

REVIEW OF THE USE OF SPIT HOODS BY THE AFP

REVIEWER:

s47F

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EXECUTIVE SUMMARY

This Review was commissioned by Assistant Commissioner Scott Lee in his capacity as Chair of the Australian Federal Police's Operational Safety Committee, at the request of the Australian Federal Police (AFP) Commissioner, for the purpose of urgently examining, the use by the AFP of spit hoods with a view to making recommendations in relation to their future use. The Terms of Reference for the Review are attached as **Annex A**.

This Review was document-based, and was supported by interviews with a small number of relevant internal and external stakeholders, as identified by the AFP. The AFP also requested all Australasian jurisdictions for assistance with the review, with most providing responses detailing their use of spit hoods and other relevant material. A list of persons interviewed is attached as **Annex B**.

A spit hood is a cloth/mesh device which is placed over the head of a subject and is designed to stop the subject from spitting on or biting a police officer. The AFP primarily utilises a spit hood made by a subsidiary company of Safariland, the "Tranzport Safety Hood". In a response to a question on notice from Andrew Braddock MLA, the Australian Capital Territory Policing (ACTP) Chief Police Officer (CPO) advised the ACTP also had access to the Safariland Spit Net¹.

The use of spit hoods is controversial, with many human rights organisations calling for them to be banned, mainly on the grounds that their use is degrading, not proportional to the risks they are designed to mitigate, and possibly dangerous in some circumstances. However, many policing organisations and police associations argue that the use of spit hoods is a necessary option to enable officers to protect themselves from the risk of communicable diseases, such as HIV and Hepatitis B, when confronted with subjects who attempt to bite or spit on them. This view has been reinforced during the Covid-19 epidemic with spit hoods also seen as a mitigation to the risk of contracting Covid-19.²

Notwithstanding these concerns, there appears to be little evidence to support the contention that spitting and biting assaults pose a serious physical health risk to the victim, with publications such as the ANZPAA Guideline on the management of blood borne viruses, which has assessed the risk of contracting Hepatitis B, Hepatitis C, and HIV/AIDS as nil to very low; noting that these diseases are often cited as being of the most concern. The AFP's Chief Medical Officer (CMO) concurs with this assessment and believes that other measures, such

¹ Answer to Question on notice from Andrew Braddock MLA 29 August 2022.

² *A Review of PSNI's Use of Spit and Bite Guards by NI Policing Board's Human Rights Advisor*, February 2022, p16.

as vaccinations, are more appropriate. The Review was not provided with any evidence to support the contention that spit hoods can mitigate the risk of transmission of Covid-19. Indeed, the supplier of the model of spit hood utilised by the Police Service of Northern Island (PSNI) and the Garda Siochana³ has reportedly advised that it is not guaranteed to prevent transmission of Covid-19.

The debate about the use of spit hoods is an emotional one, with much of the published material, on both sides of the debate, being opinion-based, informed by pre-existing perspectives, and lacking a firm foundation in data. There is, however, general agreement that being spat on is an extremely unpleasant experience which a person should not be subjected to in their workplace.

It is also an experience that, regardless of the actual medical risks, can have a psychological impact on the victim and their family. This is due to the perception of the possibility of infection, concerns about timeframes, and indeed the effectiveness of testing, and the need to take courses of prophylactic drugs. These concerns are magnified in some cases by uncertainty about whether the assailant was carrying a transmissible disease at the time of the assault.

It is also argued that the provision of spit hoods is necessary if policing organisations are to meet their responsibility under relevant work health and safety legislation. In the AFP's case, the relevant legislation is the Commonwealth Work Health and Safety Act 2011 and the ACT Work Health and Safety Act 2011. Both Acts have identical provisions in respect to an employer's responsibility to provide a safe workplace for their staff as far as is reasonably practical.⁴ It is likely, given the low risk of disease transmission, the availability of other mitigations such as vaccination, as well as the lack of any evidence that spit hoods are effective in preventing the transmission of Covid-19, that the provision of spit hoods would not be regarded as reasonably practical.

Spit hoods have been implicated in a number of deaths in custody both in Australia and internationally. Many of those cases are still subject to coronial processes, and the Review has not been able to identify any completed processes where the spit hood was found to be the primary cause of death. It is generally accepted, however, that the use of spit hoods can be dangerous in certain circumstances, and most police forces that use them have strict guidelines in place as to when, and how they may be used and, more importantly, when they should not be used.

³ Letter dated 10 September 2020 from the Chair of the Garda Policing Authority to Garda Siochana titled Re: Evaluation of Management and Use of Anti Spit Guards.

⁴ Commonwealth Work Health and Safety Act 2011.

The Review has identified issues with the AFP's governance and training in the use of spit hoods. These issues require immediate attention, particularly in light of the safety concerns attached to the incorrect use of spit hoods. It should be noted that many of these safety concerns have arisen after the AFP adopted the use of spit hoods and may not have been understood when the relevant governance was implemented.

On balance, the Review has concluded that the risks of the AFP's continuing to utilise spit hoods outweighs any potential benefit and, accordingly, recommends that the AFP considers ceasing the use of the spit hoods. Regardless of its consideration of permanently discontinuing the use of the spit hoods, the AFP should institute an immediate pause on their use while record-keeping, governance, and training regarding spit hoods is reviewed.

It is also recommended that the AFP engages with the ACT and Commonwealth Governments to seek legislation:

- To implement a mandatory testing regime for individuals who spit or bite police to identify if they pose an infection risk to those that they have assaulted;
- Increase the penalties for this type of assault with a view to discouraging this behaviour.

The Review further recommends that the AFP instigate a whole of organisation risk assessment of the risks posed by biting and spitting assaults to ensure all risks are identified and appropriately treated. The medical and psychological risks associated with this type of assault should be assessed by AFP Medical Services to ensure the outcome aligns with best practice. A summary of recommendations are attached as **Annex C**.

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THE REVIEW

Terms of Reference

This Review was commissioned by Assistant Commissioner Scott Lee in his capacity as Chair of the AFP's Operational Safety Committee, at the request of the AFP Commissioner for the purpose of urgently examining the use by the AFP of spit hoods due to "*... mounting political and public pressure for the AFP to review/reform its policy on this matter and align with other jurisdictions who have either banned the device, or have regulated the use for adults in custody only.*" (**The Review**)

The Review was requested to consider "*... current frameworks, policy and governance relating to the use of spit hoods by ACT Policing*" as well as "*...the implications of using or ceasing to use Spit Hoods for the public and AFP members including the necessity for legislative change and implications for work health and safety.*"

The Review was required to "*... make recommendations to inform AFP decision making in respect of continued use of Spit Hoods including consideration of work health and safety implications for the use or non-use for members of the public and police officers.*"

Methodology

As required by the Terms of Reference, the methodology adopted was limited to a document-based review and analysis of extant material including previous reviews, doctrine, governance, strategic guidance, resourcing, and operational protocols. The AFP also sourced material from and state police services to inform the Review.

This document-based review was supported by interviews, as required, with relevant internal and external stakeholders, noting that the Terms of Reference indicated that the requirement for interviews would be limited. Consultation was conducted with the AFP to identify relevant stakeholders. Some interviews for the Review were conducted remotely via telephone or video conference

Background

A spit hood is a cloth mesh device that is placed over the head of a subject and is designed to stop the subject from spitting on or biting a police officer. The AFP primarily utilises a spit hood made by a subsidiary company of Safariland, the “TranZport Safety Hood”, which is pictured below. This hood is currently utilised by New Zealand Police (NZPol) and Western Australian Police (WAPol). It was previously used by the Northern Territory Police and Queensland Police. In a response to a question on notice from Andrew Braddock MLA the ACTP CPO advised that ACTP also had access to the Safariland Spit Net⁵.



Image 1. The TranZport Safety Hood

The use of spit hoods is controversial, with many human rights organisations, including the United Nations, Amnesty International and the ACT Human Rights Commissioner, amongst those calling for their use to be banned, mainly on the grounds that their use is degrading, not proportional to the risks they are designed to mitigate, and possibly dangerous in some circumstances. However, many policing organisations and police associations argue that the use of spit hoods is a necessary option to enable officers to protect themselves from the risk of communicable diseases such as HIV and Hepatitis B, when confronted with subjects who attempt to bite or spit on them. This view has been reinforced during the Covid-19 epidemic with the spit hoods also seen as a mitigation to the risk of contracting Covid-19.⁶

⁵ Answer to Question on notice from Andrew Braddock MLA 29 August 2022.

⁶ *A Review of PSNI's Use of Spit and Bite Guards by NI Policing Board's Human Rights Advisor*, February 2022, p16.

It is also argued that the provision of spit hoods is necessary if policing organisations are to meet their responsibility under relevant work health and safety legislation. In the AFP's case, the relevant legislation is the Commonwealth Work Health and Safety Act 2011 and the ACT Work Health and Safety Act 2011. Police Officers are expressly covered under the provisions of those Acts and both have identical provisions in respect to an employer's responsibility to provide a safe workplace for their staff.

Spit hoods have been implicated in a number of deaths in custody, both in Australia and internationally. However, many of those cases are still the subject of coronial processes and the Review has not been able to identify any completed processes where the spit hood was found to be the primary cause of death. It is generally accepted, however, that the use of spit hoods can be dangerous in certain circumstances and that most police forces that use them have strict guidelines in place regarding when and how they may be used and, more importantly, when and how they should not be used. The 2018 death in custody of a person who was placed in a spit hood by South Australian Corrections Officers led to the use of spit hoods being banned in South Australia. It should be noted that the inquest into this death is incomplete.

The debate about the use of spit hoods is an emotional one, with much of the published material, on both sides of the debate, being opinion-based, informed by pre-existing perspectives, and lacking a firm foundation in data. There is, however, general agreement that being spat on is a deeply unpleasant experience to which a person should not be subjected. It is also an experience that, regardless of the actual medical risks, can have a psychological impact on the victim and their family due to the perception of the possibility of infection, and the uncertainty that this causes.

The Use of Spit Hoods - Other Jurisdictions

The United Kingdom and Ireland

A survey of material available on the internet reveals that the majority of readily available information regarding spit hoods relates to the United Kingdom and Ireland, perhaps because it is currently a very topical issue in United Kingdom Policing. Since the start of the Covid-19 epidemic, there has been a significant increase in the number of United Kingdom police forces that have commenced using spit hoods⁷. This trend has been strongly supported by police unions but is being actively questioned by Human Rights Groups as well as by some police oversight bodies such as the Police Service of Northern Ireland Police Board, and the Garda Síochána Police Authority. The main driver for this trend is the belief that the spit hoods may

⁷ National Police Chiefs Council and College of Policing, *Officer and Staff Safety Review*, 2020, P. 67.

have some prophylactic effect in respect of Covid-19 as well as a concern about meeting work health and safety legislative requirements.⁸

A staff safety review conducted by the United Kingdom College of Policing and the National Council of Police Chiefs supported the introduction of spit hoods. While acknowledging that the risk of transmission of blood borne diseases is very low, the review stated that spit hoods were introduced 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. This point is particularly important given the ongoing Covid-19 pandemic as officers and staff face an increased risk of contracting this potentially deadly virus if they are coughed at or spat on by offenders who are infected.*”⁹

Those opposed to the use of spit hoods challenge the assumption that they will mitigate against Covid-19, pointing to the lack of scientific evidence supporting this assertion, as well as statements to the contrary from the manufacturers of the spit hood being used by the Garda Síochána¹⁰ and the Police PSNI. Additionally, Amnesty International’s policing advisor asserts that the close contact required to fit a spit hood would present more of an infection risk than any prophylactic benefit it may offer.¹¹

Australasian Jurisdictions (Excluding AFP/ACTP)

In order to inform the Review, the AFP wrote to all Australasian jurisdictions seeking information in respect of the current practices regarding spit hoods, specifically:

- “Copies of any current or previous policy or governance for the use, or non-use, of spit hoods
- Copies of any reviews conducted on the use, or non-use of spit hoods;
- What, if any, risk assessments were required to be undertaken before using a spit hood; and
- An insight into legislative reform, if any, as a result of the use, or non-use of spit hoods, i.e. mandatory testing for infectious diseases for those who spit or bite emergency service workers.”¹²

⁸ C. De Camargo, *The Weaponising of Covid 19: Contamination Protection and the use of spithoods in UK policing*, Police Journal: Theory Practice and Principles Volume 95 issue 4. Pp 1-2.

⁹ National Police Chiefs Council and College of Policing, *Officer and Staff Safety Review*, 2020, P. 67.

¹⁰ Letter dated 10 September 2020 from the Chair of the Garda Policing Authority to Garda Síochána titled RE: Evaluation of Management and Use of Anti Spit Guards.

¹¹ Amnesty International UK Press Release, UK: Police spit hoods may increase risk of Covid-19 spread and should not be used to police pandemic, 24 June 2020

¹² Email dated 8 November 2 from Acting Deputy Commissioner Gale addressed to all Australasian policing jurisdictions.

In making the request, the AFP gave an undertaking not to release any information provided to anyone other than the reviewer.

Responses were received from all jurisdictions with the exception of South Australia. However, the use of spit hoods in South Australia has been prohibited by legislation since 2021. A summary of responses is provided in the table below:

Jurisdiction	General Duties	Watch House	Juvenile	Adult
New Zealand	Yes	Yes	No	Yes
South Australia	No	No	No	No
Victoria	No	No	No	No
Tasmania	No	No	No	No
NSW	No	No	No	No
Queensland	No	No	No	No
Northern Territory	s47B			
Western Australia	No	Yes*	No	Yes

Table 1 Spit Hood Usage by Jurisdiction

*Perth Watch House only

s47B Queensland Police Service (QPS) have recently conducted reviews of the use of spit hoods. As outlined above, only the Western Australia Police Force

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s47B In Western Australia, use is further restricted to the Perth Watch House only. Queensland Police have prohibited the use of spit hoods since 16 September 2022¹³

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s47B¹⁴. QPS had previously restricted the use of spit hoods to the Watch House environment.

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¹³ "QPS discontinues use of safety hoods in Watchhouses," MyPolice 16 September 2022.

¹⁴ s47B

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Victoria Police, Tasmania Police and the NSW Police Service have stated that they rely on the use of defensive tactics and personal protective equipment (PPE) to protect their staff from biting or spitting assaults. The NSW Government has also enacted legislation enabling mandatory testing of perpetrators, of spitting or biting assaults on police, to test for infectious diseases.¹⁵ Similar legislation exists in Western Australia¹⁶ and South Australia.¹⁷ In all jurisdictions the mandatory test must be approved by a senior police officer. In NSW, some cases, including that of juveniles and vulnerable persons, require approval by a relevant judicial officer. In addition, some jurisdictions have enacted legislation to increase the penalties attached to spitting/biting assaults on police officers.¹⁸

NZPol have also conducted an internal review of the use of spit hoods. This review, dated 19 July 2022 identified that spit hoods have been used on 1250 occasions since 2017, and an average of 251 times per year. The majority of use (89%) has occurred in the field environment rather than in the Watch House. Statistics quoted in the review indicate that NZPol members have been the subject of spitting assaults 2327 times in the same period. The NZPol review supports the continued use of spit hoods based primarily on NZPol's legislated work health and safety obligations, and due to the lack of a suitable alternative. However, it also notes research that puts the risk of disease transmission as low. This same review also identified that NZPol did not have a suitable training package in place in respect of the spit hoods, albeit that clear guidance was given that spit hoods should not be used in a range of circumstances, including in conjunction with OC spray. The review noted, however, that records indicate that in 5.5% of the times spit hoods have been used, OC spray had also been used. The review also

¹⁵ Mandatory Disease Testing Act 2021

¹⁶ WA Mandatory Testing (Infectious Diseases) Act 2014.

¹⁷ SA Criminal Law (Forensic Procedures) Act 2007.

¹⁸ Criminal Consolidation Act Section 20AA

reports that spitting-related attacks account for 7.5% of workforce injuries suffered by NZPol members. The nature of the injuries were not specified in the review. Additionally, NZPol records show that in the 1250 occasions that spit hoods were used, there were two occasions where the subject experienced breathing difficulties, one from asthma. On one occasion, a person died following the application of a spit hood. This case is still before the coroner.¹⁹

The AFP including ACTP

	General Duties	Watch House	Juvenile	Adult
Australian Federal Police ²⁰	Not in practice	Not in practice	Not in practice	Not in practice
ACT Policing	Yes	Yes	Yes	Yes

Table 2 Spit Hood Usage in the AFP.

The AFP advises that, as a matter of practice, the use of spit hoods is restricted to ACTP. Specialist Protective Command Special Operations have informed the Review that they have a stock of spit hoods but that they do not use them. ACTP advise that they are used very rarely, and then mainly in the ACT Watch House. However, they acknowledge that there has been some use outside that environment²¹. While it is clear the use of spit hoods is not a common occurrence, ascertaining the use of spit hoods by the AFP is difficult as there is no readily available data. While, as will be seen, the use of a spit hood is required to be reported as a use of force, issues with the format of the “use of force report form”, means any search for this data has to be done manually and is time consuming.

ACTP have further advised that at the start of the Covid-19 pandemic spit hoods were issued to all stations as a precautionary measure. They have since been withdrawn and only the Watch House now has a stockpile. However, as they were treated as a disposable item there are no records regarding their issue, so it is uncertain whether individual officers are still carrying them.

Similar to the data on the use of spit hoods, the number of spitting/biting attacks on AFP members is difficult to quantify. The primary source of the data is via Work Health and Safety (WHS) reporting. However, both ACTP and AFP Medical Services believe that these incidents are under-reported and, in any event, the data aggregates biological exposures from all sources. This means that the data does not distinguish between a deliberate assault and an accidental or environmental exposure. From the first quarter of 2020 until the second quarter of 2022, 137

¹⁹ NZPol internal document, A Review of Spit Hoods in New Zealand Police, dated 19 July 2022.

²⁰ Use authorised by Commissioner Order 3 but does not occur in practice.

²¹ ACTP Response to the Review 20 January 2023

incidents were reported to Medical Services.²² Both ACTP and AFP Medical Services advise that there is no record of an AFP appointee contracting HIV, Hepatitis B, or Hepatitis C in respect of any of these exposures.

Other evidence supporting the fact that the use of spit hoods by the AFP is not widespread is advice from AFP Professional Standards that they have not been able to identify any complaints regarding the use of a spit hood by an AFP appointee in the period 31 December 2021 to 12 December 2022.²³

Governance

Commissioner's Order 3 on Operational Safety (CO 3) is the relevant primary governance for the AFP in relation to the use of force in general, and spit hoods in particular. Under this Commissioner's Order, AFP equipment is defined as "... equipment approved by the Commissioner or Operational Safety Committee (OSC) Chair and recorded on the AFP Authorised Equipment Register (AER) ..."²⁴

The AER is a register of approved AFP equipment. It is maintained by the Operational Safety Committee (OSC) and is published on the AFP Hub.²⁵ The preamble to the AER states:

- *"The OSC Secretariat is responsible for updating this register in consultation with Operational Safety Practice and the OSC"*
- *"For equipment to be considered for approval by the OSC, a submission paper needs to be tabled to the Committee."*
- *"All trials for new pieces of equipment must be approved by the OSC **prior** to any trial taking place."²⁶*

The AER lists spit hoods as an approved restraint. The entry in relation to spit hoods has a photograph of what appears to be a "TranZport Safety hood" and states that:

- Spit hoods are approved for all AFP appointees "... involved in custody situations"; and
- Further information is available in the Operational Safety Training (OST) handbook Section 1.4.

²² Email [redacted] s 22 to [redacted] s47F 5 January 2023

²³ Email Jason Kennedy to [redacted] s47F 28 December 2022.

²⁴ Commissioner Order 3 on Operational Safety Section 4 Definitions.

²⁵ Ibid.

²⁶ Authorised equipment Register.

Operational Safety Practice (OSP) advise that the handbook is out of date, and has been archived. It should be noted that the AER is currently under review. OSP, who perform a secretariat function for the OSC, has also been unable to provide any advice on the previous considerations or deliberations by the OSC in respect of the adoption and authorisation of the use of spit hoods.

Section 13 of CO 3 addresses the use of spit hoods. The relevant sections are replicated below:

“13.1 AFP appointees must only use handcuffs and other approved restraints, including spit hoods, lawfully and in accordance with this Order.

13.2 AFP appointees must only apply handcuffs, restraints or spit hoods to persons in custody if it is lawful to do so.

13.3 In deciding whether to use handcuffs, restraints or spit hoods AFP appointees must consider:

- 1. their safety and that of other persons and the person in custody*
- 2. the nature of the offence or breach of law*
- 3. the conduct and demeanour of the person either by words or actions*
- 4. whether the person has previously attempted to escape or is likely to attempt escape*
- 5. whether the person should be restrained to prevent the loss, concealment or destruction of evidence*
- 6. whether the person has a history of violent behaviour or the demeanour of the person is violent or aggressive*
- 7. whether the person threatens to expel a bodily fluid or has done so*
- 8. the number of other persons in custody at the time*
- 9. the parity/disparity in physical attributes of the appointee and person in custody*
- 10. the likelihood of injury to the appointee, other persons or the person in custody*
- 11. the person's mental health history including incidents of self-harm*
- 12. the requirement to prevent escalation of an incident*
- 13. the circumstances and location of the incident.”²⁷*

Other relevant provisions of CO 3 includes:

- Section 6.3 which outlines that an AFP Appointee must only carry AFP equipment and munitions that are qualified and approved to carry and use.
- Section 7.1 1 AFP Appointees must only be issued with, or seek to be issued with, AFP equipment that they are qualified and authorised to carry and use.

²⁷ Commissioners Order 3 on Operational Safety Section 13.

The AFP National Guideline on Controlled items defines a controlled item as a piece of AFP equipment that's potential to cause harm represents a significant risk to the AFP and the community.²⁸ The National Guideline outlines a regime for the management of these items. Unlike many of the items on the AER, spit hoods are not listed as a controlled item. This accords with advice from ACTP and Specialist Operations that they are considered a disposable item and no record is kept of their issue.

Clearly, the import of CO 3 and the AER is that all AFP appointees are authorised to use spit hoods in a custody situation. No particular model of spit hood is mandated and there is no requirement in governance for them to be treated as a controlled item. Similarly, there is no mandated qualification specified before an AFP appointee is qualified to use them. These issues all become problematic when viewed in light of the AFP's lack of an established training regime relating to spit hoods, as well as the known risks associated with their use.

ACTP Governance

The only other specific mention of spit hoods in an ACTP governance document, that the Review is aware of, is in the ACT Watch House Operations handbook which states:

“Watch House staff are to be mindful of their responsibilities under Commissioner’s Order 3 in relation to any dealings with detainees who are non-compliant and/or violent. Detainees may be intoxicated which can exacerbate their propensity for violence and inability to comprehend instructions. Some basic steps for dealing with such persons taken into custody who are brought to the Watch House include:

- (1) Communicate with the detainee to ensure that they are provided with information about their being in Police custody, where they are and the processes they will need to undergo (such as being subjected to a search or fitted with a spit hood) whilst at the Watch House ...”²⁹*

While this advice is sound, it does not address the issues identified previously with AFP Governance, and certainly does not address the risks specific to the use of spit hoods.

