Joint Submission to the UN Special Rapporteur on Torture's Thematic Report on Current Issues and Good Practices in Prison Management

Australian National Preventive Mechanism

We acknowledge the traditional custodians of the lands where we work and live, and Elders both past and present.

We recognise Aboriginal and Torres Strait Islander Peoples' ongoing connection to Country and Culture.

****Aboriginal and Torres Strait Islander readers are warned that the names of deceased Aboriginal people are contained in this submission.****

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Members of the Australian National Preventive Mechanism (NPM)

In 2017, Australia ratified the UN *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**). The coordinating body for the Australian National Preventive Mechanism (**NPM**) is the Commonwealth Ombudsman, and a number of bodies have been designated members of the NPM by Federal, State and Territory Governments. Not all governments have nominated or established bodies as an NPM member.

This submission has been prepared and endorsed by the following NPM members:

- Commonwealth National Preventive Mechanism
- Australian Capital Territory Inspector of Correctional Services (ACT OICS)
- Australian Capital Territory Ombudsman
- Northern Territory (NT) Community Visitor Program
- NT Office of the Children's Commissioner
- NT Anti-Discrimination Commission
- Western Australian Office of the Inspector of Custodial Services (WA OICS)
- South Australia Training Centre Visitor

Summary of Recommendations

We recommend that the Special Rapporteur's report:

Recommendation 1: Calls on States that have ratified OPCAT to, where they have not yet done so, appoint NPM bodies, to legislate their role and powers, and to resource them to fully discharge their mandate to carry out preventive visits to places of detention.

Recommendation 2: Recommends a legislated presumption in favour of bail, with the burden on prosecution to demonstrate that bail should not be granted.

Recommendation 3: Discusses how incarcerated people on remand should have access to (but not be compelled to participate in) programs and services that will provide an opportunity to not only engage in meaningful activity, but that will also address underlying issues that may have contributed to the individual's contact with the criminal legal system, and may assist in future bail applications being successful.

Recommendation 4: Reiterates that when decisions about parole are made, decision-makers should be bound by the rules of natural justice. This includes the right of incarcerated people to be heard by parole decision-makers, be legally represented, and to have access to all the information and documents being considered by the decision-makers (including any adverse material), subject to limited exceptions. Applicants should have a right to be provided the reasons for the decision.

Recommendation 5: Discusses how incarcerated people should be able to access, in a timely manner, the assessments, programs and reports that are required to support a successful parole application. The programs should meet the treatment needs and be appropriate for those who are incarcerated.

Recommendation 6: Recommends that States make targeted efforts to support Aboriginal and Torres Strait Islander people to successfully apply for parole.

Recommendation 7: Reiterates that children should not be detained in police cells or adult prisons as a result of youth detention facilities being at capacity, or due to availability and/or geographical reasons.

Recommendation 8: Reiterates that children should not be detained in police cells for more than a few hours, and if this does occur, these must be 'child safe environments'. Legislative protections are necessary to strictly cap the period any child is able to be detained in police cells. These protections should ensure that such practice is a very short-term measure, and should explicitly require that children receive all appropriate support and protections to limit harm.

Recommendation 9: Reiterates that detention of children must always be a last resort, and governments must always act with the best interests of the child as a primary consideration.

Recommendation 10: Reiterates that appropriate support must be in place to divert children away from the criminal legal system, and evidence-based approaches should be used to intervene and ultimately prevent interactions of children and young people with the criminal legal system in the first place.

Recommendation 11: Reiterates that the minimum age of criminal responsibility should be raised to at least 14 years old, including in Australia, with no exceptions for 'carve-outs' for types of offending.

Recommendation 12: Reiterates that incarcerated people should be provided medical care that is the equivalent to that provided in the community. In the Australian context, this includes, but is not limited to, access to the federally funded Pharmaceutical Benefits Scheme (PBS), Medicare Benefits Schedule (MBS), and National Disability Insurance Scheme (NDIS).

Recommendation 13: Recommends that healthcare, including mental health care, provided to Aboriginal and/or Torres Strait Islander people deprived of their liberty must be culturally safe, and free from any form of racism or cultural bias.

Recommendation 14: Reiterates that there should be early assessment and diagnosis of cognitive impairment for individuals who are incarcerated, commencing upon reception to the prison or youth detention facility. The assessment should not be postponed for people who are remanded, as opposed to sentenced.

Recommendation 15: Recommends that indefinite detention of individuals not fit to stand trial should be prohibited in legislation.

Recommendation 16: Reiterates that processes should be improved to support individuals with disability to participate in legal proceedings to maximise the prospects of them being fit to stand trial.

Recommendation 17: Recommends that legislation should prohibit the detention of people who are not fit to stand trial in prisons or youth detention facilities.

