnerable and highly irritated persons, de-escalation and conflict management and non-complacency where detainees demonstrate distress.³¹
25. In a domestic case study, the Northern Territory Ombudsman considered the reasonable use of a spit hood in a complaint about excessive use of force by police. In this example, the complainant spat at a police officer, was taken down and manoeuvred into a standing position with the spit hood on. He was directed into a cell with a hand on the back of his neck. He was then directed onto a mattress in the cell and an officer rested his knees on the complainant's shoulder blades to facilitate removal of handcuffs, after which time he was left in the cell.
26. The Northern Territory Ombudsman found the use of force was reasonable and proportionate in the circumstances, however, in like manner to Mr Ngata and Mr Roger's circumstances commented that the failure to remove the spit hood when the complainant was placed in the cell was 'a clear failing.'³² The Northern Territory Ombudsman further asserted 'it is important that police utilising restraints as potentially intrusive as a spit hood take every step to ensure that their use is kept to an absolute minimum and that they are removed as soon as possible.'³³
27. These examples are illustrative of the substantial risks associated with the use of spit hoods and, in particular, their use in combination with other forms of restraint; as well as the exceptionally heightened risk posed to vulnerable cohorts.
28. This latter point is particularly important in the Australian policing context noting that police contact with particular groups of people with disability is both 'frequent and inadequate.'³⁴ A 2021 report commissioned on behalf of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has found that:

Research has consistently shown that police lack an understanding about disability and how it affects a person's behaviour or ability to comply with

police orders. In particular, evidence indicates that police have difficulty in distinguishing between mental health problems, intellectual disability, acquired brain injury and foetal alcohol spectrum disorder.³⁵

29. The Northern Ireland Policing Boards Spit Hood Review in 2020 also emphasises that 'in the circumstances of a police arrest or in custody, it may not be known to the police officers whether the person has any mental health issues or vulnerabilities. It is therefore very difficult for those officers to assess the effect on a person of a Spit [Hood] and ensure they are not used on people with mental or physical health issues or any other specific vulnerabilities.'³⁶

4 Police justification for the use of spit hoods

30. The National Police Chiefs' Council and the College of Policing (UK) states that the primary rationale behind the introduction of spit hoods to policing was 'because spitting or biting is an unpleasant form of assault, and because people should be afforded a sufficient level of protection from such acts if the technology is available.'³⁷

31. The continued use or discontinuation of spit hoods is both an 'emotive and complex issue.'³⁸ Police officers are expected to respond to difficult situations sometimes involving violent and out of control individuals. They are expected to protect victims, witnesses, and suspects. There is no question that police officers themselves deserve protection, and have the right to a safe workplace.

32. In outlining the appropriate situations for which police could use a spit hood, ACT Minister for Police and Emergency Services, Mr Mick Gentleman stated, 'spit hoods can be used by ACT Policing to prevent a person in custody from spitting at or biting officers, which protects officers from the transmission of communicable diseases and sustaining other serious injuries.'³⁹

33. The Australian Federal Police Association (AFPA) also called spit hoods a 'necessary safety measure' from officers being exposed to transmissible diseases, many of which can have an ongoing and harmful impact on a member's health.⁴⁰

34. In evaluating the evidence of transmissibility of communicable diseases, the National Police Chiefs' Council and the College of Policing (UK) found that 'the chances of being infected by communicable diseases through the deliberate or accidental transfer of bodily fluids, such as spit and blood, have been shown to be very low.'⁴¹ The Northern Ireland Policing Board Review in 2020 also accepted that 'the risk of contracting a blood-borne

- virus from spit/bite injuries is very low and that psychological impact is the primary risk to officer's lives.⁴²
35. In the Australian context, Hepatitis Australia has stated that 'saliva can contain but not transmit blood borne viruses unless there is sufficient blood contamination. Even then, the risk of transmission of these viruses to police, bus drivers and other workers in the community via occupational exposure is negligible.'⁴³
 36. The Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine (ASHM) and the Australia New Zealand Policing Advisory Agency have also partnered to produce resources for police officers which demonstrate that HIV, Hepatitis B and Hepatitis C transmission through saliva exposure or bite are very low risk.⁴⁴
 37. The Northern Ireland Policing Board Review has rightly asserted that 'if officers were better equipped with the scientific evidence surrounding the very low chance of transmission, this may lower the risk of any psychological impact.'⁴⁵ We would argue that the same is applicable in the Australian context.
 38. The COVID-19 virus saw rise to some international jurisdictions equipping police officers with spit hoods as a form of personal protective equipment (PPE). The Garda Síochána in Ireland for example was one such jurisdiction to roll out spit hoods as a preventive tactical measure. In a 2020 evaluation of the roll out, the Police Authority 'contacted the manufacturer and distributor of the anti-spit hood device used by the Garda Síochána. They stated that the device is designed to prevent spitting into the face of a police officer. It cannot be guaranteed to prevent the transmission of other aerosols and has not been tested against airborne or respiratory droplets of COVID-19.'⁴⁶
 39. The Ombudsman South Australia's 2019 investigation 'was unable to locate any empirical research purporting to evaluate the effectiveness of spit hoods in preventing staff injury when compared with other forms of protective equipment.'⁴⁷
 40. The evidence that is available suggests that the key risk a spit hood is designed to prevent (namely the risk of transmission of communicable diseases) is very low. Given this, the use of spit hoods is not a proportionate response, and the safety concerns that have been raised could be addressed by a range of alternative mitigation strategies. These may include greater education for police about the relevant scientific evidence, immediate testing and support for any police officers who are injured in

this way, and additional training in de-escalation and alternative response techniques.

5 Recommendations

41. The Commission makes the following recommendations:

Recommendation 1: The use of spit hoods should be discontinued by the Australian Federal Police, for all people of all ages and in all settings.

Recommendation 2: In the alternative to Recommendation 1, if the use of spit hoods is retained, every step should be taken to ensure that their use is kept to an absolute minimum and that they are removed as soon as possible.

Recommendation 3: All police officers should be provided with:

- a) Education addressing the relevant scientific evidence concerning the risk of transmission of communicable diseases in the context of policing;
- b) Immediate testing and support for any officer injured in the course of duty by biting and/or spitting;
- c) Additional training in de-escalation and alternative response techniques.

Endnotes

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- ⁴⁷ Ombudsman South Australia (September 2019) Investigation concerning the use of spit hoods in the Adelaide Youth Training Centre, p31. <<https://www.ombudsman.sa.gov.au/publication-documents/investigation-reports/2019/Department-for-Human-Services-Use-of-spit-hoods-in-the-Adelaide-Youth-Training-Centre.pdf>>.