²⁸ AFP National Guideline on controlled items

²⁹ ACTP Watch House Operations Hand book P. 53

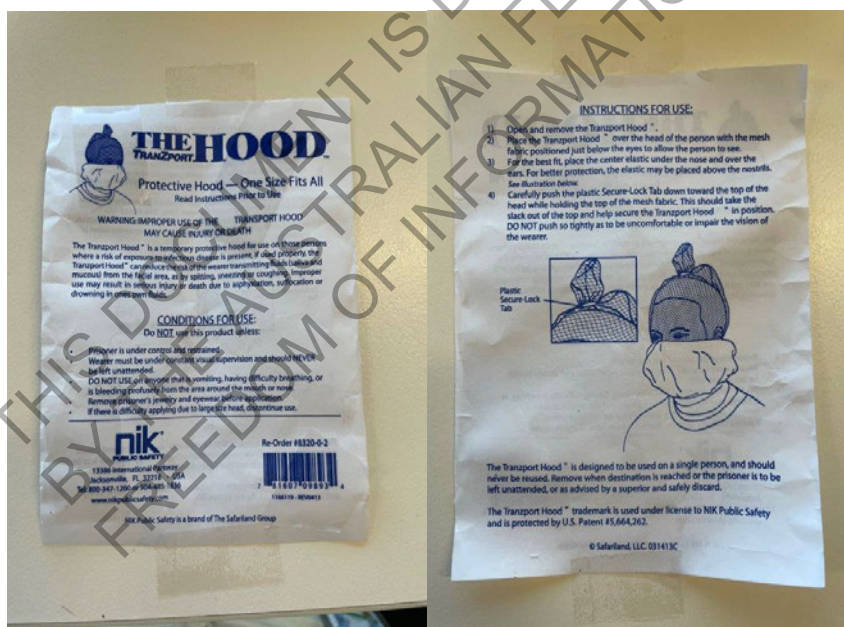
Training

CO 3 Section 7.1 states that AFP appointees must only be issued with AFP equipment that they “are qualified and authorised to carry and use.”³⁰ Section 7.2 further states that they “must only handle, carry, use, store and transport AFP equipment in accordance with:

- applicable Australian legislation
- AFP governance, including this Order
- their training and qualifications.”³¹

Both these sections would appear to indicate that the use of accoutrements to which CO 3 applies should only occur if that appointee is authorised and appropriately trained and qualified. The Review has been unable to identify any formal or informal training program within ACTP or, indeed, the AFP specific to the use of spit hoods. Operational Safety Training have advised that they do not have a training program for the spit hoods nor do they instruct about the spit hoods in Use of Force Training. Additionally, they advise that assaults by spitting have not been raised as a particular issue recently, and they provide no specific training in respect of this type of assault.

Advice from ACTP is that they rely on the general AFP use of force principles outlined in Commissioners Order 3 on Use of Force as well as the instructions printed on the packaging of the spit hoods. The instructions on the packaging is reproduced below.



³⁰ Commissioner Order 3 on operational safety, Section 7.1

³¹ Commissioner Order 3 on operational safety, Section 7.2

Importantly, the instructions state that “improper use may result in serious injury or death due to asphyxiation, suffocation or drowning in ones’ own fluids.”³² The packaging outlines the following conditions of use:

- *Prisoner is under control and restrained.*
- *The wearer must be under constant visual supervision and **never left unattended.** (Emphasis from the packaging)*
- *Do not use on anyone that is vomiting, having difficulty breathing or is bleeding profusely from the area around the mouth or nose.*
- *Remove the prisoner’s jewellery and eyewear before application.*
- *If there is difficulty in applying due to a large head size discontinue use.*³³

The packaging also gives instructions on fitting the hood, outlines that it is a single use item and advises that it should be removed if the prisoner is to be left unattended.

Additionally, ACTP advises that:

*“The watchhouse conducts a 2 day formal training package for all staff entering the watchhouse for their first time. This has been in place for at least the past 5 years. The training is not specific to spit hoods but there is a small component of spit hood training relating to both CO3 considerations and the actual application of the spit hoods if/when it is necessary to use them. The training doesn’t specifically record spit hood training, simply that they have completed the full watchhouse training package which includes half a day focussed on Clinical Forensic Medical training as well.”*³⁴

This training appears to be included in a power point presentation consisting of 14 slides, of which seven deal with the use of spit hoods. All the slides in relation to spit hoods relate to the positioning of officers in respect of the application of a spit hood in three different scenarios. The presentation also states that if a spit hood has been utilised on a subject and then removed when they are placed in a cell, it should be retained for use when they are next removed from the cell. While it makes it clear that the spit hood should be kept on for a minimum period necessary, the presentation appears dated and is inadequate in the absence of other training.

Critically, the presentation does not address the risk factors associated with a spit hood or the issues which an officer should consider prior to use.

Noting the requirements of Commissioner’s Order 3 and the risk related to the use of spit hoods, as evidenced on the label of the spit hood packaging, the AFP’s approach to training in respect

³² Packaging of the Safariland TranZport Safety Hood.

³³ Ibid.

³⁴ Email A/Assistant Commissioner J. Cameron to [REDACTED] s47F dated 19 February 2023.

of spit hoods appears inadequate. It also appears out of step with the requirements of CO 3 as well as with other jurisdictions that have, or are still using, spit hoods. Generally, those jurisdictions advised that they ensure members are trained to understand the factors that need to be considered prior to utilising a spit hood.

Similarly, the AFP does not provide training in alternate strategies that may be employed in the event of spitting or biting incidents, noting that many Australian Jurisdictions have abandoned the use of spit hoods, either because of legislation or internal policy, and have implemented alternate measures to compensate.

Record Keeping

As stated above, the introduction of operational equipment that comes under the ambit of CO 3 is the responsibility of the OSC. In this instance, the OSC has not been able to provide any information regarding the adoption of spit hoods due to the historical nature of that decision, and a changeover in personnel. As such, it is not clear how long spit hoods have been used in the AFP. In ACT Policing News February 2010 edition, the then CPO announced the introduction of spit hoods in the ACT Watch House on a trial basis.³⁵ An article in the same publication states that the spit hoods were introduced to combat the threat of communicable diseases, although it notes that the risk of this occurring is small.³⁶

ACTP's decision to conduct the trial of spit hoods appears to have been based on an ACTP risk assessment dated 22 December 2009. This risk assessment assessed the "danger of a person in custody at risk of infection from spit or spittle" as high and requiring further treatment. It also assessed the dangers associated with the use of the spit hood as insignificant or low.³⁷ Many of the performance measures outlined in the risk assessment related to assessing the outcomes of trial. The risk assessment did not provide any commentary on why the risk of infection from spit or spittle was rated as high. Nor has the Review been provided with any report on the outcomes from the trial, or evidence of further consideration by the AFP's OSC of adoption of the spit hood.

It appears, based on anecdotal evidence, that there was further consideration by ACTP of extending the use of spit hoods to general duties members and that this may have been done following the submission of another risk assessment.³⁸

³⁵ ACT Policing News February 2010, P.1

³⁶ ACT Policing News February 2010, P.3

³⁷ ACTP Risk Assessment Register "Spit Hoods for WH – Safariland Tranzport Hood" dated 22/12/2009.

³⁸ Email from [REDACTED] s 22 to [REDACTED] s47F dated 5/1/2023.

Noting that Commissioners Order 3 authorises the use of spit hoods, there appears no doubt that, at some stage, the OSC authorised this use. Nevertheless, the records of the decisions, and the basis of those decisions do not appear to be readily available. Similarly, and as noted, records in respect of the issue of spit hoods, the use of spit hoods, training, and even the number of spitting and biting assaults on AFP Officers are not readily available. Noting the level of opposition to the use of spit hoods, record keeping could become a significant issue if the AFP's use of spit hoods is significantly challenged.

The Medical Risk Posed By Spitting/Biting Assault

Traditionally, the rationale for the use of spit hoods has been to protect police officers from the risk of contracting blood borne viruses from a spitting or biting assault, in particular given that:

*“...the spitting of infected body fluids such as saliva or blood at another person might result in the transmission of serious diseases, especially should the saliva enter the target's mouth, eyes or nose. This is referred to medically as mucocutaneous exposure and these diseases include Hepatitis A and B, TB and HIV.”*³⁹

There are two main cases most commonly referenced in highlighting this risk. They are the 1977 death of a British police officer who died after contracting meningitis after being spat on at a football match, as well as the 2016 death of a Ukrainian police officer who died after becoming infected with tuberculosis during the arrest of an infected subject.⁴⁰ In the Australian context, the risk presented by blood borne diseases such as Hepatitis B, Hepatitis C and HIV/AIDS has been the main driver of the use of spit hoods. Recently, both in Australia and overseas the Covid-19 pandemic has seen police forces in the United Kingdom increasingly adopting spit hoods as a means of protecting their staff from Covid-19. Indeed, while universally accepted as a use of force option, some police forces have been characterising spit hoods as PPE.⁴¹

The Australia New Zealand Policing Advisory Agency ANZPAA has issued a guideline entitled Police and Blood Borne Virus, the purpose of which is to provide guidance in relation

³⁹ P. Joyce and W. Laverick, *Spit guards, ethical policing and the need for an evidence-based approach*, Safer Communities Volume 13 No. 3 2018

⁴⁰ C. De Camargo, *The Weaponising of Covid 19: Contamination Protection and the use of spithoods in UK policing*, Police Journal: Theory Practice and Principles Volume 95 issue 4.

⁴¹ “Management and Use of Anti-Spit Guards” An Garda Siochana Policy Document dated 02/04/2020.

to protecting police from the threat of blood borne viruses. It analyses the risk posed to police officers, from blood and spittle in a range of scenarios. The results are detailed below:

Exposure	Hepatitis B	Hepatitis C	HIV
Blood and saliva to intact skin and skin-to-skin contact	Zero	Zero	Zero
Saliva in bites that break the skin	Very Low	Zero	Zero
Blood contact with broken skin, mouth or eyes, e.g. <ul style="list-style-type: none"> • Punch from bleeding person to body causing break in skin. • Large blood splash, e.g. bleeding artery. • Blood contact to mouth from giving mouth-to-mouth resuscitation if no protective equipment used. 	Moderate	Low	Low

Table 3 Risks of Contracting Diseases from Blood Borne Viruses.

This assessment is supported by AFP medical services. The AFP's Chief Medical Officer (CMO) advises the risk of a blood borne infection from a spitting or biting incident was non-existent to extremely low and that the use of spit hoods could not be justified on medical grounds. Prophylaxis, vaccination, and appropriate PPE were the more effective countermeasures. The CMO noted that AFP officers were required to be vaccinated against a range of diseases including Hepatitis B. The academic literature viewed by the Review supports this analysis.⁴²

Recently, Covid-19 has been cited by a number of overseas police forces as the main reason they have adopted spit hoods. Indeed, some forces have characterised the spit hood as PPE. While there is no doubt Covid-19 has presented new hazards to police officers, the Review has been unable to locate any material that suggests that spit hoods are effective as a countermeasure against Covid-19. Amnesty International's policing expert has claimed that the very act of fitting the hood to a non-compliant subject could increase the risk of Covid-19 transmission due to the close contact required.⁴³ The makers of the type of spit hood utilised by the Garda Síochána and the Police Service of Northern Ireland (PSNI) have reportedly advised their spit hood is not guaranteed to provide protection against Covid-19.⁴⁴ While the

⁴²K. Kennedy, J. Payne-James, G. Payne James and P. Green, *The use of spit guards (also known as spit hoods) by police services in England, Wales and Northern Ireland: to prevent transmission of infection or another form of restraint?*, *The Journal of Forensic and Legal Medicine* 66 2019.

⁴³ Amnesty International UK Press Release "UK: Police spit hoods may increase risk of Covid -19 spread and should not be used to police pandemic." 24 June 2020

⁴⁴ P. Corrigan, *The case against the use of spit hoods in response to Covid_19*, Amnesty International/Blogs, 5 November 2020.

model of spit hood used by the PSNI differs from that used by the AFP it does emphasise the fact that it cannot be assumed a spit hood is effective in these circumstances.

In the Northern Territory Police review of spit hoods, the statement was made that, aside from the diseases traditionally cited when considering the need for spit hoods, other “... *new viruses, such as Ebola virus and bird flu, are also a concern ...*”.⁴⁵ The CMO discounts this threat, noting that Ebola has never been found in Australia.

In summary, the medical rationale for the use of spit hoods focuses on two main issues:

- The risk of the transmission of blood borne diseases including Hepatitis B and C as well as HIV AIDS.
- The risk of transmission of Covid-19.

The Review accepts that the risk of the former is non-existent to very low, and there is no evidence that the use of the spit hood is effective against the latter.

In addition to considerations of the physical risk posed by spitting and biting assaults, there is the potential for this type of assault to affect a police officer’s mental health, particularly in light of the perceived threat.⁴⁶ This is especially the case where there is uncertainty about whether the assailant involved in the assault was carrying a transmissible disease, the length of time and uncertainty in respect of testing, the uncertainty relating to the effectiveness of prophylactic treatments, and the impact on family members.⁴⁷ This risk has been raised by the AFPA, and an example, outlined below, was cited in a 2020 United Kingdom study into police and staff safety.

*“...involving two West Midlands officers, who were spat on during arrest. In the aftermath, one officer had a false positive diagnosis for hepatitis, and his wife and young baby also needed to be tested. The other officer was unable to visit his brother, who was undergoing chemotherapy, for six weeks.”*⁴⁸

It is possible that this risk is overstated, noting the paucity of data about the prevalence of biting and spitting attacks available generally,⁴⁹ and from the AFP specifically; as well as the ACTP’s

⁴⁵ NTFES Review of the use of Spit Hoods Appendix C: Medical Considerations – Exposure to Body Fluids

⁴⁶ P. Joyce and W. Laverick, *Spit guards, ethical policing and the need for an evidence-based approach*, Safer Communities Volume 13 No. 3, 2018

⁴⁷ K. Kennedy, J. Payne-James, G. Payne James and P. Green, *The use of spit guards (also known as spit hoods) by police services in England, Wales and Northern Ireland: to prevent transmission of infection or another form of restraint?*, The Journal of Forensic and Legal Medicine 66 2019. Pp. 147 -154

⁴⁸ National Police Chiefs Council and College of Policing, *Officer and Staff Safety Review*, 2020, P. 69.

⁴⁹ K. Kennedy et. al. p. 149

belief that these types of incidents are under reported. It does, however, present a risk that needs to be treated. It has been suggested that this risk may best be treated by providing police officers with a better understanding of the real risks of disease transmission from spitting and biting incidents.

As previously identified, some states have moved to address this issue by providing regimes for mandatory testing of persons who assault police officers by spitting and/or biting, as well as legislation designed to deter this type of assault through heavier penalties. While it should be noted the effectiveness of mandatory testing has been called into question due to the uncertainty of some of the results, it does appear it may have some benefit in terms of the police officers' mental health.⁵⁰

Work Health and Safety Legislation

WHS legislation is often cited as a justification for the adoption of spit hoods by police services. In a 2014 case, the MPS were held liable because they had not provided a spit hood to an officer who was injured in a spitting assault.⁵¹ The provisions of the Commonwealth Work Health and Safety Act 2011 and the ACT Work Health and Safety Act 2011 are complementary. They both specifically include police officers. Under this legislation, the AFP and, ACTP have a positive duty to provide a safe workplace for their staff. This requires that the AFP:

- eliminate risks to health and safety, so far as is reasonably practicable;
- if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.⁵²

Reasonably practical is defined as:

"...reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring; and*
- (b) the degree of harm that might result from the hazard or the risk; and*
- (c) what the person concerned knows, or ought reasonably to know, about:
 - (i) the hazard or the risk; and*
 - (ii) ways of eliminating or minimising the risk; and**
- (d) the availability and suitability of ways to eliminate or minimise the risk; and*

⁵⁰ P. Joyce and W. Laverick, *Spit guards, ethical policing and the need for an evidence-based approach*, Safer Communities Volume 13 No. 3 2018

⁵¹ Ibid

⁵² Commonwealth Work Health and Safety Act 2011.

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.”⁵³ AFP WHS advise that consideration of whether the failure to provide spit hoods to AFP staff to protect themselves against a spitting or biting assault would constitute a breach of this legislation would depend on the extent of the risk that a biting or spitting assault presents. If the risk is considered low, particularly in light of other treatments, then it would fall outside the parameters of what is considered reasonably practical.

AFP Work Health and Safety have indicated that, if a decision is made to suspend the use of spit hoods, it may be appropriate to conduct a whole of AFP risk assessment in relation to spitting and biting assaults to identify the most appropriate risk treatments in respect of both the physical and mental aspects of this risk. If this approach, which the Review supports, is adopted, the medical and psychological risks should be informed by AFP Medical Services to ensure the outcomes align with best practice.

Risks Associated With the Use of Spit Hoods

A study conducted in 2020, which specifically studied the physiological effects of wearing the Safariland TranZport Safety Hood concluded that “... in healthy adult subjects there were no clinically significant differences in respiratory or circulatory parameters while wearing the Safariland Tranzport Hood spit mask”,⁵⁴ and that there were “no cardiac or ventilatory changes found in healthy subjects wearing mask at rest.”⁵⁵

An additional study found that the tested spit socks “... offer nearly zero resistance to breathing. The highest resistance spit sock was still 100 times better than the best N95 mask for airflow during inhalation. Our results do not support the occasional hypothesis that spit socks might contribute to an arrest-related death.”⁵⁶

Opponents of the use of spit hoods question the methodology used in these studies, pointing out that it does not reflect the likely real world use of spit hoods.⁵⁷

⁵³ Commonwealth Work Health and Safety Act 2011

⁵⁴ O. Marigold, E. Castillo, C. Sloane, J. Brennan, C. Coyne, S. Swift, G. Vike, *Further study on the physiological effects of an alternative spit mask*, Journal of Forensic and Legal Medicine Vol 72 May 2020.

⁵⁵ Ibid

⁵⁶ M. Kroll, M. Brave, S. Hall, R. Kroll, H. Williams, *Pneumatic Impedance of Spit Socks and N95 Masks: The Applicability to Death Investigation*, <https://pubmed.ncbi.nlm.nih.gov/34417373/>

⁵⁷ ACT HRC Response to the Australian Federal Police Review of the Use of Spit Hoods, 2 February 2023.

Spit hoods are implicated in a number of deaths in Australia and New Zealand which are currently the subject of coronial processes. These include matters in Queensland, New Zealand and South Australia. The New Zealand matter was also the subject of an investigation by the Independent Police Conduct Authority which found, among other things, that the spit hood used on the deceased in this case was incorrectly positioned, and that the deceased was left in a cell with the spit hood in place.⁵⁸ The pathologists' findings as outlined in the report identified that "... possible suffocation by the spit hood" as a contributing factor in the death.⁵⁹ The use of spit hoods has also been reported as potential factors in a number of other deaths overseas.⁶⁰ In at least one of those cases deficiencies in police training and governance in respect of spit hoods was highlighted as an issue.⁶¹

As previously noted, the packaging of the spit hood states that improper use can cause injury or death and outlines a number of circumstances where its use is contra-indicated. Additionally, all jurisdictions surveyed that use the spit hood, mandate that it should not be used if the person being restrained has been subjected to OC spray or other chemical irritants.

In addition to the physical risk associated with the use of spit hoods, many organisations argue that they can cause psychological damage.⁶² The issue of spit hoods was on the agenda of the Standing Council of Attorney Generals when it met in December 2022. In a report on the outcomes of that meeting they noted:

*"Non-Government Organisations (NGOs) continue to express concerns about the ongoing use in some cases of spit hoods on both adults and children in detention. While spit hoods are used to protect police, corrections and other workers from acquiring a communicable disease or otherwise being harmed by being spat on or bitten by a detainee, the use of spit hoods can cause significant harm and distress to the wearer."*⁶³

⁵⁸ Report of the Independent Police Conduct Authority Death of Alo Ngata following his arrest in Auckland," P. 15.

⁵⁹ Ibid P. 17.

⁶⁰ A. Watkins, *What are 'Spit Hoods' and Why Do Police Use Them*, The New York Times, 3 September 2020.

⁶¹ Nova Scotia Police Review Board File 16-0121, <https://www.novascotia.ca/opcc/publications/decisions-Public-Jeanette-Rogers-May-16-2022.pdf>

⁶² ACT HRC Response to the Australian Federal Police Review of the Use of Spit Hoods, 2 February 2023.

⁶³ Media release Standing Council of Attorneys-General communiqué, <https://ministers.ag.gov.au/media-centre/standing-council-attorneys-general-communique-09-12-2022>, 9 December 2022.

Stakeholder Consultation

ACTP

Deputy Chief Police Officer ACTP was spoken to in the course of the Review and ACTP also submitted some responses to questions from the Review in writing, along with some other material. ACTP have advised it supports the continued availability of the spit hood as a use of force option for its officers based on medical grounds. It also believes the provision of spit hoods is in line with its responsibilities under the Work Health and Safety Act 2011. The DCPO noted, however, that given how rarely the spit hoods are used, that discontinuing their use would have no effect on its operations. In respect of training in the use of spit hoods it relies on the Provisions of CO3. In addition, it states that “new starters” at the Watch House receive a power point presentation on spit hoods, and all Watch House Staff receive clinical medical training on the handling of persons in custody who are ill, vulnerable or at risk.

ACTP also points out that instructions on the use of spit hoods are provided on the packaging of the spit hoods. In support of its position with regard to the medical risk presented by spitting/biting assaults, ACTP forwarded an email from Dr Jane Van Diemen, Acting Unit Director, Clinical Forensic Medical Service (CFMS) dated 7 October 2022. This email references an article from The Journal of Forensic and Legal Medicine entitled “*The use of spit guards (also known as spit hoods) by police services in England, Wales and Northern Ireland: to prevent transmission of infection or another form of restraint?*” This article has been referenced elsewhere in this Review. In the email, Dr Van Diemen states that:

“Essentially, from a medical perspective (and since the Covid-19 pandemic) the risks from saliva exposure at work, including bites are not negligible. The risk of contracting HIV/hepatitis B/hepatitis C are very low, but the risk of contracting a respiratory illness or one transmitted by respiratory droplets is very real. Whether spit hoods or spit guards are the right method of reducing this risk is not clear from the evidence, however if their use was to continue then the development of robust guidelines, processes and documentation should be considered.”⁶⁴

In the event that spit hoods are withdrawn from use, the CPO would be likely to make a submission to the ACT Government requesting that they implement legislative provisions similar to those in place in other jurisdictions and referenced elsewhere in this Review.

⁶⁴ Email from Dr Jane Van Diemen MBBS BEng (Hons) MForensicMed FFCFM (RCPA) to [REDACTED] dated 7 October 2022.

Australian Federal Police Association

In accordance with the terms of reference for the Review, the Australian Federal Police Association (AFPA) has been consulted. The AFPA position is that no police officer should be assaulted at work, and that spitting or biting, especially where there is blood involved, represents a serious assault. Accordingly, it strongly supports the continued use of spit hoods as a preventative measure against communicable diseases, particularly in the Watch House environment.

It also notes that this type of assault can cause mental health issues for Officers, and their families, due to the apprehension of contracting a disease, and the uncertainty caused by lengthy wait times for the results of medical tests. Examples given of the mental trauma that can be caused by this type of assault, included one where a female officer discontinued IVF treatment after being spat on due to concerns about the possible transmission of a communicable disease. On the basis of feedback from members, the AFPA understands that, in common with other reportable workplace incidents, there is widespread under-reporting of this type of incident.

The AFPA believes that, in the event that spit hoods are withdrawn as a use of force option, legislation should be enacted mandating the compulsory testing of individuals who spit or bite police, for communicable diseases. This legislation would mirror that which other jurisdictions adopted prior to withdrawing the use of the hoods. It also supports heavier penalties for this type of assault, particularly given the continued threat of Covid-19. In particular it believes Section 26 of the Crime Act 1900 should be amended to include an aggravated assault of frontline community service provider (FCSP). The offence would be considered aggravated *“If the person, after testing, has a transmittable disease, or is known to carry a transmittable disease, or weaponises the act of spitting by telling a frontline community service provider that they have a transmittable disease (doesn’t matter if they do or don’t have a transmittable disease) does spit on a FCSP, then it’s an aggravated offence.”*⁶⁵ The AFPA has provided a suggested amendment which is attached as **Annex D**.

Other issues raised included the need to explore alternatives to spit hoods including face shields as a PPE option.

⁶⁵ Email Alex Caruana to

ACT Human Rights Commission

It is the position of the ACT Human Rights Commission (ACT HRC) that ACTP meets the definition of a Public Authority under the ACT Human Rights Act and is thus subject to its jurisdiction. Part Section 5A 40 (1) (e) of the Act specifically refers to “*a police officer, when exercising a function under Territory Law.*” The ACT HRC believes that the use of spit hoods could, in some circumstances, constitute a breach of the ACT Human Rights Act 2004. Specifically, it could contravene Section 10 which provides protection from torture and cruel and degrading treatment. Accordingly, it is opposed to the use of such devices, particularly with regard to children.