Recommendation 18: Recommends that States establish a consistent standard to define what constitutes 'isolation' of both adults and children, for detention management and oversight purposes.

Recommendation 19: Reiterates that the use of isolation on a child or young person should be prohibited in legislation, except when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.

Recommendation 20: Recommends that there be an enforceable legislated prohibition on solitary confinement, for both children and adults.

Recommendation 21: Reiterates that the use of isolation for both children and adults must be authorised by law and there should be legislated safeguards in place for use of isolation.

Recommendation 22: Recommends that natural justice must be afforded for both the initial decision to isolate and subsequent reviews of the isolation:

- incarcerated people must know why they have been isolated, and have access to any adverse material being relied upon.
- incarcerated people should know what they need to do in order to be released from isolation. This is important not only for adherence to the principles of natural justice, but also for mitigating the adverse effects of isolation and for ensuring that the incarcerated person and detaining authorities are clear on when and under which circumstances the individual will be released from isolation, and what they need to do to achieve this.
- incarcerated people should be included in the relevant processes – both the initial decision to isolate and internal and external review processes – by knowing the reasons for their isolation and the facts being relied upon, having the opportunity to present their views in person (or otherwise, including remotely or through an intermediary/representative, and including legal counsel) to the panel, and being able to suggest alternative solutions.

Recommendation 23: Recommends that governments do more to target efforts at reducing the overincarceration of Indigenous people, co-designed with Indigenous people.

Recommendation 24: Recommends that the rights of incarcerated Indigenous people be protected. This includes ensuring culturally appropriate care and services, and consideration of relevant international instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 25: Recommends that the use of isolation in response to a pandemic must be necessary, proportionate and the least restrictive means of addressing the health risks. Restrictive measures should not be normalised and continued when no longer necessary to mitigate the risk.

Recommendation 26: Reiterates that States should ensure they can maintain humane conditions in prisons, developing and implementing plans in response to existing and anticipated temperature extremes.

Recommendation 27: Recommends that States (including prison authorities) should ensure to have disaster risk reduction strategies in place, taking both preventative and mitigatory steps, paying particular attention to the impact of climate change.

Recommendation 28: Discusses how States should ensure that the privatisation of prison services is appropriate in the circumstances, that the procurement process is robust, and that there are relevant safeguards in place to protect the human rights of incarcerated people.

Recommendation 29: Discusses how, where services are contracted out by the government or private providers, and those services are working with incarcerated Aboriginal and Torres Strait Islander people, the services should be provided in a culturally appropriate manner.

Recommendation 30: Discusses how, governments should consider contracting out services, such as the provision of primary healthcare, to not-for-profit Aboriginal Community Controlled Organisations.

Realising the Objectives of OPCAT

Australia's NPM is firmly committed to our work. An NPM plays an important role in identifying risk of ill-treatment and making recommendations for improvements to tackle some of the most challenging detention-related issues facing Australia. This includes, the treatment of children, people with disability and Aboriginal and Torres Strait Islander people. The Australian NPM, properly resourced and with the appropriate powers, privileges and immunities, would be better-placed to, proactively and with a preventive lens, identify issues and good practice in prison management across Australia, work that many of our members are already undertaking to their best of their abilities, within resourcing and legislative constraints.

Recommendation 1:

We recommend the Special Rapporteur's report calls on States that have ratified OPCAT to, where they have not yet done so, appoint NPM bodies, to legislate their role and powers, and to resource them to fully discharge their mandate to carry out preventive visits to places of detention.

Measures to Reduce Overcrowding

Decreasing overcrowding of prisons and youth detention facilities should be achieved by reducing the number of people imprisoned, rather than building new detention facilities or expanding the capacity of existing ones. This could be achieved in a number of ways, including those highlighted below.

Bail

The UN Committee Against Torture's Concluding Observations on Australia recommended that Australia

> *"…should ensure that the regulations governing pretrial detention are scrupulously respected and that such detention is resorted to only in exceptional circumstances and for limited periods, taking into account the principles of necessity and proportionality. It should also* ***intensify efforts to significantly reduce the number of pretrial detainees*** *by making more use of alternatives to detention, in particular with regard to Aboriginal and Torres Strait Islander adults and children, in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)."* (emphasis added)

Article 37(b) of the *Convention on the Rights of the Child* provides that detention of children is to be a last resort:

> *"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".*

For this right to be realised, children must be remanded as a last resort, which, in turn, requires the legislative presumption to be in favour of bail.

Overcrowding in adult prisons could similarly be addressed by legislating a presumption in favour of bail. According to the Australian Bureau of Statistics, on 30 June 2022, 37% of incarcerated people in Australia were unsentenced. In its recent annual report, WA OICS reported that *"[i]n Western Australia, the daily average unsentenced population across the adult custodial estate has progressively increased over the past decade. In 2011, 18 per cent of the daily average population were unsentenced. This increased to nearly 31 per cent by 2022, despite a decrease in the total population*."

The South Australia Training Centre Visitor's 2022-2023 Annual Report stated that, *"[o]n any given day, 90.4% of young people in the Centre are not serving a sentence of detention. These young people are on remand*."

People charged with criminal offences may spend lengthy periods of time on remand while their matters before the court are resolved (this means people spending time in prison, but ultimately being found not guilty, or being on remand for longer than their ultimate sentence of imprisonment). According to the Australian Productivity Commission, *"the average time spent on remand has increased to 5.8 months in 2020 from 4.5 months in 2001."*

ACT OICS has found that there is scant information available as to how many people are held on remand due to an inability to meet bail conditions. Such data is not kept by the ACT courts' system or ACT Corrective Services (**ACTCS**) (which does not have any legislative responsibilities regarding the management of bail orders, except where reporting to ACTCS is a condition of bail). Having an ACTCS officer whose role specifically includes bail support as a central part of their functions would assist with keeping remanded people eligible for bail out of the Alexander Maconochie Centre (**AMC**) (the only correctional centre in the ACT) or reducing their time spent in custody.

Recommendation 2:

We recommend that the Special Rapporteur's report recommends a legislated presumption in favour of bail, with the burden on prosecution to demonstrate that bail should not be granted.

Programs and Supports for People on Remand

People on remand are often not able to access the programs and services that are available for people who have been sentenced. This not only impacts on their experience of incarceration (e.g. being able to participate in meaningful activities), but it also limits their ability to demonstrate to the court that they are willing and able to take positive action while remanded, and that this should be taken into consideration in decisions regarding bail.

WA OICS has, in a number of its prison visit reports, identified the fewer opportunities for people on remand to engage in rehabilitative and meaningful programs, including being able to "join offender programs or access the work camp" and "criminogenic treatment programs".

Recommendation 3:

We recommend that the Special Rapporteur's report discusses how incarcerated people on remand should have access to (but not be compelled to participate in) programs and services that will provide an opportunity to not only engage in meaningful activity, but that will also address underlying issues that may have contributed to the individual's contact with the criminal legal system, and may assist in future bail applications being successful.

Parole

When decisions about parole are made, decision-makers should be bound by the rules of natural justice, as is the case in the Australian Capital Territory (**ACT**). In the ACT, the Sentence Administration Board (**SAB**) makes parole decisions and is provided a Pre-Release Report (**PRR**) on each parole applicant by ACTCS. This report should be discussed with the applicant prior to being provided to the SAB, a requirement highlighted by ACT OICS as being "*important from a procedural fairness perspective: detainees must be aware of information contained in a report that may be adverse to their interests and have an opportunity to comment or highlight any perceived factual inaccuracies before it is put before the board.*" ACT OICS has emphasised that it "*is totally unacceptable for a PRR to be provided to the SAB if it has not been provided to, and understood by, the applicant.*"

In one of its reports, WA OICS has discussed the fact that "*officers were able to write negative comments about prisoners into the TOMS database (offender notes),*" which could then be used in a parole report. Thus, it recommended that, "*if offender notes are to be used for any administrative decision making, then they should be subject to natural justice, including the right of reply.*" WA OICS has also recommended that the reason for denying parole is tracked.

Recommendation 4:

We recommend that the Special Rapporteur's report reiterates that when decisions about parole are made, decision-makers should be bound by the rules of natural justice. This includes the right of incarcerated people to be heard by parole decision-makers, be legally represented, and to have access to all the information and documents being considered by the decision-makers (including any adverse material), subject to limited exceptions. Applicants should have a right to be provided the reasons for the decision.

WA OICS has identified that there "*are significant numbers of prisoners around the state who are denied parole because they have not been given the opportunity to participate in a treatment program…. staying in prison past their earliest possible release date, which in turn contributes to the expanding prisoner population. We have witnessed the impact of this firsthand. Prisons around the state… are chronically crowded, and there is no indication of the population growth slowing any time soon.*" 'Unmet treatment needs' (and subsequent denial of parole), "*was due to short sentences, delays in treatment assessments, refusals to transfer out to do programs (especially women for whom local programs were not offered) and insufficient treatment gains in programs completed. There was often a mismatch between individual learning capacity and the learning needs of the programs being provided.*"

Recommendation 5:

We recommend that the Special Rapporteur's report discusses how incarcerated people should be able to access, in a timely manner, the assessments, programs and reports that are required to support a successful parole application. The programs should meet the treatment needs and be appropriate for those who are incarcerated.