The ACT HRC also questioned the proportionality of the use of the devices given the prevailing medical opinion that biting and spitting presented a very low risk of the transmission of a blood borne disease. They noted safety concerns with the use of spit hoods given that they are implicated in a number of deaths both in Australia and overseas. Part 3B Section 28(1) of the Human Rights Act states that “*human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.*” Section 28(2) outlines the factors to be considered in determining whether a limitation on human rights is reasonable. These include:

- (a) *The nature of the right affected;*
- (b) *The importance of the purpose of this limitation;*
- (c) *The relationship between the limitation and its purpose;*
- (d) *Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.*

The ACT HRC is also opposed to mandatory testing of the perpetrators of spitting and biting assaults on the grounds:

- That given the low risk of transmission of blood borne viruses there does not appear to be any public health necessity.
- Under Section 10(2) of the Human Rights Act there is a general right not to be subjected to medical treatment (including testing) without consent.⁶⁶

Instead, it suggested the possibility of legislating free and expedited testing for police officers who were subjected to this type of assault.

⁶⁶ Australian Federal Police Review of the Use of Spit Hoods, ACT HRC submission, 2 February 2023, P. 6

The ACT HRC also noted that the use of spit hoods is the subject of discussions by the Standing Council of Attorney Generals, and that a private members' bill is being prepared for presentation to the ACT Legislative Assembly that seeks to legislate against the use of spit hoods.

In concluding its written submission, the ACT HRC recommended *“that the AFP immediately cease using spit hoods on vulnerable cohorts and implement a plan for the provision and use of spit hoods in general operational settings.”*⁶⁷

A copy of the ACT HRC submission is attached as **Annex E**.

Australian Human Rights Commission

It is the position of the Australian Human Rights Commission (AHRC) the use of a spit hood is clearly a method of restraint which is degrading. It considers the use of spit hoods is inherently dehumanising and poses significant risks of injury or even death. It further asserts the use of spit hoods is inconsistent with Australia's responsibilities under Article 2 of the United Nations (UN) Convention against torture, citing the concluding observations of the UN Committee against Torture on the sixth periodic report of Australia:

*“The State party should also take all necessary measures to end the use of spit hoods in all circumstance across all jurisdictions ...”*⁶⁸

The AHRC also submit that it is generally accepted that circumstances spit hoods are designed to protect against, present little risk of actual disease transmission and that, if used incorrectly or inappropriately, the spit hood can cause death or serious injury. In their written submission, the AHRC cited a number of references to support both these contentions. Based on these factors, as well as human rights considerations, it considers that the use of spit hoods is not a proportionate response to the risk they are treating.

AHRC recommends that the AFP immediately cease using spit hoods. It further recommends that if the AFP does not cease using them the AFP should ensure their use is kept to a minimum and they are removed from service as quickly as possible.

Noting the potential psychological risk to officers the AHRC recommends that police be educated in the scientific evidence about the risk of transmission of communicable diseases

⁶⁷ *Australian Federal Police Review of the Use of Spit Hoods*, ACT HRC submission, 2 February 2023, P 7.

⁶⁸ United Nations Committee on Torture (5 December 2022) Concluding observations on the sixth periodic report of Australia.

through their work and that police be provided with immediate testing and support in the event of injury from a spitting or biting assault.⁶⁹ A copy of the AHRC written submission is attached as **Annex F**.

Conclusions and Recommendations

The Review has been requested to consider “... *current frameworks, policy and governance relating to the use of spit hoods by ACT Policing*” as well as “... *the implications of using or ceasing to use Spit Hoods for the public and AFP members including the necessity for legislative change and implications for work health and safety.*”

While the use of spit hoods by the AFP appears to be confined to ACTP and particularly the Watch House, under AFP governance they are an authorised use of force option for any AFP member. Spit hoods are not a controlled item under AFP governance but are treated as a disposable item. As a result, there do not appear to be records of to whom they are issued. Likewise, there is no training or qualification requirement relating to issue, carriage, or use.

The rationale for the use of spit hoods is that they prevent the transmission of communicable diseases via spittle or blood from biting or spitting assaults. Material sighted by the Review has indicated that this risk is non-existent to very low in respect of blood borne viruses, and that it can be adequately managed through other measures such as vaccination and personal protective equipment.

While many police forces have adopted spit hoods in response to Covid-19, there is no evidence, which the Review is aware of, that spit hoods prevent Covid-19. There is commentary, however, that they may actually increase the risk of transmission given that close contact is necessary to fit the hood. The Review considers that there is insufficient evidence to justify the use of spit hoods on medical grounds alone.

While spit hoods have been characterised by some as a form of PPE, under Commissioner’s Order 3 they are a restraint and their use is a use of force involving all the normal considerations and responsibilities of the AFP’s use of force model. Noting the risks involved in utilising spit hoods, the AFP’s governance and training in respect of this device requires urgent review.

While arguments persist about the dangers associated with the use of spit hoods, it is clear that if they are used inappropriately or incorrectly they may contribute to injury or death. In this

⁶⁹ The Australian Federal Police’s review on its use of spit hoods, submission by the Australian Human Rights Commission, 17 February 2023.

circumstance, it is incumbent on the AFP to ensure the governance in respect of spit hoods is appropriate and staff are properly supervised and trained. The Review has identified flaws in both the AFP's governance regarding spit hoods and the training. These issues, combined with the dangers inherent in the use of spit hoods, are such that, regardless of any other considerations, the AFP should immediately cease the use of spit hoods until they are addressed. Any such cessation should be supported by an assessment of what other PPE options are available as well as enhancements to the AFP's Operational Safety training package to ensure members are properly informed about the risks of this type of assault, and are given tactics to defend against it. It should be noted that some of those tactics, which have been adopted by other police services, can also attract controversy. However, police officers should be permitted to protect themselves against this type of assault.⁷⁰ Legislation, which recognises the aggravated nature of this type of assault, particularly where the threat of disease has been weaponised, should also be pursued. This legislation should also consider the potential deterrent effect of heavier penalties.

Noting that, the main risk of spitting or biting assaults is to members' mental health rather than disease, the AFP should pursue legislation similar to that in other states which mandates the compulsory testing for communicable diseases of the perpetrators of such assaults. The current consideration of spit hoods by the Standing Council of Australian Attorney Generals⁷¹ may provide a vehicle for moving this issue forward. While noting the objections of the ACT Human Rights Commission to compulsory testing, Section 28 of the Human Rights Act recognises that limitations on human rights may be justified in some cases. An appropriate approvals process should ensure any mandatory testing regime is not abused.

While the AFP has responsibilities under the relevant WHS Legislation, given the minimal medical risk, it is likely that the provision of spit hoods would fall outside of the definition of what is reasonably practical. In any event, and regardless of whether a decision is made to suspend or cease the use of spit hoods, it would be advisable that a whole of AFP risk assessment of biting and spitting assaults is conducted. The assessment of the medical and psychological risks to inform this risk assessment should be conducted by AFP Medical services to ensure they are based on the best available evidence.

⁷⁰ C. Schelle, *Slap or redirection strike? Lawyer, police chief disagree on PSO's slap of boy*, <https://www.theage.com.au/national/victoria/police-chief-defends-pso-for-striking-11-year-old-boy-who-spat-at-her-20230209-p5cj51.html>

⁷¹ Media release Standing Council of Attorneys-General communiqué, <https://ministers.ag.gov.au/media-centre/standing-council-attorneys-general-communique-09-12-2022>, 9 December 2022.

The Review is required to “*make recommendations to inform AFP decision making in respect of continued use of Spit Hoods including consideration of work health and safety implications for the use or non-use for members of the public and police officers.*”

It is recommended that:

- 1. The AFP consider discontinuing the use of spit hoods due to the limited evidence that biting or spitting assaults pose a medical risk to the victim.**
- 2. Regardless of its consideration of permanently discontinuing the use of the spit hoods, the AFP institute an immediate pause on their use while its record keeping, governance, and training in respect spit hoods is reviewed.**
- 3. The AFP work with the Commonwealth and ACT governments to pursue legislation authorising the mandatory testing for communicable disease of the perpetrators of spitting or biting assaults.**
- 4. ACTP should work with the ACT government to pursue legislative change in line with that suggested by the AFPA in relation to Section 26A of the Crimes Act 1900.**
- 5. The AFP conduct a whole of organisation risk assessment in relation to spitting and biting assaults with the assessment of the medical and psychological risks associated with those type of assaults being conducted by AFP Medical Services.**

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Review of the use of Spit Hoods by the AFP

Terms of Reference

Situation

The use of spit hoods in the AFP is governed by Commissioner's Order 3 (CO3) on the Use of Force. The specific requirements for deploying spit hoods are set out in section 13 of CO3. The overall principles of CO3, in particular the policy underpinning CO3 set out in section 5.4, apply to their use.

There is mounting political and public pressure for the AFP to review/reform its policy on this matter and align with other jurisdictions who have either banned the device, or have regulated the use for adults in custody only.

Purpose of the review

Due to recent policy changes within other jurisdictions who still use spit hoods (NT and QLD), and ongoing community concern regarding the device, particularly on young people, a request has been made by the Commissioner to the Operational Safety Committee (OSC) to commission a review on the AFP's use of spit hoods.

The review will consider current frameworks, policy and governance relating to the use of spit hoods by ACT Policing. The review will also consider any legislative reform and the work, health and safety implications for the use, and non-use, of spit hoods for members of the public and police officers.

The review will assist in determining whether, based on the information available, the use of spit hoods is necessary.

Scope of the Review

A paper-based review is to be conducted with the following terms of reference:

1. Current ACT legislative framework governing the use of spit hoods;
2. Current AFP policy and governance for the use of spit hoods, including relating to those under the age of 18 years;
3. The WHS implication for the use of, and non-use of, spit hoods, both for members of the public and police officers;
4. The reasonableness and proportionality of the use of spit hoods generally; and
5. Whether the AFP should prosecute legislative reform as seen in other jurisdictions, such as mandatory infectious disease testing of those whom spit or bite emergency service workers.

The majority of this review could be undertaken as a paper-based review with only a limited number of interviews/consultations, including the AFPA.

The AFP has written to state and territory Deputy Commissioners seeking their respective jurisdictions experiences in the use of spit hoods, their policies and governance and legislative reform in this area. Their responses will be available to assist with the conduct of the review.



OFFICIAL: Sensitive

Methodology

The methodology to be adopted includes:

- Review and analysis of all extant material including previous reviews, doctrine, governance, strategic guidance, resourcing, and operational protocols, noting that the AFP will be sourcing material from other Law Enforcement Agencies and State Police Services to inform the review.
- Interviews as required with relevant internal and external stakeholders, noting the Terms of Reference indicate that the requirement for interviews will be limited. Consultation will be conducted with the AFP to identify relevant stakeholders where interviews are required but will at a minimum include the AFPA.

The intention is to conduct the bulk of the review remotely from Adelaide with interviews conducted via telephone or video conference.

Deliverable and timeframe

Deliverable will be a final written report outlining findings and recommendations. End date for the review is 31 January 2023. Delivery will be dependent on the availability of persons selected for interview, and the provision of required material by the AFP in a timely fashion.

Reviewers

The review was initiated by Assistant Commissioner Specialist Protective Command, as Chair of the Operational Safety Committee and completed by [REDACTED] s47F. Final endorsement of the review will be conducted by the Executive Leadership Committee once received and cleared by AC SPC through the Operational Safety Committee (OSC).

Expected Outcomes

The review is intended to achieve the following:

To make recommendations to inform AFP decision making in respect of continued use of Spit Hoods including consideration of work health and safety implications for the use or non-use for members of the public and police officers.

[REDACTED]
s 47F

Assistant Commissioner Scott Lee
Specialist Protective Command

19 December 2022

OFFICIAL: Sensitive

List of persons interviewed

Scott Lee	Assistant Commissioner - OSC Chair
Peter Crozier	Deputy Chief Police Officer
Alex Caruana	AFPA President
Lorraine Finlay	Commissioner Australian Human rights Commission
Helen Watchirs	Commissioner ACT Human rights Commission
Karen Toohey	ACT Human rights Commission
s 47F	ACT Human rights Commission
Alison Money	Chief Medical Officer
s22(1)(a)(ii)	Acting Manager Shield Strategy and Capability
	Australian Human Rights Commission
	Acting Commander - Specialist Operations
Peter Murphy	Tactical Commander - Specialist Operations
s47F	Learning and Development Command - OST
	Acting Coordinator Injury Prevention

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**REVIEW OF THE USE OF SPIT HOODS BY THE AFP - SUMMARY OF
RECOMMENDATIONS**

It is recommended that:

1. The AFP consider discontinuing the use of spit hoods due to the limited evidence that biting or spitting assaults pose a medical risk to the victim.
2. Regardless of its consideration of permanently discontinuing the use of the spit hoods, the AFP institute an immediate pause on their use while its record keeping, governance, and training in respect spit hoods is reviewed.
3. The AFP work with the Commonwealth and ACT governments to pursue legislation authorising the mandatory testing for communicable disease of the perpetrators of spitting or biting assaults.
4. ACTP should work with the ACT government to pursue legislative change in line with that suggested by the AFPA in relation to Section 26A of the Crimes Act 1900.
5. The AFP conduct a whole of organisation risk assessment in relation to spitting and biting assaults with the assessment of the medical and psychological risks associated with those type of assaults being conducted by AFP Medical Services.

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AFPA Proposal to Amend Section 26A of the Crimes Act 1900**CURRENT OFFENCE**

CRIMES ACT 1900 - SECT 26A

Assault of frontline community service provider

- (1) A person commits an offence if—
- (a) the person assaults another person; and
 - (b) the other person is a [frontline community service provider](#); and
 - (c) the person knows, or is reckless about whether, the other person is a [frontline community service provider](#); and
 - (d) the Assault is [committed](#)—
 - (i) when the [frontline community service provider](#) is exercising a function given to the person as a [frontline community service provider](#); or
 - (ii) as a consequence of, or in retaliation for, action taken by the person in exercising a function as a [frontline community service provider](#); or
 - (iii) because the person is a [frontline community service provider](#).

Maximum penalty: imprisonment for 2 years.

NEW OFFENCE**Aggravated Assault of frontline community service provider**

- (1) A person commits an offence if—
- (a) the person assaults another person; and
 - (b) the other person is a [frontline community service provider](#); and
 - (c) the person knows, or is reckless about whether, the other person is a [frontline community service provider](#); and
 - (d) the Assault is [committed](#)—
 - (i) when the [frontline community service provider](#) is exercising a function given to the person as a [frontline community service provider](#); or
 - (ii) as a consequence of, or in retaliation for, action taken by the person in exercising a function as a [frontline community service provider](#); or
 - (iii) because the person is a [frontline community service provider](#).
 - (iv) the person undergoes a medical screening test and returns a positive test to a transmittable disease
 - (v) the person is known to carry a transmittable disease
 - (iv) the person weaponises the act of spitting on a frontline community service provider

Maximum penalty: imprisonment for 4 years.

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Mr Scott Lee APM
Assistant Commissioner
Chair, Operational Safety Committee
Australian Federal Police

Via [REDACTED] s22(1)(a)(ii)

Cc: [REDACTED] s47F

2 February 2023

Dear Assistant Commissioner Lee

Australian Federal Police Review of the Use of Spit Hoods

1. Thank you for meeting with the ACT Human Rights Commission on 25 January 2023 in relation to the Australian Federal Police (AFP) internal review of the deployment, use and alternatives to use of spit hoods by AFP officers, including ACT Policing members.
2. We understand that the Operational Safety Committee, which you chair, has been tasked with undertaking a review of:
 - a) The current policy framework governing the deployment and use of spit hoods, including on young people under 18 years of age
 - b) the work, health and safety duties on AFP staff and the risks of transmission of blood borne viruses (BBV) or other illness as a result of offenders biting and spitting
 - c) the reasonableness and proportionality of spit hoods as a restraint mechanism and as a work, health and safety mechanism
 - d) any alternatives to the use of spit hoods that could be pursued through practice or law reform to meet the operational and safety needs of AFP officers
3. We understand that the review is paper-based but will feature interviews with agencies with a relevant interest and consider the experience of other state and national police services. We welcome the consultation with the Commission to date, including the opportunity to provide input about our concerns with the continuing use of spit hoods by the AFP, particularly in ACT watch houses and on minors, and the application of the ACT human rights framework to AFP officers exercising public authority functions under ACT laws.

Human rights and governance framework

4. The *Human Rights Act 2004* (HR Act) sets out obligations on public authorities in the ACT to act and make decisions consistently with human rights.¹
5. A police officer when exercising a function under a Territory law is expressly stated under s 40(1)(e) to be a public authority subject to these obligations.²
6. The HR Act guarantees a number of relevant human rights that apply when a person is deprived of their liberty, including the right to life (s 8 HR Act), the right to protection from cruel, inhuman or degrading treatment or punishment (s 10 HR Act), and the right to humane treatment when deprived of liberty (s 19 HR Act). It also guarantees the right to the enjoyment of just and favourable conditions of work (s 27 HR Act).
7. We understand that spit hoods are “approved restraints” under the CO3,³ which are deployed and used to protect police officers from assaults occasioned by people in their custody who may bite or spit during arrest or while deprived of liberty. This use is particularly to protect against the risk of transmission of illnesses, including BBVs.
8. We understand that their use is considered a use of force, and therefore governed under the Commissioner’s Order on Operational Safety (CO3). We note that the CO3 (version dated November 2017 – we understand this may have been updated) embeds principles of reasonableness, proportionality, and use of lethal force (being force likely to result in death or serious injury) as a last resort.⁴
9. The CO3 states at paragraph 5.5 that: ‘...the principles of negotiation and conflict de-escalation are always emphasised as alternatives to the use of physical force as the safety of AFP employees and members of the public is of paramount importance’.
10. Under the CO3, use of force is classified as either ‘reasonable’ or ‘excessive’, with reasonable force being the minimum force necessary and reasonable in the circumstances of a particular incident. Excessive force, in comparison, is force beyond that which is reasonably necessary in the circumstances of the particular incident. This includes any force when none is needed, more force than is needed, or any force or level of force continuing after the necessity for it has ended.⁵
11. Factors required to be considered by police before using spit hoods include the mental health history and incidents of self-harm of the person in custody; the parity/disparity in physical attributes of the appointee and person in custody, and whether the person threatens to expel a bodily fluid or has already done so.⁶ Significantly 13.3 does not require

¹ s 40B *Human Rights Act 2004*.

² s 40(1)(e) *Human Rights Act 2004*.

³ AFP, Commissioners Orders on Operational Safety (Co3) 29 November 2017, [Commissioner's Order on Operational Safety \(CO3\) \(afp.gov.au\)](#) p 25, [13.1].

⁴ AFP, Commissioners Orders on Operational Safety (Co3) 29 November 2017, [Commissioner's Order on Operational Safety \(CO3\) \(afp.gov.au\)](#) p 6-7.

⁵ Australian National Audit Office, *Management of the Use of Force Regime*, (Auditor-General Report No 30 of 2015-16, 5 May 2016) [1.5].

⁶ AFP, Commissioners Orders on Operational Safety (Co3) 29 November 2017, [Commissioner's Order on Operational Safety \(CO3\) \(afp.gov.au\)](#) p 25, [13.3].

explicit consideration of the number of responding officers and the disparity of force that may result where many officers are physically restraining a person in custody – which may often be a factor correlated with deaths in custody.

12. We note that in Estimates hearings on this issue, the Minister for Police and Emergency Services provided an answer indicating that ACT Policing is unable to confirm if spit hoods were used in any of the 26 incidents where police officers reported contact with biological factors of human origin between May 2020 and 30 June 2022.⁷
13. Without readily available disaggregated data on the use of spit hoods by age, situation, background of offender etc, oversight of whether use is in fact reasonable, proportionate and justified and least restrictive is difficult to achieve. In this regard, we consider the capture and regular publication of data relevant to community policing (including the rollout of new technologies, legislative powers and operational strategies) provides an important safeguard against arbitrary or disproportionate impacts on vulnerable cohorts.

Risks associated with use of spit-hoods

14. The Commission considers that that the use of spit hoods is inherently dehumanising and may constitute cruel, inhuman and degrading treatment when used to punish or coerce, or in combination with other restraints and use of force. This view is informed by domestic and international human rights jurisprudence and commentary.
15. As with any use of force or restraint, spit hoods may be used in a range of ways and contexts that fall within a spectrum. The reasonableness, necessity and proportionality will depend on all the circumstances of the use as noted in para 13.1 of C03. The impacts of use also vary, but have been held in some circumstances to cause suffering, humiliation and distress, and have been linked to deaths in custody, as outlined below.
16. The European Court of Human Rights has found that hooding (a term generally understood as placing a covering over a person's face to completely obscure vision) can "cause, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected to it".⁸
17. The Australian Human Rights Commission (AHRC) has noted that the European Committee for the Prevention of Torture has "recommended that there be an absolute ban on the use of means likely to obstruct the airways (nose and/or mouth) partially or wholly. This includes restraint methods reported on by CPT including 'gagging the mouth and/or nose with adhesive tape, putting a cushion or padded glove on the face, pushing the face against the back of the seat in front, etc'". It considers that the use of spit hoods could fall into that same category.⁹

⁷ Answer to Question Taken on Notice, 2022-23 Budget Estimates (QON 262) [QON-Answer-CMTEDD-Spit-hoods-use-Braddock.pdf \(act.gov.au\)](#).

⁸ ECHR, *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, (Application no. [39630/09](#)), Strasbourg, 13 December 2012, [209].

⁹ Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130 (1 May 2019) available at [2019_aushrc_130.pdf](#), p 70, [245] citing European Committee for the Prevention of Torture and Inhuman

18. The AHRC concluded that “beyond the risk that masking or hooding may present to detainees, it is clearly a method of restraint that is degrading. Unless it can be demonstrated as necessary in the circumstances and proportionate to particular risks faced, it is likely that the use of face masks or spit hoods on people in custody will be contrary to the right to be treated with humanity and with respect for the inherent dignity of the human person”.¹⁰
19. In Australia, the Northern Territory Supreme has Court held “that it is self-evident that wearing a spit hood and shackles would be a humiliating and distressing experience - especially for young people” (*LO v Northern Territory* (2017) 317 FLR 324 at [391]).
20. While the devices used and the manner of application by the AFP may differ from those in other parts of the world, we consider there is potential for serious harm anytime a person’s face is enclosed and obscured. This potential is elevated when used on vulnerable cohorts including children and young people, those with co-morbidities or trauma backgrounds, mental illness and Aboriginal and Torres Strait Islanders. The Royal Commission into Disability notes that “people with cognitive and/or psychosocial disability are significantly overrepresented amongst the group who are charged with or accused of criminal offences” and “are at a heightened risk of violence, abuse, neglect and exploitation in criminal justice settings”.¹¹
21. Spit hoods may pose a risk of suffocation when used in combination with other forms of restraint or on people in custody with health vulnerabilities or experiencing acute mental health distress.
22. The application of a spit hood was identified as a potential factor in the death in custody of Aboriginal man Wayne Fella Morrison in South Australia (noting that the coronial findings have not yet been finally delivered)¹² Their use is implicated as a circumstance likely to be relevant to the coronial inquest into the death of Ms Tafaifa in Queensland Corrective Services’ care.¹³ This inquest is tentatively listed for hearing in early February 2023.¹⁴
23. Use of spit hoods has been involved in many similar deaths in police custody in the USA where they are more widely distributed and readily deployed.¹⁵
24. While it is difficult to definitively attribute specific contributions to cause of death in custody where multiple stressors are usually present and cumulative, temporal correlations are sufficient to justify scepticism about their safety. Studies on spit hoods that have observed no physiological changes in test subjects have been carried out in

or Degrading Treatment or Punishment, *Deportation of foreign nationals by air*, extract from the 13th General Report of the CPT, published in 2003, available at <https://rm.coe.int/16806cd172> [36].

¹⁰ Australian Human Rights Commission, Use of force in immigration detention [2019] AusHRC 130 (1 May 2019) available at [2019_aushrc_130.pdf](#), p 70, [246]

¹¹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, [Issues paper- Criminal justice system Issues paper \(royalcommission.gov.au\)](#) (January 2020) p 1.

¹² The Guardian, [Wayne Fella Morrison inquest hears spit hood could have left Indigenous man struggling to breathe](#), 9 June 2021.

¹³ Inquest into the death of Selesa TAFIFA, 2021/5437, 20 June 2022, p 2, [4].

¹⁴ Inquest into the death of Selesa TAFIFA, 2021/5437, 20 June 2022, p 8.

¹⁵ New York Times, [‘What Are ‘Spit Hoods,’ and Why Do the Police Use Them?’ - The New York Times \(nytimes.com\)](#) 8 September 2020; Oakland Reporter, [Justified by myth, spit hoods can kill](#), 12 August 2019.

artificial test conditions (healthy subject at rest, no exertion, no mental stressors), and therefore have little relevance to situations in which the AFP are likely to use spit hoods.¹⁶

Work, health and safety

25. The Commission recognises and takes seriously the human rights of police, first responders, frontline workers and other public officials to a safe workplace, consistent with their right to just and favourable conditions of work (s 27B HR Act). We consider however, that there are alternative methods of engagement or staff personal protective equipment (PPE) available to the AFP that can effectively minimise health risks to staff while also protecting that individuals under their control are treated with dignity, respect and consistently with duties of care.
26. As with any risk mitigation, measures to minimise risk must be proportionate to the actual, evidence base establishing the objective level of risk. Although there is a scarcity of research to reliably determine the risk of illness being transmitted or contracted, studies have suggested that there is a low to negligible risk of transmission through spitting, and a low risk through biting.
27. A study of more than 10,000 use of force applications by US law enforcement agencies showed that spitting occurred in 3.6% of cases. Female and younger subjects and those using drugs and/or alcohol were more likely to spit at officers. Spitting was more likely to occur in incidents of longer duration, when officers used less force relative to subject resistance, when subjects were displaying intent to assault or engaged in self-harm, and when subjects were hobbled with leg restraints.¹⁷
28. This suggests that shorter interactions with police, or reduced combinations of restraints may lessen the risks of people in custody spitting on officers.
29. The study also found that in the US, the actual risk of injury to an officer from spitting has been historically difficult to assess. Although a broad range of pathogens can be found in saliva, including life-threatening ones like tuberculosis, HIV, and viral hepatitis, no formal studies have been done to assess transmission rates from spitting. But notably, there have been no clear documented cases of disease transmission through this route.¹⁸
30. A study performing an international case review of potential infections from spitting and bites in medical journals showed that the risk of acquiring HCV (Hepatitis C) through spitting is negligible and is very low for HBV (Hepatitis B). The risk is also low for acquiring HBV and HCV through biting, especially if no blood is apparent in the saliva.¹⁹
31. Similarly, a 2018 study of risk of HIV transmission through spitting and biting concluded:

¹⁶ Marigold, Oliver, et al. "Further study on the physiological effects of an alternative spit mask." *Journal of Forensic and Legal Medicine* 72 (2020) p 3, [4.1]

¹⁷ Strote, J., Warner, J., M Scales, R., & J Hickman, M. (2021). Prevalence and correlates of spitting on police officers: New risks in the COVID era. *Forensic science international*, 322, 110747.

¹⁸ Ibid.

¹⁹ Pintilie H, Brook G. Commentary: A review of risk of hepatitis B and C transmission through biting or spitting. (2018) 25 *J Viral Hepat*. 1423–1428. <https://doi.org/10.1111/jvh.12976>

“There is no risk of transmitting HIV through spitting, and the risk through biting is negligible. Post-exposure prophylaxis is not indicated after a bite in all but exceptional circumstances. Policies to protect emergency workers should be developed with this evidence in mind”.²⁰

32. This study did not consider needlestick injuries and need for post-exposure prophylaxis.

33. A study on the use of spit hoods in the United Kingdom noted that:

“Consideration must be afforded to the possibility that the use of spit guards represents a form of mechanical restraint rather than a means to prevent transmission of infection, especially given the paucity of information available from police services in respect of officers who have contracted infectious disease as a result of spitting and/or bites”.²¹

34. We acknowledge that other forms of available PPE may not be suitable for every operational use, but when considered with the very low to negligible risk of transmission from spitting, we suggest that there will be situations where PPE is sufficient to negate any risk to officers to an acceptable level. We note that PPE is used by staff in other custodial situations in the ACT including corrections and forensic mental health facilities.

Other alternatives

35. At our meeting, it was mentioned that the Australian Federal Police Association had advocated policy proposals that would seek to require people in custody who spit or bite police or other emergency services to undergo mandatory blood testing.

36. We are aware that other states including Western Australia, South Australia, the Northern Territory and New South Wales have some form of mandatory testing requirements.

37. Based on the available evidence about the risk of transmission of BBVs through spitting, there does not appear, in our view to be any public health necessity for mandatory testing. Under s 10(2) of the HR Act, there is a general right not to be subject to medical treatment (including testing) without consent. Deliberate assaults are already treated as serious offences, discouraging such conduct, and the evidence demonstrates little to no risk of transmission through spitting. As discussed, we understand that the open weave of materials used in spit hoods means that they are not a protection against transmission of COVID.

38. In 2016, the Australasian HIV and AIDS Conference – a group consisting of Australia’s most eminent HIV experts [unanimously adopted a resolution](#) condemning laws requiring mandatory testing, which did not reflect scientific evidence and contributed to further stigma and discrimination against people.²²

²⁰ Cresswell, F., Ellis, J., Hartley, J., Sabin, C., Orkin, C. and Churchill, D. *A systematic review of risk of HIV transmission through biting or spitting: implications for policy* (2018) 19: HIV Med, 532-540, <https://doi.org/10.1111/hiv.12625>

²¹ Kieran M. Kennedy, J. Jason Payne-James, Grace J. Payne-James, Peter Green, *The use of spit guards (also known as spit hoods) by police services in England, Wales and Northern Ireland: to prevent transmission of infection or another form of restraint?* (2019) 66 *Journal of Forensic and Legal Medicine*, 147.

²² Croakey, [Mandatory testing for people who spit on police “founded on fear, not evidence”](#), 23 November 2016.

39. The Commission considers that a preferable alternative would be to commit resources to expedite free and rapid BBV testing for police officers who are exposed and are concerned they may have contracted a disease. This may address concerns that police officers are having to wait extended periods for a test result, (noting the technical requirements of the test to allow antibodies to developed to allow detection means that no test will be immediate). It is not clear how a legislative mandatory testing system that would necessarily require a series of approvals and oversights would be any quicker than an individual police officer directly accessing a dedicated assessment service.

Conclusions

40. States have a positive duty to take legislative and other measures to address risks of torture and cruel, inhuman or degrading treatment or punishment (referred to in UN Human Rights Committee, [General Comment No. 20: Article 7 \(Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment\)](#) at [8] and [11]).
41. Under the Optional Protocol to the Convention Against Torture, the Commonwealth Ombudsman has a monitoring role over ACT Policing watchhouses and is required as part of the National Preventative Mechanism to review the steps taken to lessen the risk of deployment of restraints where that could give rise to inhumane conditions of detention.
42. For these reasons and noting the evidence suggesting that risk of transmission of illness through spitting and biting is very low to negligible, we consider that use of spit hoods is not demonstrably justified, or a reasonable limit on the rights of people in custody to humane treatment and should not be used by the AFP. Such calls are echoed by the Australian Human Rights Commission in its submission to the UN Committee Against Torture.²³
43. We consider that the AFP is required to take positive steps to reduce the use of spit hoods. We recommend the AFP immediately cease the use of spit hoods on vulnerable cohorts and implement a plan for the phasing out of provision and use of spit hoods in general operational settings.

We welcome an ongoing conversation and consultation about this important matter.

Yours sincerely

s 47F

Dr Helen Watchirs OAM
President and Human
Rights Commissioner

s 47F

Karen Toohey
Discrimination, Health
Services, and Disability
and Community Services
Commissioner

²³ Australian Human Rights Commission, Submission to the Committee Against Torture, (October 2022) available at: [submission to the committee against torture 2022 0.pdf](#), p 19 [83].

Submission to the Committee Against Torture

Australian Human Rights Commission

October 2022

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1 Introduction

1. This submission is made by the Australian Human Rights Commission (Commission). The Commission is an 'A status' national human rights institution, operating in conformity with the Paris Principles.¹ This submission is based on work that has been undertaken by the Commission in accordance with our mandate and functions.
2. The Commission is a federal body that has oversight over federal issues. However, it is important to note that the Federal Government has a significant leadership role and specific responsibilities with respect to ensuring human rights standards are met nationally. Therefore many of the concerns raised in relation to states and territories are also pertinent to the Federal Government and its duties.

1.1 Priority areas

3. The matters addressed in this submission are all of importance to Australia's compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).² However, the Commission wishes to draw the Committee's attention to four areas of critical importance:
 - The length of time that people are held in immigration detention, discussed in section 4.2 of this submission.
 - The need to ensure compliance with obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)³ by the 20 January 2023 extended deadline, discussed in section 3.
 - Non-fulfilment of the principle of *non-refoulement*, discussed in section 4.1.
 - Cruel treatment of children and young people in youth justice centres, discussed in section 5.2.
4. The Commission recommends that the Committee request an update from the Australian Government on progress in the three priority areas in 12 months' time.

2 Legal and institutional framework

Relevant provisions of the CAT: Article 2(1)

2.1 Legislative and institutional rights protections

5. The Commission welcomes the ratification of OPCAT by Australia in December 2017. Australia's progress with respect to OPCAT implementation is addressed below.
6. Australia has legislated to criminalise torture in the *Criminal Code Act 1995* (Cth),⁴ which includes reference to the CAT and the definition of torture.⁵ Despite this, Australia lacks a comprehensive legislative framework implementing its human rights obligations at the federal level. There are limited avenues to seek review of government decisions or to obtain redress for human rights violations.

2.2 National Human Rights Institution

7. The Commission has a statutory power to promote and protect human rights under the *Australian Human Rights Commission Act 1986* (Cth) Act (AHRC Act). Human rights are defined as the international instruments scheduled to or declared under the AHRC Act. The Commission's legislation does not include the CAT within the definition of 'human rights'.
8. The *International Covenant on Civil and Political Rights* (ICCPR),⁶ and the *Convention on the Rights of the Child* (CRC),⁷ are included in the definition of human rights under the AHRC Act. The Commission can therefore investigate allegations of torture, cruel, inhuman and degrading treatment through the ICCPR and the CRC. If the Commission considers the 'act or practice' to be a breach of a human right, it reports to the Attorney-General. However, there is no recourse to courts for individuals making complaints to the Commission under these instruments.⁸
9. The definition of human rights in the AHRC Act is narrower than the range of rights that guide the Joint Parliamentary Committee on Human Rights. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) defines human rights as the seven instruments to which Australia is a party, including the CAT.
10. The Commission needs the necessary tools and resources to protect and promote human rights in line with the Paris Principles. In 2022, the Commission's re-accreditation as an A-status institution was deferred by the Global Alliance of National Human Rights Institutions' Subcommittee on Accreditation, and will be reconsidered in October 2023.

11. While the deferral was primarily due to concerns about the appointment process for Commissioners,⁹ the Subcommittee also raised concerns that the AHRC Act does not include explicit reference to the CAT or the International Covenant on Social, Economic and Cultural Rights.¹⁰ It similarly noted that the Commission has faced funding challenges, and emphasised that 'to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its priorities and activities'.¹¹
12. The Commission has itself recommended that the AHRC Act be amended to ensure full compliance with the Paris Principles, including to incorporate a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations, and to:
- Specify that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process. The Commission welcomes the introduction of a Bill drafted to this effect, which is currently under consideration by Parliament.¹²
 - Include a reference to the Paris Principles in the objects clause of the legislation acknowledging that the Commission is intended to be a Paris Principles compliant National Human Rights Institution.
 - Specify that all Commission functions may be exercised independently of government authorisation.
13. The Commission has also recommended that the Australian Government periodically conduct a re-baselining review of the Commission to ensure that it has adequate resourcing to conduct its statutory functions.¹³

Recommendation 1: The Australian Government amend the AHRC Act to ensure that the Commission is guided by a comprehensive definition of human rights, including through CAT being a scheduled instrument.

Recommendation 2: The Australian Government take steps to ensure that the Commission is fully compliant with the Paris Principles, including through amending the AHRC Act, and ensuring adequate resourcing of the Commission's functions.

2.3 Role of the Parliamentary Joint Committee on Human Rights

14. The Parliamentary Joint Committee on Human Rights (PJCHR) analyses bills and legislative instruments before the federal Parliament for compliance with human rights.¹⁴ The definition of human rights is the seven international instruments to which Australia is a party, including the CAT.¹⁵
15. The PJCHR considers legislative instruments and raises concerns when they believe that proposed legislation places an unjustifiable limitation on human rights. However, legislators are under no obligation to amend bills to reflect these concerns. The Commission notes that the findings of the PJCHR are often not taken into account by legislators when they are deliberating on proposed legislation.¹⁶ As a comparison, the views of the Parliamentary Joint Committee on Intelligence and Security are more regularly considered in relation to legislation on national security issues.¹⁷
16. The Commission is also concerned about the variable quality of 'Statements of Compatibility with Human Rights' that accompany bills introduced to Parliament. While sometimes they are thorough, other times they do not adequately identify how breaches of human rights in the legislation could be considered legitimate or proportionate.¹⁸ The Commission notes that the quality of Statements of Compatibility and associated legislation could be improved by ensuring there is regular education and training support for public servants on human rights.¹⁹

Recommendation 3: Government train public servants to ensure that Statements of Compatibility are of a consistently high standard; and ensure the proper consideration of PJCHR views by Parliamentarians in the enactment of legislation.

3 Implementation of OPCAT

3.1 OPCAT progress to date

17. Australia signed OPCAT in 2009 and ratified it in 2017, although the obligation to establish National Preventive Mechanisms (NPMs) was postponed for three years by way of a declaration under Article 24. The Committee subsequently accepted Australia's further request for an extension of this obligation, with the new date for full compliance being 20 January 2023.²⁰
18. The Australian Government has elected to adopt a multiple-body monitoring system with the Commonwealth, States and Territories asked to

designate their own NPMs within their relevant jurisdictions. The Office of the Commonwealth Ombudsman has been nominated by the Australian Government as the NPM Coordinator, being tasked with coordinating the Australian NPM Network.²¹

19. At the time of writing, only four jurisdictions, in addition to the Australian Government, have nominated their NPMs. Others have proposed but not yet established their NPMs. New South Wales, Queensland, and Victoria have yet to designate their NPMs.
20. Funding has emerged as a significant issue delaying the establishment of the Australian NPM Network.²² In July 2021 the Australian Government pledged 'funding over two years from 2021–22 to support states and territories',²³ however 'jurisdictions are responsible for funding their own oversight and detention arrangements on an ongoing basis'.²⁴
21. The Commission is of the view that establishing and maintaining oversight mechanisms to perform the role of NPMs in each jurisdiction in Australia requires modest changes to existing legislation, resourcing and oversight mechanisms. The longstanding delays in implementing OPCAT are concerning to the Commission.
22. The Commission recommends that all national, state and territory governments in Australia finalise the process of designating oversight mechanisms as the NPM for their respective jurisdictions, including any changes necessary to broaden their mandates and meet the requirements of OPCAT. They also need to provide sufficient resources to enable NPMs to meet their responsibilities. Resourcing should be provided in a way that enables NPM bodies to fulfil OPCAT's core functions; respects the functional, structural and personal independence of NPM bodies; and ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.²⁵
23. The Commission considers that progress has been too slow to date and that immediate action is needed to fast-track implementation to ensure that Australia complies with the 20 January 2023 extended deadline.
24. The Commission is currently drafting a 'Road Map to OPCAT compliance' for the purpose of assisting the Commonwealth, State and Territory Governments with a clear pathway to meeting the 20 January 2023 extended deadline; assisting the UN SPT in its upcoming mission to Australia²⁶ and to assist with the Committee's request for Australia to develop an Action Plan for the establishment of the NPMs.²⁷

3.2 Scope of places of detention

25. The Australian Government has opted for a 'progressive realisation' of OPCAT, whereby NPMs will prioritise activities in 'primary' places of detention, as opposed to all places where people may be deprived of their liberties. 'Primary places of detention' is defined by the Australian Government as including adult prisons, juvenile detention facilities, police lock-up or police station cells, closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment, closed forensic disability facilities or units where people may be involuntarily detained by law for care, immigration detention centres and military detention centres.²⁸
26. Article 4 of OPCAT imposes obligations on Australia to allow NPMs to visit any place under its jurisdiction and control where persons are, or may be, deprived of their liberty. The UN Subcommittee on Prevention of Torture (SPT) considers that the preventive nature of OPCAT requires a broad interpretation of Article 4 to maximise the preventive impact of the work of NPMs in places of detention.²⁹
27. The Commission considers that Australia should adopt an inclusive approach, consistent with Articles 1 and 4 of OPCAT, that includes both 'primary' and 'secondary' places of detention within the ambit of the functions of all NPMs. This will uphold OPCAT's aim to strengthen protections for all persons deprived of their liberty.

3.3 Steps towards achieving best practice

28. The Commission supports the introduction of dedicated primary legislation that gives full effect to the key provisions of OPCAT. Legislation should provide powers of unfettered access to all places of detention by NPMs; provide a clear foundation for visits; ensure access to facilities and information; and secure the continued, long-term, and effective operation of OPCAT.³⁰
29. The Commission considers all OPCAT reporting should adopt a human rights framework, which requires, at a base level, consideration of whether NPM activities and outcomes have resulted in better protection of human rights in places of detention. The Commission therefore recommends that NPMs report on the extent to which governments and relevant authorities are protecting detainee human rights; whether law, policy and procedures reflect best practice standards; and whether recommendations made by the NPMs are being implemented.³¹

30. The Commission recommends attention be given to ensuring Article 18 is complied with in the staffing of NPMs. Specific efforts, including special measures, should be made to employ First Nations staff and people with a lived experience of disability.³²
31. The Commission considers it necessary for all NPMs to have technical expertise about child development, children's rights, trauma and how detention can affect children – particularly when visiting institutions where children and young people are detained.³³
32. The Commission emphasises the importance of ongoing involvement in the OPCAT process of civil society organisations, academic and other experts and people with lived experience of detention.³⁴ Both domestic and international commentators, including the UN SPT and UN Committee on the Rights of Persons with Disabilities, have recommended strong and formal relationships be established between the NPM and civil society.³⁵
33. Funding has emerged as a significant issue delaying the establishment of the Australian NPM Network.³⁶ In July 2021 the Australian Government pledged 'funding over two years from 2021–22 to support states and territories',³⁷ however 'jurisdictions are responsible for funding their own oversight and detention arrangements on an ongoing basis'.³⁸
34. The Commission is of the view that establishing and maintaining oversight mechanisms to perform the role of NPMs in each jurisdiction in Australia requires modest changes to existing legislation, resourcing and oversight mechanisms. The longstanding delays in implementing OPCAT are concerning to the Commission.
35. The Commission recommends that all national, state and territory governments in Australia finalise the process of designating oversight mechanisms as the NPM for their respective jurisdictions, including any changes necessary to broaden their mandates and meet the requirements of OPCAT. They also need to provide sufficient resources to enable NPMs to meet their responsibilities. Resourcing should be provided in a way that enables NPM bodies to fulfil OPCAT's core functions; respects the functional, structural and personal independence of NPM bodies; and ensures effective liaison with, and involvement of, civil society representatives and people with lived experience of detention in the OPCAT inspection process.³⁹
36. The Commission considers that progress has been too slow to date and that immediate action is needed to fast-track implementation to ensure that Australia complies with the 20 January 2023 extended deadline.

Recommendation 4: Governments ensure full OPCAT compliance no later than the 20 January 2023 extended deadline by designating NPMs, and ensuring the mandates and resourcing of NPMs is sufficient to allow them to effectively fulfil their OPCAT functions.

Recommendation 5: Governments adopt an inclusive approach to the interpretation of 'places of detention', ensuring that both 'primary' and 'secondary' places of detention are included within the scope of all NPMs.

Recommendation 6: Governments give particular attention to ensuring NPMs are designed and operate in a way that reflects the particular needs, and is inclusive of, vulnerable cohorts who are disproportionately represented in places of detention, including (but not limited to) First Nations people, children and young people, and people with disability.

4 Immigration detention and asylum seekers

4.1 *Non-refoulement*

37. The Commission notes the continuation of Operation Sovereign Borders, a military-led border security operation which aims to counter people smuggling, including through preventing the entry to Australia of boats carrying asylum seekers. As part of Operation Sovereign Borders, boats have been intercepted and returned to their point of departure 'where it is safe to do so'. To date in 2022 there have been 183 people who have been returned to Sri Lanka after being detected and intercepted attempting to reach Australia on maritime people smuggling ventures.⁴⁰
38. The Commission remains concerned that the screening process conducted as part of Operation Sovereign Borders activities does not constitute a fair or thorough assessment of protection claims. The screening process creates a risk that asylum seekers who have legitimate needs for protection may be returned to situations where they could be in danger of being tortured or subjected to other forms of cruel, inhuman or degrading treatment.
39. The Commission is also concerned about possible refoulement, arbitrary, prolonged and/or indefinite detention and separation from family resulting from decisions to cancel visas of non-citizens under sections 501 and 116 of the *Migration Act 1958* (Cth) (Migration Act).⁴¹
40. While the Minister has a personal power under s 159A of the Migration Act to grant a visa if they consider it is in the public interest to do so, the Commission considers this to be an insufficient safeguard against indefinite detention for someone to whom Australia owes *non-refoulement* obligations,

but whose visa application is refused or who has their visa cancelled on character grounds.

41. The Minister's power under s 195A is discretionary. The Minister is not under any duty to consider whether to exercise his or her power in s 195A to grant a visa, even if he or she is requested to do so.⁴² A person therefore cannot challenge the Minister's decision not to exercise this power.
42. The Commission is also concerned that even if the Minister grants a 'removal pending' bridging visa under s 195A, such a visa is a temporary solution which only permits the holder to remain in the Australian community until he or she can safely be removed. This offers the holder no certainty about their future in cases where removal is not currently practicable.⁴³

4.2 Mandatory immigration detention

43. Immigration detention remains mandatory for all unlawful non-citizens,⁴⁴ which can result in prolonged and/or indefinite detention that may be arbitrary and risks mental ill-health.⁴⁵ The average length of detention has continued to increase reaching 736 days in May 2022 – which is the highest ever recorded.⁴⁶ The length of time in immigration detention is far higher in Australia than in comparable jurisdictions. For example, in the United Kingdom in 2021, 76% of all detainees had been in immigration detention for fewer than 7 days. In Canada, the average length of detention was 24.1 days between July and September 2021.⁴⁷
44. People towards whom Australia has *non-refoulement* obligations and people who are stateless are at particular risk of prolonged detention, as they cannot be readily returned to their country of origin. Under the Migration Act, however they must remain in immigration detention until they are either granted a visa or removed from Australia. Unless they can meet the requirements for the grant of a Protection Visa (which include satisfying the character test), or there is another country in which they can be resettled, they face the prospect of prolonged and indefinite detention.
45. The detention of an unlawful non-citizen is not based on an individual assessment of the need for detention. The Commission has long recommended that the Migration Act be amended to ensure that closed immigration detention is only used in circumstances where it is strictly necessary to manage unacceptable risks to the community.⁴⁸ A short period of closed detention aimed at managing risks to the Australian community

may be justifiable under international law, provided that the risks cannot be managed in a less restrictive way, and that detention is necessary, reasonable and proportionate in the individual's circumstances.

46. The Commission has also long recommended that the Australian Government introduce legislation to ensure that the necessity for continued immigration detention is periodically assessed by a court or tribunal up to a maximum time limit.⁴⁹ Independent oversight of the necessity of closed detention, and the introduction of an overall time limit on closed detention, would help to reduce the likelihood of closed detention becoming so lengthy as to breach human rights.