The Australian Law Reform Commission has highlighted the fact that many Aboriginal and Torres Strait Islander people do not apply for parole when eligible, in part because they form a view that they are unlikely to be successful in their application.

Recommendation 6:

We recommend that the Special Rapporteur's report recommends that States make targeted efforts to support Aboriginal and Torres Strait Islander people to successfully apply for parole.

Youth Detention in Queensland

On 24 August 2023, the Queensland Parliament legislated to retrospectively permit the indefinite detention of children in police watch houses and adult correctional facilities by suspending the application of aspects of Queensland's Human Rights Act.

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 Aboriginal and Torres Strait Islander people of all ages, including in Queensland, we are also concerned the Queensland Government's actions will have a disproportionate impact on Aboriginal and Torres Strait Islander people children, who already face other sustained, compounded challenges.

We draw attention to the observations of the UN Committee on the Rights of the Child that children must not be placed in adult detention environments, including due to the impacts of this on their rehabilitation and future reintegration into society. A core consideration of NPMs under OPCAT is the extent to which detention environments within the criminal justice system are rehabilitative. Children detained in police watch houses and adult prisons are not being rehabilitated. As a result, and in addition to violating the rights of children, this measure is not in the community's long-term interests and will not increase community safety.

Watch houses have limited capacity to ensure adequate separation of children from adults and adequate gender separation, and they lack capacity to provide education and therapeutic interventions. Despite this, in Queensland in 2021–22 children were detained in watch houses for between one and two weeks almost 150 times. Young people in the youth justice system also have a high prevalence of health problems during detention, and allowing their prolonged detention in unsuitable environments will exacerbate this.

Recommendation 7:

> **We recommend that the Special Rapporteur's report reiterates that children should not be detained in police cells or adult prisons as a result of youth detention facilities being at capacity, or due to availability and/or geographical reasons.**

Recommendation 8:

> **We recommend that the Special Rapporteur's report reiterates that children should not be detained in police cells for more than a few hours, and if this does occur, these must be 'child safe environments'. Legislative protections are necessary to strictly cap the period any child is able to be detained in police cells. These protections should ensure that such practice is a very short-term measure, and should explicitly require that children receive all appropriate support and protections to limit harm.**

We encourage all governments to address the deeper issues pervading youth justice as a matter of urgency. While the Queensland Government has indicated these amendments are a stop-gap measure until the completion of new youth detention centres in 2026, this is too long to wait to address immediate needs and concerns in the youth justice system. The Queensland Government has previously acknowledged the need to focus on alternative, preventive approaches, with two pillars of its own Youth Justice Strategy 2019–23 being to 'intervene early' and 'keep children out of custody'.

We reiterate one of the concluding observations of the UN Committee against Torture which last year implored Australia to actively promote alternative measures for children accused of criminal offences, such as diversionary and counselling programs. We also observe the ongoing work across Australia towards raising the age of criminal responsibility, but that progress is piecemeal and inconsistent. We note that the minimum age of criminal responsibility encouraged by the UN is 14 years.

Recommendation 9:

> We recommend that the Special Rapporteur's report reiterates that detention of children must always be a last resort, and governments must always act with the best interests of the child as a primary consideration.

Recommendation 10:

> We recommend that the Special Rapporteur's report reiterates that appropriate support must be in place to divert children away from the criminal legal system, and evidence-based approaches should be used to intervene and ultimately prevent interactions of children and young people with the criminal legal system in the first place.

Recommendation 11:

> We recommend that the Special Rapporteur's report reiterates that the minimum age of criminal responsibility should be raised to at least 14 years old across Australia, with no exceptions for 'carve-outs' for types of offending.

Designing Daily Life in Prisons - Meaningful & Productive Activities, Rehabilitation & Reintegration and Achieving Good Health

Equivalency of Healthcare

The right of incarcerated people to equivalent, appropriate healthcare can be found in the following:

- The Nelson Mandela Rules state that "*prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary healthcare services free of charge, without discrimination on the grounds of their legal status.*"
- The International Covenant on Economic, Social and Cultural Rights provides for "*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*"

In its Concluding Observations on Australia, the UN Committee against Torture recommended Australia "*improve the provision of gender- and age-specific medical services to all persons deprived of their liberty, particularly those with intellectual or psychosocial disabilities.*"

In its *The Health of People in Australia's Prisons 2022 Report*, the Australian Institute of Health and Welfare (AIHW) outlines one of the key differences between the healthcare provided in the community and that provided in prisons:

> *"The Medicare Benefits Schedule (Medicare) gives residents of Australia access to no-cost or subsidised health care, including no-cost or low-cost treatment and accommodation in public hospitals. Medicare is funded by the Australian Government and does not apply to services provided directly by state and territory governments. This means that prison health services are not provided under the Medicare system… The Pharmaceutical Benefits Scheme (PBS), which provides access to medicines at lower cost for Australian residents, is also funded by the Australian Government. Medications dispensed to people in prison are not covered, except for medications that fall under Schedule 100 of the PBS, known as the Highly Specialised Drugs Program."*

Issues of concern identified in the report include a reluctance of incarcerated people to transfer through other prisons to access healthcare, and only 46% of incarcerated people surveyed were able to easily see a doctor or general practitioner (noting that at prison clinics, a nurse-led primary healthcare model is used).