4.3 Offshore processing

47. The Commission notes that the Australian Government has obligations under the Refugee Convention to people who arrive in its territory seeking asylum. Those obligations remain, even if Australia transfers people to a third country for their claims to be processed.
48. Whether Australia exercises 'effective control' in relation to asylum seekers and refugees subject to regional processing arrangements has been considered in detail by two Parliamentary Committees and was considered by the Commission in a report concerning a complaint against the Commonwealth of Australia under the *Australian Human Rights Commission Act 1986* (Cth).⁵⁰ In each instance, the evidence and degree of involvement demonstrated that Australia could be viewed as exercising 'effective control'.
49. The Commission considers that transferring asylum seekers to third countries does not release Australia from its obligations under international human rights law. Australia must ensure adequate safeguards are in place in those countries to ensure that the human rights of the people transferred are upheld.
50. The Commission welcomes the cessation the offshore processing arrangements for asylum seekers on Papua New Guinea at the end of 2021.⁵¹ However, the Commission continues to hold serious concerns that those asylum seekers remaining in Papua New Guinea may be subjected to arbitrary detention and inadequate living conditions. At the time when offshore processing arrangements for asylum seekers on Papua New Guinea ceased, there were 74 refugees remaining in Papua New Guinea.⁵²

51. Australia continues to support regional processing arrangements in Nauru. As at 30 June 2022, there were 112 transitory persons in Nauru, with 83 of these individuals being recognised as refugees.⁵³ The Commission continues to hold serious concerns that third country processing arrangements could see Australia in breach of its international human rights obligations, including the potential for breach of Australia's *non-refoulement* obligations.
52. The Commission also notes with concern that there is still no independent monitoring body for third country processing arrangements. In relation to cross-border detention arrangements, the UN SPT has advised that the 'sending State should ensure that such an agreement provides for its national preventive mechanism to have the legal and practical capacity to visit those detainees in accordance with the provisions of the Optional Protocol and the Subcommittee guidelines on national preventive mechanisms'.⁵⁴

4.4 COVID-19 and immigration detention

53. The outbreak of the COVID-19 pandemic introduced new challenges for the management of Australia's immigration detention facilities, and significant risks to health and wellbeing, especially of people detained in these facilities.
54. The use of controlled movement policies increased because of COVID-19. Movement out of accommodation compounds occurred for meals, medical appointments, interviews, or visits. This restricted people to their compounds most of the time, except in limited circumstances, with the objective of preventing a COVID-19 outbreak.
55. One of the measures used to prevent the entry, and control the spread, of COVID-19 into and within immigration detention facilities is to separate some detainees from the general population by way of quarantine. The buildings used for quarantine inside immigration detention tend to be harsh and prison like, with no or very limited access to outdoor areas.
56. While acknowledging that some restrictions may need to be imposed to protect the health and safety of detainees and staff, the Commission emphasises that measures that restrict individual's basic rights – such as freedom of movement – must remain reasonable, necessary and proportionate to addressing COVID-19 risks.
57. Further controls on the movement of people in detention results in a significantly more restrictive environment. This also increases the

importance of considering alternatives to closed detention wherever possible.

58. Many international bodies emphasised that measures to reduce the number of people detained were in many cases an essential precondition to the effectiveness of other prevention and control measures.⁵⁵ In relation to immigration detention specifically, the UN SPT advised that the use of immigration detention should be reviewed 'with a view to reducing their populations to the lowest possible level'.⁵⁶
59. The number of people released from closed immigration detention in Australia was very small in comparison with other jurisdictions, such as the United Kingdom, Canada, and the United States.⁵⁷
60. In August 2020, the Australian Government announced that people would be transferred to the North West Point Immigration Detention Centre (NWP IDC) on Christmas Island to 'relieve capacity pressure across the detention network in Australia'.⁵⁸
61. While re-opening of the NWP IDC provided some relief, the Commission considers this was not an appropriate solution to addressing increasing numbers and overcrowding. The remoteness of Christmas Island significantly restricts communication and visits with family, friends, lawyers, and other key supports. In-person visits are difficult, if not impossible, due to geographical and other barriers. The NWP IDC is not an appropriate facility for immigration detention, particularly for people who are vulnerable or have been detained for prolonged periods of time.⁵⁹

Recommendation 7: The Australian Government ensures that its border security operations, treatment of refugees and asylum seekers, and offshore processing arrangements comply with international human rights obligations, including *non-refoulement* obligations.

Recommendation 8: The Migration Act be amended to ensure that closed immigration detention is only used in circumstances where it is strictly necessary to manage unacceptable risks to the community.

Recommendation 9: The Australian Government introduce legislation to ensure that the necessity for continued immigration detention is periodically assessed by a court or tribunal up to a maximum time limits.

5 Criminal justice system

Relevant provisions of the CAT: Articles 2, 11 and 16.

5.1 First Nations Peoples

62. First Nations peoples continue to be significantly overrepresented in prisons in Australia. Reasons for over-incarceration 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.⁶⁰ Institutional racism, and a 'legacy of dispossession, marginalisation and exclusion have created conditions in which Aboriginal and Torres Strait Islander peoples experience serious and multiple forms' of disadvantage and inequality.⁶¹ In order to reach a solution to over-incarceration, it is necessary to attend to the root causes of First Nations inequality in a comprehensive manner, which involves addressing factors both within, and beyond, the justice system.
63. Although First Nations peoples make up 3.2% of the total population,⁶² they constitute 30% of the prison population.⁶³ First Nations women are the fastest growing prisoner population – and they are 19 times more likely than non-Indigenous women to be in prison.⁶⁴ Almost half (49%) of the young people in juvenile detention on an average day in 2020–21 were First Nations children and young people.⁶⁵
64. Due to the over representation of First Nations peoples in the criminal justice system, First Nations peoples are more likely to die in police or prison custody compared to the general (non-prison) population.⁶⁶ In the years since the landmark report of the Royal Commission into Indigenous Deaths in Custody in 1991, which first highlighted the extent of this issue, there have been a further 517 deaths in custody that have been identified as First Nations peoples.⁶⁷ Many of these deaths were found in inquests to be preventable.
65. The Commission welcomes the Partnership Agreement in 2019 between the Coalition Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments (Partnership Agreement).⁶⁸ Parties to the Partnership Agreement have committed to reducing the rate of First Nations adults held in incarceration by at least 15% by 2031 and reducing the rate of First Nations children (10–17 years) in detention by at least 30% by 2031. The Commission also welcomes funding provided by the Australian Government to meet these justice targets,⁶⁹ and emphasises the importance of

consistent, sufficient resourcing to address criminal justice overrepresentation.

66. The Commission similarly welcomes the establishment of some justice reinvestment programs across Australia, and the Australian Government's commitment to provide \$79 million in funding for justice reinvestment initiatives.⁷⁰ The Commission also notes the introduction of the Australia New Zealand Police Advisory Agency's Anti-Racism and Cultural Diversity Principles in 2018.⁷¹
67. More action is needed to address this national crisis. There is a wealth of knowledge and recommendations outlining steps to address over-incarceration and deaths in custody that have not yet been implemented. Most of the 339 recommendations of the 1991 Royal Commission remain unimplemented or only partially implemented.⁷² Some of these recommendations 'have been repeated again and again at various points in time in various reports',⁷³ including the Australian Law Reform Commission's 2018 *Pathways to Justice* Report – to which the Government has not published a response.
68. The Commission is concerned about certain laws, and the enforcement of those laws by police, that disproportionately impact First Nations peoples.
69. The *Pathways to Justice* report identified that First Nations incarceration is often characterised by low level offending. This includes, for example, imprisonment for public drunkenness, which still occurs in Queensland.⁷⁴ The Commission has also previously raised concerns about paperless arrest laws, which were introduced by the Northern Territory government in 2014 through amendments to the *Police Administration Act 1978* (NT).⁷⁵ These laws provide the police with the power to detain a person and hold them in custody for up to four hours (or longer if the person is intoxicated) if they suspect that the person has committed or is about to commit an 'infringement notice offence'. Paperless arrest laws have a disproportionate impact on First Nations peoples,⁷⁶ and despite indications by the Northern Territory Government that the laws would be repealed,⁷⁷ they remain in place.
70. Mandatory sentencing laws that set a mandatory minimum sentence for particular offences,⁷⁸ continue to exist in most Australian jurisdictions. Some of these laws allow judges to make exceptions from the specified sentence, while others are more restrictive in how that can be applied. These laws undermine rule of law principles, including the separation of the government and judiciary and the ability of judges to impose sentences that are proportionate to the specific circumstances of the crime.⁷⁹ These laws have been found to disproportionately⁸⁰ affect First Nations peoples. The

CERD Committee found that they have a 'racially discriminatory impact on the [First Nations] rate of incarceration'.⁸¹

71. The Commission reiterates its concern that funding for National Aboriginal and Torres Strait Islander Legal Services is insufficient to meet the legal needs of First Nations communities.⁸² It emphasises the importance of self-determined, culturally safe legal services as a means of protecting against arbitrary arrest and cruel treatment in the criminal justice system, and realising the right to a fair trial for First Nations people.
72. More must be done to work meaningfully with First Nations communities to implement substantial and ongoing solutions. The Commission has called on Australian governments to invest further in diversionary programs for adults, young people and children. Diversionary programs should be designed to effectively address the causes of offending. They should be used to divert people from further interaction with the criminal justice system in circumstances where sentencing is unlikely to be successful in preventing further offending. Resourcing should be available to communities to address the key drivers of criminal behaviour before offending occurs. Examples of successful justice reinvestment programs can be seen around the country.⁸³
73. Governments should also prioritise prison and detention-based rehabilitative programs and invest in creating pathways out of the criminal justice system, such as the provision of throughcare programs and post-release accommodation.
74. There is evidence that institutional racism within the criminal justice system contributes to high rates of imprisonment and deaths in custody. First Nations peoples experience unequal outcomes in key areas. For example, the Australian Law Reform Commission found that First Nations people are less likely to receive community-based sentences than non-Indigenous offenders, and as a result, may be more likely to be imprisoned for the same offence.⁸⁴ Death inquests point to concerning instances of racism within the criminal justice system. The ongoing Northern Territory inquest into the police shooting death of Kumanjayi Walker has revealed racist attitudes within the Northern Territory police force.⁸⁵ When addressing the causes of Aboriginal woman Ms Dhu's death in 2016, the Western Australia Coroner found that while the individual officers were not consciously motivated by racism, 'it would be naïve to deny the existence of societal patterns that lead to assumptions being formed in relation to Aboriginal persons'.⁸⁶
75. The Commission endorses the goal of the National Partnership Agreement – as agreed to by all governments in Australia – to 'identify and call out institutional racism, discrimination and unconscious bias' and to 'undertake

system-focused efforts to address disproportionate outcomes and overrepresentation of First Nations peoples by addressing features of systems that cultivate institutionalised racism'.⁸⁷ It urges governments to ensure that all available steps are taken to achieve this goal, including through a focus on preventative measures, and accountability processes.

76. The Commission is currently leading a project to progress a national anti-racism framework. It is very concerned that initial scoping findings from the project, to be released in late 2022, raise many of the matters set out above regarding First Nations peoples and the criminal justice system.
77. In submissions, government agencies, as well as First Nations organisations, experts, and individuals, recognised the overrepresentation of First Nations peoples in Australia's criminal justice system, documented the systemic discrimination experienced by them in the legal system and flagged this as a matter of urgent concern.
78. It was asserted that racism occurs at each stage of the legal system, from initial contact with law enforcement through bail processes, conviction, sentencing, and post prison release.
79. It is the Commission's view that the development of a national anti-racism strategy will develop, a coordinated, shared vision to tackle racism, promote racial equality, and ensure access to rights. It will be a long-term, central reference point to guide actions on anti-racism across all sectors, including in the criminal justice system.

Recommendation 10: Governments ensure the availability of diversionary programs for Indigenous peoples, expand justice reinvestment trials and invest in pathways out of the criminal justice system.

Recommendation 11: The Australian Government commit adequate, ongoing funding for Indigenous legal assistance services.

Recommendation 12: Governments review the use and application of mandatory sentencing laws, particularly where they disproportionately impact Aboriginal and Torres Strait Islander peoples; and expand the use of non-custodial measures.

Recommendation 13: Governments ensure that Aboriginal-led, culturally appropriate, trauma-informed and gender responsive services and programs are resourced and available throughout the criminal justice system.

Recommendation 14: Governments ensure that officials and staff in the criminal justice and law enforcement systems at all levels receive sufficient training to ensure the application of culturally appropriate, trauma-informed and gender responsive approaches.

Recommendation 15: All Australian governments commit to the development and implementation of a national anti-racism framework to ensure targeted action to identify and address the scourge of racism, including systemic and institutional racism within government agencies including within the criminal justice system.

5.2 Youth justice system

80. The Commission continues to express concern about the treatment of children in youth detention centres. Despite legislation in most states and territories prohibiting the use of isolation and limiting the use of force to certain circumstances, allegations of mistreatment of children and young people in youth detention have arisen in several jurisdictions over recent years.⁸⁸
81. Reporting in 2017, the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (Northern Territory Royal Commission) found that children and young people detained in the Northern Territory youth justice system were frequently subjected to verbal abuse and racist remarks; deliberately denied access to basic human needs, including water and food; restrained in ways that were potentially dangerous; and subjected to isolation excessively and punitively.⁸⁹
82. Key recommendations of the Royal Commission remain unimplemented. The Northern Territory Government pledged to close and replace the Don Dale Youth Detention Centre in 2018, in line with recommendations to better protect the safety and rights of children in the facility.⁹⁰ However, the centre remains open. There were 54 incidents of self-harm between July 2021 and December 2021 inside Don Dale, 'a more than 500% increase from the corresponding period in 2020, when there were eight instances of self-harm reported'.⁹¹
83. Spit hoods are still used on children in police custody in some jurisdictions, including in the Northern Territory and Western Australia.⁹² The Commission welcomes the recent commitment by Queensland police to desist using spit hoods in police watch houses.⁹³ In 2021, South Australia became the first state or territory in Australia to ban spit hoods in all contexts by law.⁹⁴ The use of spit hoods should be similarly banned Australia-wide.

84. Solitary confinement and lockdowns continue to be used in youth justice centres. In the Western Australian Banksia Hill detention centre, extensive 'rolling' lockdowns in early 2022 led to one teenage boy being locked in his cell on more than 25 separate occasions for up to 20 hours a day. The Western Australia Supreme Court ruled that this breached the *Young Offenders Act 1994* (WA).⁹⁵ The Court found that the repeated use of lockdowns was primarily caused by 'chronic staff shortages'.⁹⁶ The Western Australia Inspector for Custodial Services had previously formed a view that conditions in Banksia Hill were potentially 'cruel, inhuman and degrading' and operated like 'an adult prison'.⁹⁷
85. In July 2022, the Tasmanian Ashley Youth Detention Centre instituted a two-week lockdown, where detainees were locked in their rooms and only let out on a rotational 40-minute basis. This was also attributed to staffing shortages.⁹⁸ Currently, Tasmania's Commission of Inquiry into Government Responses into Child Sexual Abuse in Institutional Settings is also inquiring into sexual abuse at the Ashley Youth Detention Centre.⁹⁹
86. The evidence indicates that children entering youth detention have significant pre-existing vulnerabilities, including neurological disabilities, trauma and mental health issues.¹⁰⁰ In detention they are not receiving the specialist therapies and treatment they need. These pre-existing issues are exacerbated by the experience of incarceration, which leads to behaviours such as suicide attempts and self-harm. The Commission is concerned about the failure to provide treatment for pre-existing conditions; the failure to ensure detention does not further traumatize children; and the failure to provide qualified acute mental health treatment for suicidality and self-harm to ensure safety and promote recovery.
87. The Commission urges the Australian Government to raise the minimum age of criminal responsibility to at least 14 years, in line with international standards.¹⁰¹ In August 2020, the ACT became the first jurisdiction in Australia to support raising the age of criminal responsibility from ten to 14 years. In a November 2021 meeting, state Attorneys-General supported the development of a proposal to increase the minimum age of criminal responsibility from ten to 12 years.¹⁰² However this has not been enacted in any of the state jurisdictions.
88. Article 37(b) of Convention on the Rights of the Child states that children should only be deprived of liberty as a last resort and for the shortest appropriate period of time. However, diversion is underutilised for a variety of reasons, including limits to who can access the programs, insufficient staffing allocated to diversion, and lack of sufficient appropriately funded and culturally appropriate programs.¹⁰³ The Northern Territory Royal Commission found that First Nations children and young people are less

likely to be diverted than non-Indigenous children and young people.¹⁰⁴ Additionally, children and young people may be denied bail and held in remand due to a lack of permanent accommodation, or because they are in out of home care.¹⁰⁵

89. The Commission remains concerned about children held in adult prisons. Each state and territory has legislation that allows children to be detained in adult facilities under certain circumstances.¹⁰⁶ As recently as July 2022, Western Australia transferred a group of 20 predominately First Nations children to a maximum security prison, where they were separated from adult prisoners.¹⁰⁷ In Queensland, children are detained in police watchhouses for days at a time, despite a 2019 commitment by the Queensland Government to end this practice.¹⁰⁸ The Commission has consistently advocated for Australia to withdraw its reservation to article 37(c) of the *Convention on the Rights of the Child* regarding the obligation to separate children from adults in prison.¹⁰⁹
90. Human rights concerns have been raised in relation to the policing of children and young people. For example, the Commission is concerned that the NSW police have repeatedly strip-searched children – more than 100 children were among those searched between July 2020 and May 2022.¹¹⁰

Recommendation 16: Governments should explicitly prohibit the use of isolation practices and force as punishment in youth justice facilities. These practices should only be permitted 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 17: The Northern Territory Government fully implement the recommendations of the Northern Territory Royal Commission.

Recommendation 18: Governments legislate against the detention in adult facilities of persons under 18 years.

Recommendation 19: Governments raise the minimum age of criminal responsibility from 10 years to at least 14 years.

Recommendation 20: Governments ensure that imprisonment of children and young people occurs only as a last resort and for the shortest appropriate period of time, including through identifying and removing barriers for young offenders accessing diversionary programs, in particular for First Nations children. Governments should expand the

availability and range of diversionary programs for young offenders, including community-controlled and culturally-safe programs.

Recommendation 21: Governments should provide screening and treatment for pre-existing conditions and disabilities when children interact with the youth justice system. Governments should ensure that qualified mental health support and therapies are provided for children in youth detention (as it is for children in community), and that the experience of incarceration does not exacerbate their mental health problems and trauma.

5.3 People with disability

91. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) has reported that people with disability, particularly First Nations people with disability, are 'over represented at all stages of the criminal justice system'¹¹¹ There is limited data collection on this issue, but available information indicates that in Australia while only 2.9% of people have an intellectual disability they make up 15% of the prison population.
92. As noted above, there are high rates of children with disability in the youth justice system. A 2018 study with respect to youth detainees at Banksia Hill Detention Centre in Western Australia revealed 'unprecedented levels of severe neurodevelopmental impairment amongst sentenced youth'.¹¹² Children with Fetal Alcohol Spectrum Disorder (FASD) are particularly prevalent.¹¹³ One study in Western Australia found that 89% of children in detention between May 2015 and December 2016 had at least one domain of severe neurodevelopmental impairment and 36% were diagnosed with FASD.¹¹⁴ The majority of those with FASD had not been previously identified, highlighting a need for improved diagnosis.¹¹⁵
93. The Commission's 2014 report, *Equal Before the Law*,¹¹⁶ found that necessary supports and adjustments for people with disabilities were frequently not provided in the criminal justice system. The *Disability Discrimination Act 1992* (Cth) and the Applied Principles to the National Disability Insurance Scheme require the criminal justice system meets the disability related needs of people who are incarcerated.¹¹⁷
94. There is a high rate of First Nations people with disability in Australian prisons and youth justice centres.¹¹⁸ The University of New South Wales *Mental Health Disorders and Cognitive Disability in the Criminal Justice System Project* has commented that 'Indigenous Australians with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways'.¹¹⁹ This highlights the need for

dedicated and culturally safe supports and services provided to First Nations people with disability as a means of avoiding entry into the criminal justice system.

95. 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.¹²⁰ 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 2019.¹²¹
96. For example, in Western Australia a person can be indefinitely detained in a custodial setting without trial if found unfit to stand trial.¹²² There are no special procedures for children.¹²³ Children with FASD are at particular risk of being held in indefinite detention.¹²⁴ There is a lack of data provided by governments in relation to this cohort, so it is not clear how many people are indefinitely detained on these types of orders in each jurisdiction.
97. 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.¹²⁵ The Commission has previously reported on several cases where First Nations people have been detained for a period longer than the maximum sentence if they had been found guilty.¹²⁶
98. Although the Commission welcomed the 2019 endorsement of the *National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment* by Australian states, with the exception of South Australia, the National Principles are not implemented in state and territory legislation, policies and procedures. This falls short of expected actions.
99. The Commission has previously called¹²⁷ on the Australian Government to implement the recommendations of the 2013 *Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia*.¹²⁸

Recommendation 22: Governments implement the recommendations in the Concluding Observations of the Committee on the Rights of Persons with Disabilities in 2019 concerning the criminal justice system, including but not limited to:

- **Implementing the *National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment* into laws, policies and procedures.**
- **Ensuring adequate disability supports and services are available in the criminal justice system, including the provision of mental health care services.**

5.4 Other issues – Prison and remand

100. The Commission is concerned about the high numbers of people incarcerated in Australian prisons overall. The rate of imprisonment in Australia has risen by 130% since 1985.¹²⁹
101. In October 2021, the Productivity Commission reported that a third of Australia's prison population is on remand, awaiting trial or sentencing, and that the remand prison population has nearly doubled since 2000.¹³⁰ The average time spent on remand has also increased from 4.5 months in 2001 to 5.8 months in 2020.¹³¹ The remand rate continues to rise – in December 2021 the Australian Bureau of Statistics reported that the number of prisoners on remand in Australia increased by 16% since June 2020.¹³² First Nations people accounted for 31% of the remand population in 2020 – up from 23% in 2006.¹³³
102. The proportion of people on remand is even higher in the youth justice context. Across Australia, nearly 3 in 4 (72%) young people in detention in June 2021 were unsentenced.¹³⁴
103. The high remand population in adult prisons and youth justice centres is due in part to changes to bail legislation in Australian jurisdictions.¹³⁵ For example, in November 2021 youth detainee numbers in the Northern Territory reached their highest point since the 2017 Royal Commission report,¹³⁶ and this has been linked to harsh bail laws¹³⁷ passed in 2021. The Productivity Commission has found that remand rates reflect 'a combination of systemic resourcing constraints, largely relating to courts, as well as a judicial response to wider contextual factors such as reduced judicial discretion over bail decisions'.¹³⁸
104. The high numbers of people in prison and on remand has led to overcrowding. The Commission raised the issue of overcrowding in prisons in its 2014 CAT Submission.¹³⁹ There has been little improvement on this issue.
105. Overcrowding in prisons has also increased risk factors for the spread of COVID-19.¹⁴⁰ Available reporting indicates that prisoners have lower

vaccination rates and limited access to testing, despite prisons being particularly susceptible to COVID-19 outbreaks.¹⁴¹

106. The Commission also notes that there were severe public health restrictions in the criminal justice system, including at times where the general population had regained most of its freedoms. It is unclear whether this was necessary or proportionate. For instance, in Victoria, as of March 2021, anyone entering the justice system had to complete a 14-day quarantine in complete isolation.¹⁴²

107. The expanding use of post-sentence preventive detention regimes in Australia is also of concern to the Commission. Such laws have previously been primarily focused on narrow categories of offending, specifically terrorist offenders¹⁴³ and high-risk sexual offenders.¹⁴⁴ The reach of these laws has gradually expanded in a number of jurisdictions to encompass a broader range of offending behaviour.¹⁴⁵ One example is in Western Australia where reforms introduced in 2020 allow for a 'continuing detention order' to be made with respect to 'high-risk serious offenders', which is defined to potentially encompass individuals convicted of a broad range of criminal offences, including robbery, grievous bodily harm, and criminal damage by fire.¹⁴⁶ This expanded use of post-sentence preventive detention regimes raises serious concerns about indefinite and arbitrary detention, and disproportionately impacts First Nations peoples.

Recommendation 23: Governments take steps to reduce the number of people on remand, including by amending overly harsh bail laws.

Recommendation 24: Governments review the use of post-sentence preventive detention regimes throughout Australia to ensure compliance with international human rights obligations.

6 Violence against women and children

Relevant provisions of the CAT: Articles 2, 9, 12, 13, 14 and 16.