A 2022 prison survey of incarcerated people by ACT OICS found that 84% of respondents reported that it was 'difficult' to get general medical services when needed (for specialist medical services, it was 88%; for psychological services, it was 71%; for dental services, it was 66%). ACT OICS also found that incarcerated people are not always provided with privacy and confidentiality in the delivery of health services. A WA OICS inspection report published in 2023 found that both staffing and infrastructure issues contributed to more limited access to health care. For example, if an appointment was made with a medical officer, the likely wait for an appointment was two to three months.

In Victoria, in the inquest into the death of Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Nelson, the Coroner concluded that he was "*not satisfied that the treatment available to Veronica for her opioid dependence by virtue of the [Opioid Substitution Program Policy] was adequate to treat her withdrawal and so [he found] that the treatment she received constituted cruel and inhumane treatment contrary to section 10 of the Charter [of Human Rights].*"

Further information can be found in the Deaths in Custody Database.

Recommendation 12:

We recommend that the Special Rapporteur's report reiterates that incarcerated people should be provided medical care that is the equivalent to that provided in the community. In the Australian context, this includes, but is not limited to, access to the federally funded Pharmaceutical Benefits Scheme (PBS), Medicare Benefits Schedule (MBS), and National Disability Insurance Scheme (NDIS).

Culturally Appropriate Healthcare for Aboriginal and Torres Strait Islander People

Aboriginal and/or Torres Strait Islander people are overrepresented in prisons in Australia, and it is thus crucial that the healthcare provided to incarcerated Aboriginal people is culturally safe.

The Australian Health Practitioner Regulation Authority has defined cultural safety as follows:

> *"Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families and communities. Culturally safe practise is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible and responsive healthcare free of racism."*

Recommendation 13:

We recommend that the Special Rapporteur's report recommends that healthcare, including mental health care, provided to Aboriginal and/or Torres Strait Islander people deprived of their liberty must be culturally safe, and free from any form of racism or cultural bias.

Early Assessment and Diagnosis of Impairment

People with disabilities are overrepresented in closed settings in the criminal legal system.

For example, a Western Australian point-in-time study found that "88 young people (89%) had at least one domain of severe neurodevelopmental impairment, and 36 were diagnosed with [Foetal Alcohol Spectrum Disorder], a prevalence of 36%. AIHW's survey found that, across Australia *"almost 2 in 5 (39%) prison entrants reported that a long-term health condition or disability affected their participation in everyday activities (30%), education (16%) or employment (21%)."* In the ACT, 31% of incarcerated people participating in OICS' survey

reported that they have a disability, of which 72% reported that their needs as a person with a disability are 'rarely' or 'never' met.

As the Australian Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**DRC**) identified, effective screening is a necessary precondition to providing incarcerated people with:

- *"the supports they require to be in the same position, so far as feasible, as other prisoners, such as mobility aids or information in a form they can understand;*
- *access to appropriate rehabilitation programs;*
- *access to appropriate pre-release planning."*

WA OICS found in a recent inspection that support for incarcerated people with a disability was *"limited and unclear - At Casuarina, 70 prisoners (about 6% of the total population) were flagged with a disability alert on the Department's offender database. However, this was likely to be an underrepresentation of the true numbers. We found the pathway for a prisoner to receive additional disability support was unclear and there was confusion about the process for making applications to the National Disability Insurance Scheme."* In its submission to the DRC, WA OICS stated that it has found through its "*general inspection and review work that prisons use a generic screening tool applied to all adult prisoners received into each facility. This includes questions that address some disability issues. However, we have also found that the tool overly relies on self-reporting by prisoners. It also relies on prior system knowledge, in that records and information from prior periods of imprisonment will be used to identify need.*"

As discussed above, incarcerated people should be afforded access to the NDIS, and assessment of eligibility while incarcerated.

Although the focus of this submission is on prisons and youth detention facilities, we emphasise that the screening and assessment process (and provision of supports) should commence as soon as an individual comes into contact with the criminal legal system (ideally, in fact, before this). This means that police and courts also have a responsibility to engage appropriately with people who have or are suspected of having a disability. This entails, at the very least, a screening process by police and courts.