6.1 Rates of violence and sexual harassment

108. Domestic and family violence against women remains endemic in Australia.¹⁴⁷ The intersection of gender with other forms of inequality results in women with disability and from Indigenous, LGBTIQ+, and culturally and linguistically diverse backgrounds experiencing higher rates of violence, and additional barriers to support.¹⁴⁸ The Australian Institute of Health and Welfare and ANROWS report that:

- one woman is killed every nine days by a current or former intimate partner¹⁴⁹
- one in six women have experienced physical or sexual violence by a current or former partner¹⁵⁰
- one in four women have experienced emotional abuse by a current or former partner¹⁵¹ and
- intimate partner violence is a leading contributor to illness, disability and premature death for women aged 18-44.¹⁵²

109. Women and girls faced particular challenges during the COVID-19 pandemic, including increased risk of violence at home.¹⁵³

110. The Commission welcomed the \$600 million invested by the Australian Government in the 2021–22 budget to address family violence. Additional positive steps taken by the Australian Government include introducing a minimum standard for domestic violence leave,¹⁵⁴ and prioritising women and children who are escaping family violence in the National Housing and Homelessness Agreement.¹⁵⁵

111. The Commission also notes the significance of the Fourth Action Plan of the National Plan to Reduce Violence Against Women and Their Children 2010–2022 and that the development of a subsequent National Plan is currently underway.¹⁵⁶ The next plan should cover all forms of gender-based violence including domestic and family violence, sexual violence, online violence, gendered based elder abuse and sexual harassment. Children and young people should be recognised as victim/survivors of domestic and family violence in their own right, and their voices should be heard in the design of policy and service systems. The Commission emphasises the importance of prevention and early intervention measures to address family and domestic violence.

112. Sexual harassment is also prevalent in Australia, including workplaces and university settings. The Commission's 2018 National Survey on sexual harassment found that 33% of people who had been in the workforce in the previous five years said they had experienced workplace sexual harassment.¹⁵⁷

113. The Commission's *Respect@Work* report identified drivers and impacts of workplace sexual harassment, the adequacy of the current legal framework and measures to address this issue.¹⁵⁸ The Commission welcomes legislative reforms introduced in 2021 and 2022 to implement key recommendations of the report, and the Australian Government's commitment to implement all 55 recommendations of the report.¹⁵⁹

114. In March 2021, the Commission was asked by the Australian Government to conduct a review into Commonwealth parliamentary workplaces, to ensure that they are safe and respectful, and that the Parliament reflects best practice in prevention and responses to bullying, sexual harassment and sexual assault. The *Set the Standard* report was subsequently released in November, making 28 recommendations for reform.¹⁶⁰ The Commission welcomes steps taken to implement the report recommendations, including a statement of acknowledgement delivered to Parliament; the establishment of a Parliamentary Leadership Taskforce to monitor and progress the implementation of recommendations; and the passage of the *Parliamentary Reform (Set the Standard) Act 2022* (Cth) which improves workplace protections for Parliamentary staff.¹⁶¹

115. To address systemic failures associated with domestic and family violence, the recommendations of Coronial Inquests should be fully implemented. The Commission has previously called for a coherent national system of death reviews to consider cross-jurisdictional issues and ensure accurate monitoring. The Commission made recommendations to support this in its 2016 report, *A National System for Domestic and Family Violence Death Review*.¹⁶²

Recommendation 25: Government increase prevention and early intervention initiatives on domestic and family violence; advance tailored measures to address the needs of women and girls experiencing intersectional discrimination; and implement the further National Plan from 2022.

Recommendation 26: Governments address systemic failures to protect women from domestic violence, including through instituting a national death review system.

6.2 First Nations women and girls

116. First Nations women and girls experience higher rates of domestic and family violence compared to the non-Indigenous population. Factors relating to exclusion, inequality, intersectional discrimination including sexism and racism, and inherited trauma, increase First Nations families' vulnerability to family violence.¹⁶³ The Commission urges governments to address the structural and root causes of family violence in First Nations communities, through solutions led by First Nations peoples and organisations, including by adopting strength-based approaches.

117. Three in every five First Nations women have experienced physical or sexual violence.¹⁶⁴ First Nations women are 32 times more likely to be

hospitalised because of violence, and the rates of such violence are significantly underreported.¹⁶⁵ First Nations women are 11 times more likely to die due to assault than non-Indigenous women.¹⁶⁶

118. First Nations children are significantly over-represented in care and protection systems, and family violence is a key factor driving the contact of First Nations families with child protection authorities¹⁶⁷ It is also a factor that leads to women having greater interaction with the criminal justice system.¹⁶⁸

119. The Commission's *Wiyi Yani U Thangani* project has been funded by the Australian Government and identifies actions to improve the human rights of First Nations women and girls. This includes an urgent focus on reducing over-representation of Indigenous people victims of family violence, and in care and protection systems, with a focus on trauma recovery. A key recommendation is the development of a National Action Plan for Aboriginal and Torres Islander Women and Girls.¹⁶⁹ The Commission welcomes the recent commitment by the Australian Government to delivering a dedicated National Plan for First Nations people to end family violence and violence against women.¹⁷⁰ The Commission will host a summit of First Nations women and girls in early 2023 to input into government policies and frameworks.

120. The Commission emphasises the importance of ensuring that this National Plan is self-determined, and that First Nations women and children are at the centre of its design and delivery.¹⁷¹ The Commission also stresses that sustained investment in community-controlled services and programs is crucial to preventing and responding to family violence and its impacts on children.

121. To address systemic failures associated with domestic and family violence, the recommendations of Coronial Inquests should be fully implemented. The Commission has previously called for a coherent national system of death reviews to consider cross-jurisdictional issues and ensure accurate monitoring. The Commission made recommendations to support this in its 2016 report, *A National System for Domestic and Family Violence Death Review*.¹⁷²

Recommendation 27: Governments implement the recommendations of the *Wiyi Yani U Thangani* report.

Recommendation 28: Governments resource Aboriginal-controlled organisations to lead prevention efforts and respond to family violence and its impacts on children.

6.3 Need for child-focused responses

122. Children and young people are victim/survivors of domestic and family violence in their own right, and their voices should be heard in the design of policy and service systems. The historical 'invisibility' of children has led to a lack of data and lack of prevention, support, response and recovery services to address the unique needs of children.
123. The Australian Child Maltreatment Study findings will be launched in March 2023 and will for the first time provide a clear picture of the prevalence of child maltreatment. Research is also showing that experience of violence in childhood has serious negative outcomes throughout life.¹⁷³ The work of the National Children's Commissioner in 2015 highlighted the damaging effects of family and domestic violence on children.¹⁷⁴ The 2016 Victorian Royal Commission into Family Violence also shed light on how children are affected in their own right.¹⁷⁵ The Commission emphasises the importance of increasing prevention measures and responses to family violence that address the distinct impacts on children, including through resourcing specialist children's services.
124. Child abuse is a serious problem in Australia. Child protection data indicates that the rate of substantiations of child abuse and neglect was at 9 per 1,000 children in 2020–21, up from 8 per 1,000 in 2015–16.¹⁷⁶
125. *Safe and Supported: National Framework for Protecting Australia's Children 2021-2031* is Australia's ten-year strategy for improving the lives of children at risk of child abuse and neglect. Two five-year Action Plans will deliver the Framework, and for the first time there will be an Aboriginal and Torres Strait Islander Action Plan developed in partnership with Aboriginal and Torres Strait Islander leaders and communities. In 2021, the National Children's Commissioner heard from children, young people and families across Australia, about what they need to keep safe, in order to inform the Action Plans. The Commissioner's report, *Keeping Kids Safe and Well: Your Voices*, makes recommendations for child safety, including the need for redesign of the basic systems that are meant to support children and their families, especially those living with poverty and disadvantage.¹⁷⁷
126. There is a strong need for Australian jurisdictions to improve the quality of child protection systems. While there have been numerous inquiries in Australia which have included out-of-home care in their terms of reference¹⁷⁸ there has been little systemic change to address the increasing rates of children living in out-of-home care and the reasons why children are being placed in out-of-home care.¹⁷⁹ Early intervention policies and practices

comprise a relatively small proportion of overall child protection expenditure compared to tertiary services.¹⁸⁰

127. First Nations children are significantly over-represented in the child protection system. Between 2017 and 2021, the rate of Indigenous children in out-of-home care increased from 51 per 1000, to 58 per 1000.¹⁸¹

128. The Commission notes the extent to which children in care 'crossover' to the youth justice system. The Australian Law Reform Commission found that that 'the links between these systems is so strong that child removal into out-of-home care and juvenile detention could be considered as key drivers of adult incarceration'.¹⁸² This is due in part to systemic issues related to out-of-home care, such as 'badly trained and poorly supported staff' and a 'readiness to call police to manage children's behaviour'.¹⁸³

129. The Royal Commission into Institutional Responses to Child Sexual Abuse revealed the extent to which children have been maltreated while in the care of institutions such as schools, recreational organisations, residential care, youth detention and immigration detention. The Royal Commission highlighted the 'significant life-long impacts' of sexual abuse, including 'deep and complex trauma' that may affect all aspects of a victim/survivor's life.¹⁸⁴ The Commission welcomes the steps taken thus far to implement the recommendations of the Royal Commission. In particular, the Commission notes the National Redress Scheme,¹⁸⁵ and the development and endorsement by all governments of the National Principles for Child Safe Organisations.¹⁸⁶ The Commission urges continuous efforts to ensure the full implementation of all the Royal Commission recommendations.

130. The Commission notes that, on the whole, there are significant gaps in the implementation of children's rights in law, and across policy, programs and service delivery. The legal protections of children's rights in Australia are not comprehensive. Independent monitoring of children's rights, including the ability for children to make complaints, is limited. Overall, approaches to children experiencing vulnerability are fragmented and are largely reactive rather than preventative. The Commission has recommended the development of a National Plan for Child Wellbeing, a dedicated Cabinet Minister with overall responsibility for children's rights, and a national children's data framework to improve and coordinate children's policy and service-delivery across government portfolios.¹⁸⁷

Recommendation 29: The Australian Government increases prevention and early intervention measures and responses to family violence that address the distinct impacts of violence on children.

Recommendation 30: Governments resource prevention and early intervention measures to address child abuse and neglect; and ensure

sufficient training for staff and adequate staffing levels for child protection services.

Recommendation 31: The Australian Government develop and implement a National Plan for Child Wellbeing.

7 Trafficking

Relevant provisions of the CAT: Articles 2, 12, 13, 14 and 16.

131. While recognising the challenges of obtaining reliable estimates of the true extent of modern slavery and human trafficking, the Commission notes with concern recent estimates that there are 49.6 million people currently living in modern slavery across the world, and that this figure has grown by around 10 million people since 2017.¹⁸⁸ The number of victims of modern slavery and human trafficking in Australia from 2015–16 to 2016–17 was estimated as between 1,300 and 1,900.¹⁸⁹

132. The Commission welcomes the introduction of the *Modern Slavery Act 2018* (Cth) (Modern Slavery Act), which includes Government as a reporting entity. The current statutory review of the Modern Slavery Act is an opportunity to further strengthen Australia's anti-slavery legal framework. In particular, the Modern Slavery Act could be strengthened by establishing an independent Anti-Slavery Commissioner at the federal level (whose functions would include awareness raising, monitoring and oversight of the Modern Slavery Act), introducing financial penalties for non-compliant entities, and establishing a national compensation scheme for victims. The Commission notes that the NSW Government has recently appointed an Anti slavery Commissioner, the first to do so at the state and territory level.¹⁹⁰

133. The Commission also welcomes the *National Action Plan to Combat Modern Slavery 2020-25* (National Action Plan)¹⁹¹ and supports the full resourcing and implementation of the five National Strategic Priorities and 46 action items that are identified in the National Action Plan. The commitment to support and protect victims and survivors is an important focus and would be further strengthened by facilitating the provision of alternative supports and pathways to remedies which are not contingent on participation in criminal prosecutions.

134. *Australia's international engagement strategy on human trafficking and modern slavery: Delivering in partnership* (International Engagement

Strategy)¹⁹² recognises the critical importance of building and supporting regional and global partnerships to end all forms of modern slavery. Continued participation in regional forum such as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime,¹⁹³ investment in regional programs such as the ASEAN-Australia Counter Trafficking (ASEAN-ACT) program,¹⁹⁴ and strengthening of operational cooperation between law enforcement and border agencies should be encouraged. The 40 commitments identified in the International Engagement Strategy need to be fully resourced and implemented. In particular, the Commission notes that the commitment to ratify the International Labour Organization Protocol of 2014 to the Forced Labour Convention 1930 (No. 29) was met with the ratification of the Protocol by Australia on 31 March 2022.¹⁹⁵

Recommendation 32: The Australian Government amend the Modern Slavery Act to establish an independent Anti-Slavery Commissioner, introduce financial penalties for non-compliant entities, and establish a national compensation scheme for victims.

Recommendation 33: The Australian Government resource and implement both the National Action Plan and International Engagement Strategy.

Recommendation 34: The Australian Government facilitate the provision of alternative supports and pathways to remedies for victims and survivors which are not contingent on participation in criminal prosecutions.

8 Counter-terrorism legislation

Relevant provisions of the CAT: Article 2, 11.

135. The Australian Government has enacted 92 counter-terrorism laws in the two-decades since 11 September 2001.¹⁹⁶ The Commission is concerned that many of Australia's counter-terrorism laws restrict human rights through legislation that has not been shown to be legitimate, reasonable or proportionate responses to potential harms. In particular, the Commission draws the Committee's attention to the following laws:

- Preventative detention orders enabling a person to be held in secret without arrest or charge for up to 48 hours, and control orders which can place significant prohibitions and restrictions on a person's freedom of movement, expression, association and right to privacy.¹⁹⁷

- Continuing detention orders, which enable the continued detention of 'high-risk offenders' after the conclusion of their custodial sentence, for up to three years.¹⁹⁸
- Australian Security Intelligence Organisation (ASIO) 'questioning warrants' under which an individual can face five years in prison for refusing to answer a question.¹⁹⁹
- 'Declared areas' offences under the *Foreign Fighters Act 2014* (Cth) which criminalise entry into a specified area without having committed any other offence, or intending to perform any wrongful conduct.²⁰⁰
- Presumptions against bail and parole.²⁰¹
- Broad powers which allow police to stop, question, search, enter and seize in areas declared by the Minister to be a security zone, without a warrant.²⁰²
- Restrictions on fair trial rights.²⁰³
- Measures limiting children's rights such as in the prosecution and sentencing of children for terrorism offences.²⁰⁴
- Surveillance laws, including metadata retention laws enabling access to data by law enforcement agencies, without a warrant.²⁰⁵

136. These laws, alongside other broad terrorism legislation,²⁰⁶ impact upon rights to liberty, privacy, fair trial, freedom from arbitrary detention and freedom of speech.

137. The Independent National Security Legislation Monitor (INSLM) has a statutory mandate to review the operation, effectiveness and implications of Australia's counter-terrorism and national security laws on an ongoing basis. INSLMs have played a valuable role in recommending amendments to aspects of counter-terrorism laws to better safeguard rights and freedoms. The Commission also notes the work of the Parliamentary Joint Committee on Intelligence and Security (PCIS) in examining counter-terrorism laws passed through Parliament. However, the recommendations of the INSLM and PCIS are often not implemented by Government, or responded to in a timely manner,²⁰⁷ and both face 'ongoing limitations in their resourcing and statutory frameworks'.²⁰⁸ Despite recommendations for reforms of problematic laws, Kieran Hardy and George Williams have found that the 'framework laid out by laws from the first decade after September 11 remains almost entirely in place. In fact, many of these laws exist in the

same form in which they were enacted, except where their reach has been expanded'.²⁰⁹

Recommendation 35: The Australian Government amend existing counter-terrorism laws that disproportionately limit human rights.

9 People with disability

Relevant provisions of the CAT: Articles 2 and 16

138. The Commission welcomed the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) and commended the broad scope of the Terms of Reference. The Commission looks forward to the release of the Final Report. Similarly, the Committee on the Rights of Persons with Disabilities has previously made recommendations in 2019 relating to the issues raised below for people with disability.²¹⁰ These recommendations have not been acted upon.

139. In 2018, the Commission published *A Future Without Violence: Quality, safeguarding and oversight to prevent and address violence against people with disability in institutional settings*.²¹¹ The recommendations included improved quality, safeguarding and oversight mechanisms in the disability and mainstream sectors. The Commission remains concerned the need for improved quality, safeguarding and oversight mechanisms remains in these sectors.

140. The Commission is concerned about the lack of a nationally consistent approach to monitoring, regulating and eliminating the use of restrictive practices.²¹² The National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector only applies to disability services. These practices still occur in a range of environments, including mental health facilities, hospitals, aged care facilities and schools. There are inconsistent approaches between states and territories with respect to this issue, including in the mental health space, where it falls to each jurisdiction to regulate. Mental health services reported 1.6 physical restraint events per 1,000 bed days and 0.7 mechanical restraint events per 1,000 bed days during 2020–21.²¹³

141. The NDIS Quality and Safeguards Commission oversees the regulation of restrictive practices within the National Disability Insurance Scheme.²¹⁴ Progress made towards minimising the use of restrictive practices, including data on the reported use of regulated and non-regulated restrictive practices, should continue to be made publicly available.²¹⁵

142. The Senate Community Affairs References Committee considered the use of restrictive practices in relation to people with disability in 2016. The Committee recommended that the Australian Government work with State and Territory governments to implement a national zero-tolerance approach to eliminate restrictive practices in all service delivery contexts.²¹⁶ This issue is currently being examined by the Disability Royal Commission.²¹⁷

143. Australia has not implemented a nationally consistent supported decision-making framework and lacks legislation prohibiting the sterilisation of people with disability without consent.²¹⁸ The Commission remains deeply concerned that the non-therapeutic sterilisation of people with disability, particularly women and girls²¹⁹ continues to take place in Australia without their free, prior and informed consent. The Commission is also concerned by the forced administration of contraceptives and abortion procedures.²²⁰ The Commission encourages the Australian Government to work with state and territory governments to adopt uniform legislation prohibiting forced sterilisation and abortions in the absence of the free, prior and informed consent of the person concerned.

144. The Commission remains concerned that mental health laws, frameworks and policies in Australia permit the provision of mental health services to people with psychosocial disability and mental health conditions in ways that breach their human rights, including their right to liberty and security.²²¹ The Commission is particularly concerned about the imposition of compulsory treatment and involuntary hospitalisation.²²² Almost one in five (19.9%) residential mental health care episodes were for people with an involuntary mental health legal status during 2019–20.²²³ State and territory approaches are inconsistent in this regard. The Commission recommends that all mental health laws, frameworks and policies be examined and reformed to ensure alignment with human rights standards.

145. There remain high rates of violence against people with disability,²²⁴ in particular women and girls.²²⁵ Initiatives aimed at addressing violence against women and children often fail to adequately address the extra challenges faced by people with disability.

Recommendation 36: Governments develop a nationally consistent framework to reduce and eliminate the use of restrictive practices.

Recommendation 37: Governments adopt a human rights-based approach to mental health laws and ensure that mental health services do not violate the human rights of people with disability.

Recommendation 38: The Australian Government implement a nationally consistent supported decision-making framework. Governments ensure supports are provided to people with disabilities to exercise their legal capacity and exercise free and informed consent.

Recommendation 39: The Australian Government work with state and territory governments to adopt uniform legislation prohibiting, in the absence of the free, prior and informed consent of the person concerned: the sterilisation of adults and children with disability; and the administration of contraceptives and abortion procedures on women and girls with disability.

Recommendation 40: The Australian Government ensure that national policies to reduce violence against women and children prioritise disability.

10 Older persons

Relevant provisions of the CAT: Articles 2 and 16

146. Elder abuse, in many various forms, is a fundamental human rights issue faced by many older people and is presenting a range of complex challenges for the Australian community. In 2019–20, residential aged care services reported 5718 allegations of assault under the mandatory reporting requirements of the *Aged Care Act 1997 (Cth)*.²²⁶ In the same year, a further 27,000 to 39,000 alleged assaults occurred that were exempt from mandatory reporting because they were resident-on-resident incidents.²²⁷

147. The Commission welcomes the National Plan to Respond to the Abuse of Older Australians (2019–2023),²²⁸ and the findings of the Royal Commission into Aged Care Quality and Safety, which highlight the importance of a rights-based approach to the aged care system.²²⁹ The Commission also draws attention the Australian Law Reform Commission's 2017 report, *Elder Abuse—A National Legal Response*, which itself recommended a national plan on elder abuse, alongside a number of legislative reforms to institute safeguards and improve oversight.²³⁰ The Commission encourages the Australian Government to fully implement the priorities outlined in the National Plan, alongside Australian Law Reform Commission and Royal Commission recommendations.

148. A disproportionate number of deaths from COVID-19 occurred in residential aged care facilities.²³¹ In December 2020 Australia's COVID-19 death rate in residential aged care facilities was 'among the worst in the world'.²³² Approximately 30% of Australia's total COVID-19 related deaths as of April 2020 were among aged care residents.²³³ This was compounded by

problems with Australia's initial vaccine rollout which involved lengthy delays.²³⁴

149. Large numbers of aged care staff tested positive to COVID-19 or were deemed to be close contacts, resulting in significant staff shortages. This led to 'in some instances, aged-care residents faced deplorable conditions, with some left without food, water, or help showering and toileting'.²³⁵ The Senate Select Committee on COVID 19 found that 'the crisis in aged care was entirely predictable and – to a large extent – avoidable',²³⁶ noting key, unimplemented, Royal Commission recommendations to address staffing issues and improve aged-care capacity.²³⁷ This highlights the importance of strengthening Australia's aged care regime, including by implementing outstanding recommendations without delay.

Recommendation 41: Government implement recommendations of the Australian Law Reform Commission's report, *Elder Abuse—A National Legal Response* and the recommendations of the Royal Commission into Aged Care and Quality Safety.

11 Sexual orientation, gender identity and intersex issues

Relevant provisions of the CAT: Articles 2 and 16.

150. The Commission is concerned about involuntary surgery on people born with variations in sex characteristics, especially infants.²³⁸ The 2019 concluding observations of the Committee on the Rights of the Child called for the Australian Government to 'enact legislation explicitly prohibiting coerced sterilisation or unnecessary medical or surgical treatment, guaranteeing bodily integrity and autonomy to intersex children as well as adequate support and counselling to families of intersex children'.²³⁹ In 2017, the UN Human Rights Committee also made comments on the issue when considering Australia's obligations under the ICCPR.²⁴⁰

151. The Commission notes that the Senate Community Affairs Committee conducted an inquiry into the involuntary or coerced sterilisation of intersex people in Australia in 2013.²⁴¹ The Government responded to the recommendations of that inquiry in 2015.²⁴² Many of the recommendations were not implemented; particularly at the state and territory level.

152. The Commission's own 2021 report, *A human rights-based approach for people born with variations in sex characteristics*, makes recommendations for how Australia should protect and promote the human rights of people born

with variations in sex characteristics in the context of medical interventions to modify these characteristics.²⁴³ The recommendations are designed around human rights principles, including protecting bodily integrity and children's agency. The report also focuses on the need for new legislative protections, guidance and oversight processes when there is consideration of medical interventions for people under the age of 18 years born with variations in sex characteristics.

153. The Victorian Royal Commission into Family Violence referred to research suggesting intimate partner violence is as prevalent in LGBTIQ+ communities as it is in the general population.²⁴⁴ Transgender and intersex people are at particular risk of violence, including from parents.²⁴⁵ The Australian Institute of Family Studies has also 'significant levels' of sexual harassment and sexual violence experienced by LGBTIQ+ people.²⁴⁶ LGBTIQ+ people also experience high rates of verbal abuse, physical assault and harassment, including bullying in schools.²⁴⁷ The Commission notes the need for governments to invest in specialised and inclusive services designed to address the needs of LGBTIQ+ people in relation to family and domestic violence.
154. LGBTIQ+ people, particularly transgender and intersex people, are generally not adequately accommodated by the prison system. The Association for the Prevention of Torture has stated that LGBTIQ+ people in detention 'are in a situation of particular vulnerability, at risk of human rights violations and abuses – including by fellow detainees – throughout the entire criminal justice system'.²⁴⁸ The Commission found in 2015 that while transgender guidelines do exist, they are 'inconsistent and often left to the discretion of managers'.²⁴⁹ The Commission recommended 'all states and territories to develop and implement policies on the placement of trans and gender diverse prisoners in correctional services and for access to hormone therapy to be based on medically-identified need, not discretion'.²⁵⁰ The Commission acknowledges the complexity of the issues surrounding the placement of trans and gender diverse people in custodial contexts. Placement policies and procedures must be developed consistently with human rights principles, and to ensure that the safety and welfare of all people in detention is protected.
155. The Commission is concerned that, in NSW and Queensland, people must undergo surgical or medical treatment to change the legal record of their sex.²⁵¹ All other Australian jurisdictions have now removed that requirement.