Recommendation 14:

We recommend that the Special Rapporteur's report reiterates that there should be early assessment and diagnosis of cognitive impairment for individuals who are incarcerated, commencing upon reception to the prison or youth detention facility. The assessment should not be postponed for people who are remanded, as opposed to sentenced.

Challenges and Innovations for Providing Mental Health Provision

Appropriate Alternatives to Prison for People Unfit to Plead or Participate in Criminal Proceedings against them

The DRC addressed the issue of people who are 'unfit to be tried' for alleged criminal offending due to a mental health or cognitive impairment, who may then be subsequently detained, potentially indefinitely, in prisons and youth detention facilities, rather than forensic mental health units, forensic disability units or psychiatric hospitals.

In August last year, more than 1,200 people with a mental impairment were being indefinitely detained across Australia, and in Queensland and the Northern Territory, "*indefinite detention orders had been used to detain individuals for up to 42 years and 30 years respectively.*"

The DRC recommended the following solutions to end indefinite detention:

- *"Require the court to fix a maximum period of detention for a person found unfit to be tried in respect of whom a detention order is made" ("no 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",*
- *"support people with disability to participate in legal proceedings to maximise the prospect they are fit to stand trial*
- *improve the fitness inquiry undertaken by courts*
- *educate court practitioners about the needs of people with cognitive impairment*
- *review and implement the [National Statement of Principles Relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment]*
- *collect and publish data about the number of people found unfit to stand trial around Australia."*

An example of promising practice is Western Australian legislation*: "If a court makes a custody order, the court must set a limiting term for the order, being the best estimate of the term of imprisonment or term of detention that the court would, in all the circumstances, have imposed if the court were sentencing the person for the offence; and any mental impairment of the person were not taken into account… the court must assume that the person had pleaded guilty to the charge at the earliest opportunity; and there is no other option but to impose a term of imprisonment or term of detention."*

Limiting the amount of time an individual can be detained is a step in the right direction, but more needs to be done.

Recommendation 15:

We recommend that the Special Rapporteur's report recommends that indefinite detention of individuals not fit to stand trial should be prohibited in legislation.

Recommendation 16:

We recommend that the Special Rapporteur's report reiterates that processes should be improved to support individuals with disability to participate in legal proceedings to maximise the prospects of them being fit to stand trial.

Recommendation 17:

We recommend that the Special Rapporteur's report recommends that legislation should prohibit the detention of people who are not fit to stand trial in prisons or youth detention facilities.

Measures to Mitigate the Use and Impact of Solitary Confinement and the Development of Alternative Approaches

Issues of Concern Regarding Use of Isolation/Solitary Confinement in Australia

The issue of the use of solitary confinement has been raised repeatedly across Australia, and continues to be an issue of significant concern for members of the Australian NPM. For example:

- In a Western Australian Supreme Court case concerning a 14/15 year old child remanded in the Banksia Hill, who was locked in his cell for periods of more than 20 hours and, on some days, for between 23 and 24 hours, the Judge concluded the following: "*confining detainees or prisoners to their sleeping quarters or cells for long hours is a distinct form of confinement which involves a significant reduction in liberty and amenity. It is a severe measure. Confining children to their sleeping quarters in a detention centre for long hours, thus effectively confining them in isolation, can only be characterised as an extraordinary measure - one that should only be implemented in rare or exceptional circumstances. Among the many reasons why it should be so characterised is because of the very significant harm such confinement can do to children in detention, many of whom are already psychologically vulnerable. Further, the Act recognises that young people have a*

different sense of time, and it is a significantly more difficult and challenging experience for a young person to spend 24 hours in isolation than it is for an adult."

- In South Australia's youth detention centre, it was reported in June this year that children were being "*locked in their cells for up to 23 consecutive hours partly due to staffing shortages at, with the system in crisis amid a spate of "shocking" self-harm incidents… so they can have a break and go to hospital because they're in their rooms for what they believe to be an extraordinary amount of time."* In 2022-2023, *"data showed an average period of less than 10 hours where units were unlocked per day. For one unit, the average period was just over 8 hours."*

- The Northern Territory Office of the Children's Commissioner was notified of 204 separations of 72 children and young people in 2020-2021

Recommendation 18:

We recommend that the Special Rapporteur's report recommends that States establish a consistent standard to define what constitutes 'isolation' of both adults and children, for detention management and oversight purposes.

Recommendation 19:

We recommend that the Special Rapporteur's report reiterates that the use of isolation on a child or young person should be prohibited, except when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.

Legislating a Prohibition on the Use of Solitary Confinement

Under Rule 44 of the UN Standard Minimum Rules for the Treatment of Prisoners ("Nelson Mandela Rules"), solitary confinement is defined as confinement that is *"22 hours or more a day without meaningful human contact*". The UN Committee against Torture recommended an immediate end to the practice of solitary confinement for children across all Australian jurisdictions.