Recommendation 42: Governments implement the recommendations of the Commission's report, *A human rights-based approach for people born with variations in sex characteristics*.

Recommendation 43: The Australian Government invest in specialist and inclusive services to address domestic and family violence experienced by LGBTIQ+ people.

Recommendation 44: Governments develop specific, transparent and human-rights based policy and procedures on accommodating LGBTIQ+ people in prisons and other places of detention (including immigration detention).

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Appendix: List of Recommendations

Legal and institutional framework

Recommendation 1: The Australian Government amend the AHRC Act to ensure that the Commission is guided by a comprehensive definition of human rights, including through CAT being a scheduled instrument.

Recommendation 2: The Australian Government take steps to ensure that the Commission is fully compliant with the Paris Principles, including through amending the AHRC Act, and ensuring adequate resourcing of the Commission's functions.

Recommendation 3: Government train public servants to ensure that Statements of Compatibility are of a consistently high standard; and ensure the proper consideration of PJCHR views by Parliamentarians in the enactment of legislation.

Implementation of OPCAT

Recommendation 4: Governments ensure full OPCAT compliance no later than the 20 January 2023 extended deadline by designating NPMs, and ensuring the mandates and resourcing of NPMs is sufficient to allow them to effectively fulfil their OPCAT functions.

Recommendation 5: Governments adopt an inclusive approach to the interpretation of 'places of detention', ensuring that both 'primary' and 'secondary' places of detention are included within the scope of all NPMs.

Recommendation 6: Governments give particular attention to ensuring NPMs are designed and operate in a way that reflects the particular needs, and is inclusive of, vulnerable cohorts who are disproportionately represented in places of detention, including (but not limited to) First Nations people, children and young people and people with disability.

Immigration detention and asylum seekers

Recommendation 7: The Australian Government ensures that its border security operations, treatment of refugees and asylum seekers, and offshore processing arrangements comply with international human rights obligations, including *non-refoulement* obligations.

Recommendation 8: The Migration Act be amended to ensure that closed immigration detention is only used in circumstances where it is strictly necessary to manage unacceptable risks to the community.

Recommendation 9: The Australian Government introduce legislation to ensure that the necessity for continued immigration detention is periodically assessed by a court or tribunal up to a maximum time limits.

Criminal justice system

First Nations Peoples

Recommendation 10: Governments ensure the availability of diversionary programs for Indigenous peoples, expand justice reinvestment trials and invest in pathways out of the criminal justice system.

Recommendation 11: The Australian Government commit adequate, ongoing funding for Indigenous legal assistance services.

Recommendation 12: Governments review the use and application of mandatory sentencing laws, particularly where they disproportionately impact Aboriginal and Torres Strait Islander peoples, and expand the use of non-custodial measures.

Recommendation 13: Governments ensure that Aboriginal-led, culturally appropriate, trauma-informed and gender responsive services and programs are resourced and available throughout the criminal justice system.

Recommendation 14: Governments ensure that criminal justice officials at all levels receive sufficient training to ensure the application of culturally appropriate, trauma-informed and gender responsive approaches.

Recommendation 15: All Australian governments commit to the development and implementation of a national anti-racism framework to ensure targeted action to identify and address the scourge of racism, including systemic and institutional racism within government agencies including within the criminal justice system.

Youth justice system

Recommendation 16: Governments should explicitly prohibit the use of isolation practices and force as punishment in youth justice facilities. These practices should only be permitted 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 17: The Northern Territory Government fully implement the recommendations of the Northern Territory Royal Commission.

Recommendation 18: Governments legislate against the detention in adult facilities of persons under 18 years.

Recommendation 19: Governments raise the minimum age of criminal responsibility from 10 years to at least 14 years.

Recommendation 20: Governments ensure that imprisonment of children and young people occurs only as a last resort and for the shortest appropriate period of time, including through identifying and removing barriers for young offenders accessing diversionary programs, in particular for First Nations children. Governments should expand the availability and range of diversionary programs for young offenders including community-controlled and culturally-safe programs.

Recommendation 21: Governments should provide screening and treatment for pre-existing conditions and disabilities when children interact with the youth justice system. Governments should ensure that qualified mental health support and therapies are provided for children in youth detention (as it is for children in community), and that the experience of incarceration does not exacerbate their mental health problems and trauma.

People with disability in the justice system

Recommendation 22: Governments implement the recommendations of the Committee on the Rights of Persons with Disabilities in 2019 concerning the criminal justice system, including but not limited to:

- Implementing the *National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment* into laws, policies and procedures.
- Ensuring adequate disability supports and services are available in the criminal justice system, including the provision of mental health care services.

Prison and Remand

Recommendation 23: Governments take steps to reduce the number of people on remand, including by amending overly harsh bail laws.

Recommendation 24: Governments review the use of post-sentence preventive detention regimes throughout Australia to ensure compliance with international human rights obligations.

Violence against women and children

Recommendation 25: Government increase prevention and early intervention initiatives on domestic and family violence; advance tailored measures to address the needs of women and girls experiencing intersectional discrimination; and implement the further National Plan from 2022.

Recommendation 26: Governments address systemic failures to protect women from domestic violence, including through instituting a national death review system.

Recommendation 27: Governments implement the recommendations of the *Wiyi Yani U Thangani* report.

Recommendation 28: Governments resource Aboriginal-controlled organisations to lead prevention efforts and respond to family violence and its impacts on children.

Recommendation 29: The Australian Government increases prevention and early intervention measures and responses to family violence that address the distinct impacts of violence on children.

Recommendation 30: Governments resource prevention and early intervention measures to address child abuse and neglect; and ensure sufficient training for staff and adequate staffing levels for child protection services.

Recommendation 31: The Australian Government develop and implement a National Plan for Child Wellbeing.

Trafficking

Recommendation 32: The Australian Government amend the Modern Slavery Act to establish an independent Anti-Slavery Commissioner, introduce financial penalties for non-compliant entities, and establish a national compensation scheme for victims.

Recommendation 33: The Australian Government resource and implement both the National Action Plan and International Engagement Strategy.

Recommendation 34: The Australian Government facilitate the provision of alternative supports and pathways to remedies for victims and survivors which are not contingent on participation in criminal prosecutions.

Counter-terrorism legislation

Recommendation 35: The Australian Government amend existing counter-terrorism laws that disproportionately limit human rights.

People with disability

Recommendation 36: Governments develop a nationally consistent framework to reduce and eliminate the use of restrictive practices.

Recommendation 37: Governments adopt a human rights-based approach to mental health laws and ensure that mental health services do not violate the human rights of people with disability.

Recommendation 38: The Australian Government implement a nationally consistent supported decision-making framework. Governments ensure supports are provided to people with disabilities to exercise their legal capacity and exercise free and informed consent.

Recommendation 39: The Australian Government work with state and territory governments to adopt uniform legislation prohibiting, in the absence of the free, prior and informed consent of the person concerned: the sterilisation of adults and children with disability; and the administration of contraceptives and abortion procedures on women and girls with disability.

Recommendation 40: The Australian Government ensure that national policies to reduce violence against women and children prioritise disability.

Older persons

Recommendation 41: Government implement recommendations of the Australian Law Reform Commission's report, *Elder Abuse—A National Legal Response* and the recommendations of the Royal Commission into Aged Care and Quality Safety.

Sexual orientation, gender identity and intersex issues

Recommendation 42: Governments implement the recommendations of the Commission's report, *A human rights-based approach for people born with variations in sex characteristics*.

Recommendation 43: The Australian Government invest in specialist and inclusive services to address domestic and family violence experienced by LGBTQI+ people

Recommendation 44: Governments develop specific, transparent and human-rights based policy and procedures on accommodating LGBTQI+ people in prisons and other places of detention (including immigration detention).

Endnotes

- ¹ 'Principles Relating to the Status and Functions of National Institutions for the Promotion and Protection of Human Rights' General Assembly Resolution 48/134 1993.
- ² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
- ³ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) 9 January 2003, A/RES/57/199 (entered into force 22 June 2006).
- ⁴ *Criminal Code Act 1995* (Cth) s 268.13.
- ⁵ *Criminal Code Act 1995* (Cth) Div 274.
- ⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- ⁸ *Australian Human Rights Commission Act 1986* (Cth) s 20.
- ⁹ Global Alliance of National Human Rights Institutions, *Australia: Australian Human Rights Commission* (April 2022) 1-2 <https://humanrights.gov.au/sites/default/files/nhri_australia_no_cover_4.pdf>.
- ¹⁰ Global Alliance of National Human Rights Institutions, *Australia: Australian Human Rights Commission* (April 2022) 3-4 <https://humanrights.gov.au/sites/default/files/nhri_australia_no_cover_4.pdf>.
- ¹¹ Global Alliance of National Human Rights Institutions, *Australia: Australian Human Rights Commission* (April 2022) 3-4 <https://humanrights.gov.au/sites/default/files/nhri_australia_no_cover_4.pdf>.
- ¹² *Australian Human Rights Commission Legislation Amendment (Selection and Appointment Bill)* (Cth).
- ¹³ Free & Equal, *A Reform Agenda for Discrimination Laws* (Position Paper, 2021) Recommendation 37, 310. <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>
- ¹⁴ *The Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) establishes the Parliamentary Joint Committee on Human Rights.
- ¹⁵ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3(1).
- ¹⁶ See, eg, Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2021) 46(1) *Monash University Law Review* 256; Daniel Reynolds and George

Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Lawbook Co, 2020) 67.

- ¹⁷ See, eg, Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (2018) 41(1) *UNSW Law Journal* 40; and David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *Journal of Legislative Studies* 1, 7–8.
- ¹⁸ See, eg, Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (2018) 30
<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Annual_Reports>.
- ¹⁹ Although note that the PJCHR prepares guidance materials and provides targeted training. And the Attorney-General's Department provides some resources. Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2018* (12 February 2019), [3.64]; 'Tools for assessing compatibility with human rights' Attorney-General's Department <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/tools-assessing-compatibility-human-rights>>.
- ²⁰ United Nations Committee Against Torture. Decision adopted by the Committee on the request submitted by Australia under article 24 (2) of the Optional Protocol to the Convention (CAT/C/73/3). 3 June 2022.
- ²¹ See <[Monitoring places of detention – OPCAT - Commonwealth Ombudsman](#)>.
- ²² The Hon. Mark Speakman. Budget Estimates 2021 Questions Taken on Notice Portfolio Committee No. 5 – Legal Affairs (26 March 2021), Question 14, 35
<<https://www.parliament.nsw.gov.au/lcdocs/other/15381/AQON%20-%20Attorney%20General%20and%20Prevention%20of%20Domestic%20Violence%20-%20Minister%20Speakman.pdf>>; The Hon. Elise Archer. House of Assembly Estimates Committee B. (8 September 2021), 25
<<https://www.parliament.tas.gov.au/ParliamentSearch/isysquery/646e1e1a-ae8-4738-9d7a-87774dd880e2/5/doc/>>; Jack Latimore, 'Deaths in custody oversight missing as government deadline passes', *The Sydney Morning Herald* (20 January 2022)
<<https://www.smh.com.au/national/deaths-in-custody-oversight-missing-as-government-deadline-passes-20220120-p59pwv.html>>; Parliament of Victoria Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's criminal justice system*, Volume 2 (March 2022), 630
<https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf>; The Hon. Leanne Linnard, Queensland Parliament: Record of Proceedings (26 May 2022), 1479
<https://documents.parliament.qld.gov.au/events/han/2022/2022_05_26_WEEKLY.pdf>
- ²³ Australian Government, Closing The Gap Commonwealth Implementation Plan (July 2021), 50
<https://parlinfo.aph.gov.au/parlInfo/download/publications/taledpapers/4f79a3db-5aa9-4d21-8bae-7ab5ace4f4f7/upload_pdf/Commonwealth%20CTG%20Implementation%20Plan.pdf;fileType=application%2Fpdf#search=%22publications/taledpapers/4f79a3db-5aa9-4d21-8bae-7ab5ace4f4f7%22>
- ²⁴ Australian Senate, Question on notice no. 4249 (08 November 2021)
<<https://www.aph.gov.au/api/qon/downloadquestions/Question-ParliamentNumber46-QuestionNumber4249>>.
- ²⁵ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020), 40-43
<<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>>

- ²⁶ 16-27 October 2022
<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Chronological>.
- ²⁷ United Nations Committee Against Torture, Decision adopted by the Committee on the request submitted by Australia under article 24 (2) of the Optional Protocol to the Convention (CAT/C/73/3) (3 June 2022) [9].
- ²⁸ Commonwealth Ombudsman, 'Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)' (Report, September 2019), 8.
- ²⁹ The United Nations Subcommittee on the Prevention of Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/C/57/4 (22 March 2016) 19 [1]-[3].
- ³⁰ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020), 55
<<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>>
- ³¹ Australian Human Rights Commission, *Implementing OPCAT in Australia*, (29 June 2020), 36
<<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>>; United Nations, *Preventing Torture: The Role of National Preventive Mechanisms (A Practical Guide: Professional Training Series No. 21)* (2018), 26-27
<https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf>
- ³² Committee on the Rights of Persons with Disabilities. *Concluding observations on the combined second and third periodic reports of Australia* (15 October 2019) [30(c)]
<<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsnzSGolKOaUX8SsM2PfxU7sdcBNJQCwIRF9xTca9TaCwjm5OlnhspoVv2oxnsujKTREtaVWFXhEZM%2F0OdVjz1UEyF5leK6Ycmqrn8yzTHQCn>>
- ³³ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020), 25
<<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>>; National Children's Commissioner, Australian Human Rights Commission, *Children's Rights Report 2016* (October 2016) <<https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016>>; Australian and New Zealand Children's Commissioners and Guardians, *Communique* (November 2018)
<<https://humanrights.gov.au/our-work/childrens-rights/publications/australian-and-new-zealand-childrens-commissioners-and-0>>
- ³⁴ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 29 June 2020, pp 57-58
<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>
- ³⁵ See Rebecca Minty 'Involving civil society in preventing ill treatment in detention: maximising OPCAT's opportunity for Australia' *Australian Journal of Human Rights*, 25 (1) (2019), 91-112; Richard Harding, 'Australia's circuitous path towards the ratification of OPCAT, 2002-2017: the challenges of implementation' *Australian Journal of Human Rights*, 25 (1) (2019), 17; Steven Caruana, OPCAT series: 'The need for formal partnerships between civil society and the National Preventive Mechanism' *University of Western Australia Public Policy Institute* (16 December 2019) <<https://www.news.uwa.edu.au/archive/2019121611777/uwa-public-policy-institute/opcat-series-need-formal-partnerships-between-civil-societ/>>; Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 15 October 2019 [30(c)].
- ³⁶ The Hon. Mark Speakman. Budget Estimates 2021 Questions Taken on Notice Portfolio Committee No. 5 – Legal Affairs (26 March 2021), Question 14, 35
<<https://www.parliament.nsw.gov.au/lcdocs/other/15381/AQON%20>-

- [%20Attorney%20General%20and%20Prevention%20of%20Domestic%20Violence%20-%20Minister%20Speakman.pdf>](#); The Hon. Elise Archer. House of Assembly Estimates Committee B. (8 September 2021) 25
<<https://www.parliament.tas.gov.au/ParliamentSearch/isysquery/646e1e1a-ae8-4738-9d7a-87774dd880e2/5/doc/>>; Jack Latimore. "Deaths in custody oversight missing as government deadline passes." *The Sydney Morning Herald* (20 January 2022)
<<https://www.smh.com.au/national/deaths-in-custody-oversight-missing-as-government-deadline-passes-20220120-p59pwv.html>>; Parliament of Victoria Legislative Council Legal and Social Issues Committee. *Inquiry into Victoria's criminal justice system Volume 2* (March 2022), 630
<https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf>; The Hon. Leanne Linnard. Queensland Parliament. *Record of Proceedings* (26 May 2022), 1479
<https://documents.parliament.qld.gov.au/events/han/2022/2022_05_26_WEEKLY.pdf>
- ³⁷ Australian Government, *Closing The Gap Commonwealth Implementation Plan* (July 2021), 50
<https://parlinfo.aph.gov.au/parlInfo/download/publications/tables/papers/4f79a3db-5aa9-4d21-8bae-7ab5ace4f4f7/upload_pdf/Commonwealth%20CTG%20Implementation%20Plan.pdf;fileType=application%2Fpdf#search=%22publications/tables/papers/4f79a3db-5aa9-4d21-8bae-7ab5ace4f4f7%22>
- ³⁸ Australian Senate. Question on notice no. 4249 (08 November 2021)
<<https://www.aph.gov.au/api/qon/downloadquestions/Question-ParliamentNumber46-QuestionNumber4249>>
- ³⁹ Australian Human Rights Commission, *Implementing OPCAT in Australia* (29 June 2020), 40-43
<<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>>
- ⁴⁰ Australian Border Force, *Operation Sovereign Borders Monthly Updates: January - August 2022* <<https://www.abf.gov.au/sitenewsroom?k=operation%20sovereign%20borders>>.
- ⁴¹ Australian Human Rights Commission, Submission No. 11 to the Joint Standing Committee on Migration Review, *Processes associated with visa cancellations made on criminal grounds* (27 April 2018); Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy caseload'* (2019) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.
- ⁴² *Migration Act 1958* (Cth) s 195A(4).
- ⁴³ See *Migration Regulations 1994* (Cth), Schedule 2, clause 070.511.
- ⁴⁴ *Migration Act 1958* (Cth) ss 189, 196.
- ⁴⁵ Australian Human Rights Commission, *Risk management in immigration detention* (2019) 66-68
<<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.
- ⁴⁶ 'Immigration Detention and Community Statistics Summary', *Department of Home Affairs* (Webpage 31 May 2022), <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-may-2022.pdf>>.
UK Home Office, *National statistics How many people are detained or returned?, Immigration Statistics, year ending December 2021*. (March 2022)
<<https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/how-many-people-are-detained-or-returned>>; Canada Border Services Agency, *Quarterly detention statistics: Second quarter fiscal year 2021 to 2022* (Webpage, 28 April 2022)
<<https://www.cbsa-asfc.gc.ca/security-secure/detent/qstat-2021-2022-eng.html>>

- ⁴⁸ See reports from previous inspections of immigration detention facilities on the Commission's website at <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/immigration-detention-reports-and-photos>>
- ⁴⁹ Australian Human Rights Commission, *Risk Management in Immigration Detention* (Report, 2019) 68.
- ⁵⁰ Parliamentary Joint Committee on Human Rights, Parliament of Australia, Ninth Report of 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and other related legislation, 19 June 2013 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2013/2013/92013/index>; Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Incident at Manus Island Detention Centre from 16 February to 18 February 2014*, 11 December 2014, [8.33] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report>; Australian Human Rights Commission, *Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth* (Department of Home Affairs) [2018] AusHRC 128, *Report into the practice of the Australian Government of sending to Nauru families with young children who arrived in Australia seeking asylum* <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/ms-bk-ms-co-and-mr-de-behalf-themselves-and-their?_ga=2.206346131.1094768931.1664690386-1551756871.1605493616>.
- ⁵¹ Karen Andrews MP and Westly Nukundj MP, 'Finalisation of the Regional Resettlement Arrangement' (Media Release, 6 October 2021) <<https://minister.homeaffairs.gov.au/KarenAndrews/Pages/finalisation-of-the-regional-resettlement-arrangement.aspx>>.
- ⁵² Senate Standing Committee on Legal and Constitutional Affairs, *Additional Budget Estimates* (Question on Notice No. 147, AE22-147, 14 February 2022).
- ⁵³ Department of Home Affairs, *Statistics of transitory persons In Nauru and PNG* (30 June 2022) <<https://www.homeaffairs.gov.au/about-us-subsite/files/population-number-resettled-30-june-2022.pdf>>
- ⁵⁴ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex: Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms (22 March 2016) UN Doc: CAT/C/57/4
- ⁵⁵ See, eg United Nations Office on Drugs and Crime et al, 'UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings' (Joint Statement, 13 May 2020) <<https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>>; United Nations Office on Drugs and Crime, *COVID-19 preparedness and responses in prisons* (Position Paper, 31 March 2020) <https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Position_paper_COVID-19_in_prisons.pdf>.
- ⁵⁶ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Advice of the Subcommittee to State parties and national preventive mechanisms relating to the coronavirus disease (COVID-19) pandemic*, UN Doc CAT/OP/10 (7 April 2020, adopted 25 March 2020) <<https://undocs.org/CAT/OP/10>>.
- ⁵⁷ Department of Home Affairs, 'Immigration detention', *Visa statistics* (Webpage, 9 December 2020) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention>>; GOV.UK, 'Immigration detention', *Returns and detention datasets*, (Statistical dataset, 26 November 2020) <<https://www.gov.uk/government/statistical-data-sets/returns-and-detention-datasets>>; 'COVID-19 Measures at Immigration Holding

- Centres', *Public Safety Canada*, (Parliamentary Committee Notes, May 2020) <<https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20200831/032/index-en.aspx>> ; U.S. Immigration and Customs Enforcement, 'Detention Statistics', *Detention Management* (Statistics, 13 November 2020) <<https://www.ice.gov/detention-management>>.
- ⁵⁸ Australian Border Force, 'Statement regarding Christmas Island' (Media Release, 4 August 2020) <<https://newsroom.abf.gov.au/releases/statement-regarding-christmas-island>>.
- ⁵⁹ Australian Human Rights Commission, *Inspection of Christmas Island Immigration Detention Centre: 23-25 August 2017* (Report, 20 November 2018) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/australian-human-rights-commission-inspection-1>>.
- ⁶⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2009) 45 <<https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-0>>.
- ⁶¹ Law Council of Australia, *Justice Project: Aboriginal and Torres Strait Islander Peoples* (Final Report, August 2018) 1 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28Part%201%29.pdf>>.
- ⁶² Australian Bureau of Statistics, *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians* (August 2022) <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-counts-aboriginal-and-torres-strait-islander-australians/2021>>.
- ⁶³ Australian Bureau of Statistics, *Prisoners in Australia, Aboriginal and Torres Strait Islander Prisoner Characteristics, 4517.0* (September 2021). <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0-2016-Main%20Features-Aboriginal%20and%20Torres%20Strait%20Islander%20Prisoner%20Characteristics-5>>.
- ⁶⁴ Hilda Tubex, 'Prisoner numbers in Australia have decreased, but we're not really sure why yet' *The Conversation*, 21 January 2020 <<https://theconversation.com/prisoner-numbers-in-australia-have-decreased-but-were-not-really-sure-why-yet-129696>>.
- ⁶⁵ Australian Institute of Health and Welfare, *Youth Justice in Australia 2020-21* (March 2022) <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2020-21/contents/summary>>.
- ⁶⁶ See eg, Australian Institute of Criminology, *Deaths in custody in Australia 2020-21* (December 2021) 3 <<https://www.aic.gov.au/publications/sr/sr37>>; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018) 60 <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>> citing Royal Commission into Aboriginal Deaths in Custody, *Final Report*, vol 1, [1.3.3].
- ⁶⁷ 'Deaths in custody in Australia' *Australian Institute of Criminology* (Web Page) <<https://www.aic.gov.au/statistics/deaths-custody-australia>>.
- ⁶⁸ Coalition of Aboriginal and Torres Strait Islander Peak Organisations, and all Australian Governments, *National Agreement on Closing the Gap* (July 2020) <https://www.closingthegap.gov.au/sites/default/files/2022-09/ctg-national-agreement_apr-21-comm-infra-targets-updated-24-august-2022_0.pdf>.
- ⁶⁹ Law Council of Australia, 'Closing the Gap: additional funding a step in the right direction' (Media Release, 6 August 2021) <<https://www.lawcouncil.asn.au/media/media-releases/closing-the-gap-additional-funding-a-step-in-the-right-direction>>.
- ⁷⁰ 'Justice Reinvestment' *Australian Labor Party* (Web Page) <<https://www.alp.org.au/policies/justice-reinvestment>>.