The World Medical Association has stated that for "*a significant number of prisoners, solitary confinement has been documented to cause serious psychological, psychiatric, and sometimes physiological effects. These include insomnia, confusion, hallucinations, psychosis, and aggravation of pre-existing health problems. Solitary confinement is also associated with a high rate of suicidal behaviour. Negative health effects can occur after only a few days and may in some cases persist when isolation ends.*" With "*research suggest[ing] that between confinement*", we recommend that the prohibition of solitary confinement be extended to *one third and as many as 90 per cent of prisoners experience adverse symptoms in solitary* incarcerated adults as well.

Recommendation 20:

We recommend that the Special Rapporteur's report recommends that there be an enforceable legislated prohibition on solitary confinement, for both children and adults.

Affording Natural Justice in Disciplinary Procedures and Decisions to Use Isolation

The use of isolation must be authorised by law and there should be legislated safeguards in place for use of isolation (however it may be described, e.g. segregation, separation, seclusion, solitary confinement, time out, reset etc). This includes natural justice being afforded for both the initial decision to isolate and subsequent reviews of the isolation.

Recommendation 21:

We recommend that the Special Rapporteur's report reiterates that the use of isolation for both children and adults must be authorised by law and there should be legislated safeguards in place for use of isolation.

Recommendation 22:

We recommend that the Special Rapporteur's report recommends that natural justice must be afforded for both the initial decision to isolate and subsequent reviews of the isolation:

- incarcerated people must know why they have been isolated, and have access to any adverse material being relied upon.
- incarcerated people should know what they need to do in order to be released from isolation. This is important not only for adherence to the principles of natural justice, but also for mitigating the adverse effects of isolation and for ensuring that the incarcerated person and detaining authorities are clear on when and under which circumstances the individual will be released from isolation, and what they need to do to achieve this.
- incarcerated people should be included in the relevant processes – both the initial decision to isolate and internal and external review processes – by knowing the reasons for their isolation and the facts being relied upon, having the opportunity to present their views in person (or otherwise, including remotely or through an intermediary/representative, and including legal counsel) to the panel, and being able to suggest alternative solutions.

Laws, Policies, Special Measures and Management Innovations Adopted for Groups with Specific Needs

Aboriginal and Torres Strait Islander People

In 2021-2022, there were 12,782 Aboriginal and/or Torres Strait Islander people in prison and 27,922 non-Aboriginal people, despite the fact that Aboriginal people make up only 3.8% of the total Australian population. This is a pattern that is replicated in other States Parties as well. There needs to be both a targeted effort at reducing the overincarceration of Aboriginal and/or Torres Strait Islander people, and providing appropriate care and service provision for those who are incarcerated.

Recommendation 23:

> **We recommend that the Special Rapporteur's report recommends that governments do more to target efforts at reducing the overincarceration of Indigenous people, co-designed with Indigenous people.**

Recommendation 24:

> **We recommend that the Special Rapporteur's report recommends that the rights of incarcerated Indigenous people be protected. This includes ensuring culturally appropriate care and services, and consideration of relevant international instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples*.**

Preparing for the Next Pandemic

Legacy Use of Reception Quarantine (Isolation)

While many detaining authorities have ceased the use of reception quarantine across Australia, this is not the case in all jurisdictions. This highlights the need for detaining authorities to not only be able to respond quickly to a pandemic, to prevent the spread of an infectious disease among the prison population, but to also unwind restrictive measures as appropriate, with changes in circumstances. This is particularly of concern where incarcerated people are kept in isolation or subjected to solitary confinement as a measure to prevent the spread of disease.

Recommendation 25:

We recommend that the Special Rapporteur's report recommends that the use of isolation in response to a pandemic must be necessary, proportionate and the least restrictive means of addressing the health risks. Restrictive measures should not be normalised and continued when no longer necessary to mitigate the risk.

Responding to Climate-Change Effects on Prisons and Prison Populations and Climate-Proofing Prison Management and Conditions of Detention

Heating and Cooling in Prisons

In Western Australia, WA OICS has been advocating since 2003 for effective climate control in the main accommodation units at Roebourne Regional Prison, where temperatures can reach 50 degrees Celsius. As noted in 2015 by WA OICS, *"prisoner efforts to achieve comfortable temperatures within the limitations of the prison environment can therefore be creative but are unlikely to be fully effective, and can increase other risks such as restricted air flow. For prisoners who are too old, unwell, or mentally ill to undertake these behavioural adaptations, the prison environment poses an acute risk of temperature related ill-health.*"

Recommendations included that detaining authorities "*develop and implement a state plan for addressing the risk of temperature extremes across the custodial estate; provide air-conditioning in all prison cells where acceptable temperatures cannot be maintained using cheaper methods; include heat-related illness as part of the risk assessment when assigning people to cells, ensuring people at high risk of heat-related illness are placed in cells with air-conditioning; improve shading and install air-conditioning in Roebourne Regional Prison within the next 12 months to mitigate the significant risk of heat-related illness; and develop guidelines on actions to be undertaken in response to extreme temperatures.*" The WA government did eventually agree to install air conditioning.

Similarly, in the Northern Territory, there have been concerns regarding the lack of air conditioning in the Alice Springs prison, which can reach temperatures of 40°C. As well as potentially impacting the health and wellbeing of incarcerated people, as discussed above, there is also a risk to the good order and safety of a prison if conditions are inhumane. A disturbance in the prison in 2018 believed to have arisen as a result of these conditions, lead to prison staff using tear gas on incarcerated people.

Recommendation 26:

We recommend that the Special Rapporteur's report reiterates that States should ensure they can maintain humane conditions in prisons, developing and implementing plans in response to existing and anticipated temperature extremes.

Plans in Place for Natural Disasters

Preparedness for escalating disasters, such as fires and floods, increasing in terms of frequency and severity as a result of climate change, is necessary for detaining authorities. In Western Australia in 2021, although Greenough Regional Prison did not have emergency management procedures covering a cyclone emergency, the preparation for and response to Cyclone Seroja was well-managed. While WA OICS welcomed department efforts to implement its recommendations from a 2019 post-incident report to *"progress a system-wide response, the 'post incident recovery plan' and the 'state-wide emergency management plan', [were] incomplete and progress ha[d] been slow at the time of the Cyclone*."

As highlighted by 40 Member States during a special meeting of the Group of Friends of the Nelson Mandela Rules in July this year: "*While the link is rarely acknowledged, the climate crisis and the need for prison reform are closely associated: climate change impacts the vulnerable among us worst of all, and prisoners are among the most vulnerable, often subject to poor conditions, overcrowding, at risk of food and water shortage and with little means to cope with increasingly extreme weather events*."

There has also been an increased focus on the impacts of climate change on incarcerated children, with the recent publication on how climate crisis affects access to justice and children's rights, highlighting that incarcerated children are "*heavily reliant on institution or detention centre staff to ensure their health and safety in the event of a disaster*", with climate change also directly impacting on the conditions in detention.

Recommendation 27:

We recommend that the Special Rapporteur's report recommends that States (including prison authorities) should ensure to have disaster risk reduction strategies in place, taking both preventative and mitigatory steps, paying particular attention to the impact of climate change.

Maintaining Human Rights Standards in Prisons Outsourced to Private Companies

Contracted Prison Services

Governments often also contract out the provision of goods and services in government-operated prisons to private companies. While this may be appropriate for some service provision (e.g. cleaning or catering), this may not be appropriate for others. For example, following the coronial inquest into the death in custody of Veronica Nelson, the Victorian Government made the decision to take over the provision of health services in Victoria's two women's prisons, ending its reliance on private companies. Issues may also arise where rehabilitation and/or work programs are run by for-profit companies. For example, in Victoria, incarcerated people can make a maximum of $9.40 per day in prison industries. This raises concerns regarding protection of workers' rights, especially in the context of the relatively high costs of the goods and services that can be purchased in prison (e.g. phone calls).

Recommendation 28:

We recommend that the Special Rapporteur's report discusses how States should ensure that the privatisation of prison services is appropriate in the circumstances, that the procurement process is robust, and that there are relevant safeguards in place to protect the human rights of incarcerated

Cultural Appropriateness of Contracted Services

Where services are contracted out by the government, and those services are working with Aboriginal and Torres Strait Islander people, the services should be provided in a culturally appropriate manner. Governments should also consider contracting out services to not-for-profit Aboriginal Community Controlled Organisations, as is the case in the ACT prison - Alexander Maconochie Centre (AMC) - with primary healthcare provision being delivered by Winnunga Nimmityjah Aboriginal Health and Community Services. It was also recommended in the inquest into the death of Veronica Nelson that the Aboriginal Community Controlled Health Organisation provide in-reach health services in Victorian prisons.

Recommendation 29:

> We recommend that the Special Rapporteur's report discusses how, where services are contracted out by the government or private providers, and those services are working with incarcerated Aboriginal and Torres Strait Islander people, the services should be provided in a culturally appropriate manner.

Recommendation 30:

> We recommend that the Special Rapporteur's report discusses how, governments should consider contracting out services, such as the provision of primary healthcare, to not-for-profit Aboriginal Community