- ⁷¹ Australia and New Zealand Police, *Anti-Racism and Cultural Diversity Principles* (2018) <<https://www.anzpa.org.au/ArticleDocuments/180/Anti-Racism-Principles.pdf.aspx?OverrideExpiry=Y>>.
- ⁷² Amnesty International and Clayton Utz, *Review of the Implementation of RCIADIC* (May 2015).
- ⁷³ Law Council of Australia, *Justice Project Final Report – Aboriginal and Torres Strait Islander Peoples*, 96 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20P%20eople%20%28Part%201%29.pdf>>.
- ⁷⁴ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018) 16 <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>; See Australian Human Rights Commission, Submission to the Queensland Parliament, Community Support and Services Committee, *Inquiry into the decriminalisation of certain public offences, and health and welfare responses* (August 2022) <<https://documents.parliament.qld.gov.au/com/CSSC-0A12/IDCPOHWR-FA50/submissions/00000040.pdf>>.
- ⁷⁵ *Police Administration Act 1978* (NT) s 133AB.
- ⁷⁶ Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, *End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia* (2017); See also Human Rights Law Centre and Change the Record Coalition, *Over-represented and Overlooked* (May 2017) 12. Paperless arrests have been attributed to at least one death in custody: in 2015 Northern Territory Coroner Greg Cavanagh found that the laws were 'manifestly unfair' and 'irreconcilable' with the recommendations of the Royal Commission into Indigenous Deaths in Custody; *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 [25].
- ⁷⁷ Jaqueline Breen, 'Backflip on NT Government promise to repeal 'manifestly unfair' paperless arrest laws' *ABC News* (Online) 21 August 2020 <<https://www.abc.net.au/news/2020-08-21/chief-minister-backflip-nt-paperless-arrest-laws/12580178>>.
- ⁷⁸ See, for example: *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld); *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld); *Criminal Code Act Compilation Act 1913* (WA) s 297, 318; *Crimes Amendment (Murder of Police Officers) Act 2011* (NSW); *Sentencing Amendment (Violent Offences) Act 2008* (NT); *Sentencing Amendment (Mandatory Minimum Sentence) Act 2013* (NT); *Criminal Code Amendment Act (No 2) 1996* (WA); *Criminal Code Amendment Act 2009* (WA); *Sentencing Legislation Amendment Act 2014 No. 6* (WA); *Criminal Organisations Control Act 2012* (WA); *Crimes Amendment (Gross Violence Offences) Act 2013* (VIC).
- ⁷⁹ Australian Human Rights Commission, Amicus Curaie: *Magaming v The Queen* [2013] HCA 40 (11 October 2013) <<https://www.humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae>>; Law Council of Australia, *The Justice Project Final Report – Part 1 – People with Disability* (August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>; and Australian Law Reform Commission *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133 March 2018): <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>. See: *Sentencing Act* (NT) s 78DH; *Criminal Code 1913* (WA) ss 297, 318, 401 (4).
- ⁸⁰ Following the introduction of a mandatory sentencing scheme for certain assault offences in the Northern Territory in 2008 research found that although there were few differences in sentencing outcomes for repeat offenders, Aboriginal and Torres Strait Islander males were 68 times more likely to be convicted of, or come into contact with the justice system for, this kind of offence. Stephen Jackson and Fiona Hardy, 'The Impact of Mandatory Sentencing on

Indigenous Offenders' (Speech delivered at Sentencing Conference 2010, National Judicial Conference, Canberra 6 February 2010) 3.

- ⁸¹ United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by the States Parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, 56th sess, UN Doc CERD/C/304/Add.101 (19 April 2000), 16.
- ⁸² See 'Justice for Aboriginal and Torres Strait Islander people will not improve without funding for Aboriginal legal services: Analysis of the Federal Budget 2022' NATSILS (Web Page) <<https://www.natsils.org.au/wp-content/uploads/2022/04/Federal-Budget-2022-NATSILS.pdf>>.
- ⁸³ See, eg, KPMG, *Maranguka Justice Reinvestment Project: Impact Assessment* (November 2018).
- ⁸⁴ Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, March 2018) 16 and 230 citing Australian Bureau of Statistics, *Prisoners in Australia*, December 2016, cat no 4517.0 table 19. <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>
- ⁸⁵ See, eg, Lorena Allam 'Kumanjaya Walker inquest: 'Racist' text messages from police officer's phone allowed as evidence' *The Guardian* (Online) 13 September 2022 <<https://www.theguardian.com/australia-news/2022/sep/13/kumanjaya-walker-inquest-racist-text-messages-from-police-officers-phone-allowed-as-evidence>>.
- ⁸⁶ Western Australia Coroner's Report, *Record of Investigation into Death of Julieka Ivanna Dhu* (16 December 2016) [860].
- ⁸⁷ Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments, *National Agreement on Closing the Gap* (July 2020) [59] <https://www.closingthegap.gov.au/sites/default/files/2022-09/ctg-national-agreement_apr-21-comm-infra-targets-updated-24-august-2022_0.pdf>.
- ⁸⁸ Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017); Western Australian Office of the Inspector of Custodial Services, *Behaviour management practices at Banksia Hill Detention Centre* (June 2017); Victorian Commission for Children and Young People, *The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (2017); and Law Council of Australia *The Justice Project Final Report* (August 2018).
- ⁸⁹ Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory *Findings and Recommendations* (November 2017) <<https://www.royalcommission.gov.au/child-detention/final-report>>.
- ⁹⁰ Northern Territory Government, 'Safer Communities: Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory' (Media Release, 1 March 2018).
- ⁹¹ Steve Vivian 'Self-harm incidents inside Don Dale spark intervention of NT Children's Commissioner' *ABC News* (Online) 10 June 2022 <<https://www.abc.net.au/news/2022-06-10/don-dale-self-harm-incidents/101141030>>.
- ⁹² Change the Record, 'Ban spit hoods nationwide' (Media Release, 5 April 2022) <<https://www.changetherecord.org.au/change-the-record/posts/media-release-ban-spit-hoods-nationwide>>.
- ⁹³ Matt Dennien, 'No good reason to put a bag over someone's head': Queensland police ban spit hoods' *Brisbane Times* (Online) 19 September 2022 <<https://www.brisbanetimes.com.au/national/queensland/no-good-reason-to-put-a-bag-over-someone-s-head-queensland-police-ban-spit-hoods-20220919-p5bjbn.html>>.
- ⁹⁴ *Statutes Amendment (Spit Hood Prohibition) Act 2021* (SA).
- ⁹⁵ *VYZ by next friend XYZ v Chief Executive Officer of the Department of Justice* [2022] WASC 274.
- ⁹⁶ *VYZ by next friend XYZ v Chief Executive Officer of the Department of Justice* [2022] WASC 274 [35].

- ⁹⁷ Western Australia Office of the Inspector of Custodial Services, *Inspection of the Intensive Support Unit at Banksia Hill Detention Centre* (March 2022) 14, IV <<https://www.oics.wa.gov.au/wp-content/uploads/2022/03/Banksia-Report-141.pdf>>.
- ⁹⁸ Damian McIntyre, 'Ashley Youth Detention Centre ends lockdown that kept detainees in rooms amid staff shortage' *ABC News* (Online) 14 July 2022 <<https://www.abc.net.au/news/2022-07-14/tas-ashley-youth-detention-centre-kids-out-of-lockdown/101238024>>.
- ⁹⁹ 'Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings' (Web Page) <<https://www.commissionofinquiry.tas.gov.au/>>.
- ¹⁰⁰ Telethon Kids Institute, 'Nine out of ten young people in detention found to have severe neuro-disability' (Media Release, 13 February 2018) <<https://www.telethonkids.org.au/news-events/news-and-events-nav/2018/february/young-people-in-detention-neuro-disability/>>. See also Carol Bower et al, 'Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1, 2. Law Council of Australia, *Justice Project Final Report: Children and Young People* (August 2018) 14 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.
- ¹⁰¹ Committee on the Rights of the Child, *General Comment No 24 on children's rights in the child justice system*, 18 September 2019, UN doc no CRC/C/GC/24 [22]. See Australian Human Rights Commission, *Children's Rights Report 2019 — In Their Own Right* (October 2019) 7 <<https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2019>>; Australian Human Rights Commission, Submission to Human Rights Council, *Australia's Third Universal Periodic Review* (July 2020) <<https://humanrights.gov.au/our-work/legal/submission/australias-third-universal-periodic-review>>.
- ¹⁰² Tammy Mills, 'States a step closer to raising the age of criminal responsibility' *Sydney Morning Herald* (Online) 13 November 2021 <<https://www.smh.com.au/national/states-a-step-closer-to-raising-the-age-of-criminal-responsibility-20211113-p598nk.html>>.
- ¹⁰³ Australian Human Rights Commission, Submission to the Committee on the Rights of the Child. *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict* (November 2018) [338]. See Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 249–277 <<https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-2B.pdf>>.
- ¹⁰⁴ Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 259 <<https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-2B.pdf>>.
- ¹⁰⁵ Law Council of Australia, *Justice Project Final Report: Critical Support Services* (August 2018) 56 <<https://www.lawcouncil.asn.au/justice-project/final-report>>.
- ¹⁰⁶ Australian Human Rights Commission, Submission to the Committee on the Rights of the Child. *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict* (November 2018) [12].
- ¹⁰⁷ Australian Associated Press, 'Outrage as boys moved from Western Australian juvenile detention centre to maximum security adult prison' *The Guardian* (Online) 6 July 2022

<https://www.theguardian.com/australia-news/2022/jul/06/outrage-as-boys-moved-from-western-australian-juvenile-detention-centre-to-maximum-security-adult-prison>.

¹⁰⁸ Queensland Office of the Public Guardian, 'There are immediate solutions available to remove children from watch houses' (Media Release, 14 May 2019)

<https://www.publicguardian.qld.gov.au/about-us/news-and-information/news-and-media/statement-from-the-public-guardian>; Michael Atkin, 'Young people taking legal action against Queensland government after being held in watch houses' *ABC News* (Online) 16 September 2019 <https://www.abc.net.au/news/2022-09-16/young-people-legal-action-queensland-govt-watch-houses/101435970>.

¹⁰⁹ See, eg, Australian Human Rights Commission, Submission to the Committee on the Rights of the Child. *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict* (November 2018) [2.1].

¹¹⁰ Michael McGowan, 'NSW police strip-searched more than 100 children as young as 13 in two-year period' *The Guardian* (Online) 21 August 2022 <https://www.theguardian.com/australia-news/2022/aug/21/nsw-police-strip-searched-more-than-100-children-as-young-as-13-in-two-year-period>.

¹¹¹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'People with disability over represented at all stages of the criminal justice system' (Media Release, 23 December 2020) <https://disability.royalcommission.gov.au/news-and-media/media-releases/people-disability-over-represented-all-stages-criminal-justice-system>.

¹¹² Telethon Kids Institute, 'Nine out of ten young people in detention found to have severe neuro-disability' (Media Release, 13 February 2018) <https://www.telethonkids.org.au/news-events/news-and-events-nav/2018/february/young-people-in-detention-neuro-disability/>. See also Carol Bower et al, 'Foetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1, 2.

¹¹³ Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, March 2018) 66 www.alrc.gov.au/publications/indigenous-incarceration-report133; Carol Bower, Rochelle Watkins and Raewyn Mutch, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study Among Young People Sentenced to Detention in Western Australia' (2018) 8 *BMJ Open*, <https://bmjopen.bmj.com/content/8/2/e019605>.

¹¹⁴ Carol Bower, Rochelle Watkins and Raewyn Mutch, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study Among Young People Sentenced to Detention in Western Australia' (2018) 8 *BMJ Open* <https://bmjopen.bmj.com/content/8/2/e019605>.

¹¹⁵ Carol Bower, Rochelle Watkins and Raewyn Mutch, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study Among Young People Sentenced to Detention in Western Australia' (2018) 8 *BMJ Open* <https://bmjopen.bmj.com/content/8/2/e019605>.

¹¹⁶ Australian Human Rights Commission, *Equal Before the Law: Towards disability justice strategies* (2014), 12 <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>.

¹¹⁷ 'The Applied Principles and Tables of Support to Determine Responsibilities NDIS and other service' *Department of Social Services* (Web Page, 3 September 2021) <https://www.dss.gov.au/the-applied-principles-and-tables-of-support-to-determine-responsibilities-ndis-and-other-service>.

¹¹⁸ Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander Peoples* (August 2018), 5 <https://www.lawcouncil.asn.au/justice-project/final-report>.

- ¹¹⁹ Eileen Baldry et al, *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (University of New South Wales, October 2015) 12.
- ¹²⁰ Australian Human Rights Commission, 'Information for List of Issues Prior to Reporting - Australia' (June 2017) [33]-[34]; Australian Human Rights Commission, Submission to the Committee on the Rights of the Child, *Information Relating to Australia's Joint Fifth and Sixth Report under the Convention on the Rights of the Child, Second Report on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and Second Report on the Optional Protocol on the Involvement of Children in Armed Conflict* (November 2018) [354]; Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84) (July 2017) <https://www.alrc.gov.au/publications/indefinite-detention-when-unfit-stand-trial#_ftn86>; Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' 40 *Melbourne University Law Review* 816.
- ¹²¹ Committee on the Rights of Persons with Disability, *Concluding observations on the combined second and third periodic reports of Australia*, October 2019, UN Doc no CRPD/C/AUS/CO/2-3 [27].
- ¹²² *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19; Australian Institute of Criminology, *Diversionary Pathways for Aboriginal Youth with Fetal Alcohol Spectrum Disorder* (28 August 2018) 5 <<https://aic.gov.au/publications/tandi/tandi557>>.
- ¹²³ Australian Institute of Criminology, *Diversionary Pathways for Aboriginal Youth with Fetal Alcohol Spectrum Disorder* (28 August 2018) 5 <<https://aic.gov.au/publications/tandi/tandi557>>.
- ¹²⁴ House of Representatives, Standing Committee on Indigenous Affairs, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (June 2015) <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/Alcohol/Report>.
- ¹²⁵ Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' 40 *Melbourne University Law Review* 816.
- ¹²⁶ Australian Human Rights Commission Submission to the UN Committee Against Torture under the *Convention Against Torture*, 17 October 2014, [93]; Australian Human Rights Commission, Submission to the Universal Periodic Review, 15 April 2015, [37]-[38]; Australian Human Rights Commission, Factsheet: Aboriginal and Torres Strait Islander Peoples', *Australia's Universal Periodic Review on Human Rights - Commission Fact Sheets* <<https://www.humanrights.gov.au/australias-universal-periodic-review-human-rights>>.
- ¹²⁷ See eg, Australian Human Rights Commission, Submission to the Committee on the Rights of Persons with Disabilities (July 2019), [63] <<https://www.humanrights.gov.au/our-work/legal/submission/information-concerning-australias-compliance-convention-rights-persons>>.
- ¹²⁸ Parliament of Australia, Senate Community Affairs References Committee, *Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia* (29 November 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report>.
- ¹²⁹ Andrew Leigh, *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia* (CESifo Working Paper No. 8163, March 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3555590>.
- ¹³⁰ Productivity Commission, *Australia's prison dilemma* (October 2021) 39 <<https://www.pc.gov.au/research/completed/prison-dilemma/prison-dilemma.pdf>>.

- ¹³¹ Productivity Commission, *Australia's prison dilemma* (October 2021) 42 <<https://www.pc.gov.au/research/completed/prison-dilemma/prison-dilemma.pdf>>.
- ¹³² Australian Bureau of Statistics, *Prisoners in Australia 2021* (December 2021) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>>.
- ¹³³ Productivity Commission, *Australia's prison dilemma* (October 2021) 40 <<https://www.pc.gov.au/research/completed/prison-dilemma/prison-dilemma.pdf>>.
- ¹³⁴ Australian Institute of Health and Welfare, *Youth detention population in Australia 2021* (December 2021) <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2021/contents/summary>>.
- ¹³⁵ See, eg, Arie Freiberg et al 'Parole, politics and penal policy' (2018) 18(1) *QUT Law Review*, 191.
- ¹³⁶ Jacqueline Breen and Jano Gibson, 'Boy, 10, held on remand in Don Dale as detainee numbers almost double following tougher bail laws in NT' *ABC News* (Online) 30 November 2021 <<https://www.abc.net.au/news/2022-06-10/don-dale-self-harm-incident/101141030>>.
- ¹³⁷ *Youth Justice Legislation Amendment Act 2021*. This legislation includes the automatic revoking of bail for serious breaches and the broadening of the range offences to which bail doesn't apply.
- ¹³⁸ Productivity Commission, *Australia's prison dilemma* (October 2021) 42 <<https://www.pc.gov.au/research/completed/prison-dilemma/prison-dilemma.pdf>>.
- ¹³⁹ Australian Human Rights Commission, Submission to the UN Committee Against Torture under the *Convention Against Torture*, 17 October 2014 [87].
- ¹⁴⁰ Calla Wahlquist, 'Australia's overcrowded prisons could struggle to control coronavirus, expert says' *The Guardian* (Online) 19 March 2020 <<https://www.theguardian.com/australia-news/2020/mar/19/australias-overcrowded-prisons-could-struggle-to-control-coronavirus-expert-says>>.
- ¹⁴¹ 'Australia: Protect At-Risk Communities from Covid-19' *Human Rights Watch* (Web Page, August 2021) <<https://www.hrw.org/news/2021/08/19/australia-protect-risk-communities-covid-19#>>; 'Australia: Prisoners Denied Vaccine Access' *Human Rights Watch* (Web Page, September 2021). <<https://www.hrw.org/news/2021/09/01/australia-prisoners-denied-vaccine-access>>; Denham Sadler, 'Delays in vaccinating prisoners' *The Saturday Paper* (online) 12 June 2021 <<https://www.thesaturdaypaper.com.au/news/politics/2021/06/12/delays-vaccinating-prisoners/162342000011860>>.
- ¹⁴² Law Institute of Victoria et al, 'Joint open letter on ongoing and arbitrary use of 14 day quarantine in prisons' (March 2021) <<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/60619155739ab84f39589859/1617006934714/Open+letter+-+29+March+2021.pdf>>.
- ¹⁴³ *Criminal Code Act 1995* (Cth) div 105A.
- ¹⁴⁴ See, eg, *Serious Sex Offenders Act 2013* (NT); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).
- ¹⁴⁵ See, eg, *Crimes (High Risk Offenders) Act 2006* (NSW); *Criminal Law (High Risk Offenders) Act 2015* (SA); *Dangerous Criminals and High Risk Offenders Act 2021* (Tas); *Serious Offenders Act 2018* (Vic); *High Risk Serious Offenders Act 2020* (WA).
- ¹⁴⁶ *High Risk Serious Offenders Act 2020* (WA); *Garlett v The State of Western Australia & Anor* [2022] HCA 30.
- ¹⁴⁷ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019: in brief* (2019) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-and-sexual-violence-in-australia-c/contents/table-of-contents>>; Australian Bureau of Statistics, *Recorded Crime – Victims, Australia, 2021* (July 2022) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release>>.

- ¹⁴⁸ Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth, *Framework foundations 2: Think pieces, stakeholder consultations, issues, implications and approach Companion document to Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia* (2015) 14 <<https://www.ourwatch.org.au/getmedia/a415a239-5de6-4dbd-806d-4e92a53e532e/Change-the-story-framework-foundations-2.pdf.aspx>>; and Australian Human Rights Commission, *A Conversation in Gender Equality* (2017) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/conversation-gender-equality-2017>>.
- ¹⁴⁹ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019: in brief* (2019) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-and-sexual-violence-in-australia-c/contents/table-of-contents>>; Australia's National Research Organisation for Women's Safety (ANROWS) *Violence against women: Accurate use of key statistics* (ANROWS Insights, May 2018) <<https://www.anrows.org.au/resources/fact-sheet-violence-against-women-accurate-use-of-key-statistics/>>.
- ¹⁵⁰ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019: in brief* (2019) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-and-sexual-violence-in-australia-c/contents/table-of-contents>>; Australia's National Research Organisation for Women's Safety (ANROWS) *Violence against women: Accurate use of key statistics* (ANROWS Insights, May 2018) <<https://www.anrows.org.au/resources/fact-sheet-violence-against-women-accurate-use-of-key-statistics/>>.
- ¹⁵¹ Australia's National Research Organisation for Women's Safety (ANROWS) *Violence against women: Accurate use of key statistics* (ANROWS Insights, May 2018) <<https://www.anrows.org.au/resources/fact-sheet-violence-against-women-accurate-use-of-key-statistics/>>.
- ¹⁵² Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019: in brief* (2019) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-and-sexual-violence-in-australia-c/contents/table-of-contents>>;
- ¹⁵³ Australian Human Rights Commission *Better Decisions, Better Futures* (Discussion Paper, June 2020) <https://humanrights.gov.au/sites/default/files/2020-06/PDF%20Better%20Decisions%2C%20Better%20Futures%20Discussion%20Paper_2020.pdf>; UN Women, *Policy Brief: The Impact of COVID-19 on Women* (9 April 2020) <<https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-the-impact-of-covid-19-on-women-en.pdf?la=en&vs=1406>>.
- ¹⁵⁴ *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*.
- ¹⁵⁵ Department of Social Services, *National Housing and Homelessness Agreement* (July 2018) <<https://www.dss.gov.au/housing-support-programs-services-homelessness/national-housing-and-homelessness-agreement>>.
- ¹⁵⁶ 'Developing the next National Plan to Reduce Violence against Women and their Children' Department of Social Services (Web Page) <<https://engage.dss.gov.au/developing-the-next-national-plan-to-reduce-violence-against-women-and-their-children/>>.
- ¹⁵⁷ Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26.
- ¹⁵⁸ Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020) <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020?mc_cid=1065707e3c&mc_eid=%5bUNIQID%5d>.

- ¹⁵⁹ *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth); *Fair Work Amendment (Respect at Work) Regulations 2021* (Cth); 'Policies', Australian Labor Party (Web Page) <<https://www.alp.org.au/policies/womens-safety-at-work>>.
- ¹⁶⁰ Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (November 2021) <<https://humanrights.gov.au/set-standard-2021>>.
- ¹⁶¹ Parliamentary Leadership Taskforce, *Set the Standard: Implementation Tracker – September 2022* <https://www.aph.gov.au/About_Parliament/Parliamentary_Leadership_Taskforce/Updates/-/media/8C2211AE256F46E690D12F4FC91B0B9D.ashx>.
- ¹⁶² Australian Human Rights Commission, *A National System for Domestic and Family Violence Death Review Report* (December 2016) <<https://humanrights.gov.au/our-work/sex-discrimination/publications/national-system-domestic-and-family-violence-death-review>>.
- ¹⁶³ See generally, findings of the Australian Human Rights Commission, *Wiyi Yani U Thangani: Securing our rights, securing our future report* (October 2020) <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/wiyi-yani-u-thangani>>; 'Wiyi Yani U Thangani First Nations Women's Safety Policy Forum Delegate Statement' *Australian Human Rights Commission* (Web Page, September 2022) <<https://humanrights.gov.au/2022-wiyi-yani-u-thangani-first-nations-womens-safety-policy-forum-delegate-statement>>.
- ¹⁶⁴ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia, 2018* (Report, 2018) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/contents/summary>>.
- ¹⁶⁵ Australian Human Rights Commission, *Wiyi Yani U Thangani* (2020) 218 <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/wiyi-yani-u-thangani>> citing Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia 2018* (2018) and, Janet Phillips and Penny Vandenbroek, *Domestic and family violence in Australia: An overview of the issues* (2014) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust>.
- ¹⁶⁶ Our Watch, *Changing the Picture: A national resource to support the prevention of violence against Aboriginal and Torres Strait Islander women and their children* (2018) 6 <<https://www.ourwatch.org.au/resource/changing-the-picture/>>.
- ¹⁶⁷ SNAICC – National Voice for our Children, National Family Violence Prevention Legal Services Forum and National Aboriginal and Torres Strait Islander Legal Services, *Strong Families, Safe Kids: Family violence response and prevention for Aboriginal and Torres Strait Islander children and families* (September 2017) <https://www.nationalfvpls.org/images/files/SNAICC-NATSILS-NFVPLS_Strong_Families_Safe_Kids-Sep_2017.pdf>.
- ¹⁶⁸ Human Rights Law Centre and Change the Record Coalition, *Over-represented and Overlooked Report* (May 2017) 18 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf>.
- ¹⁶⁹ Australian Human Rights Commission, *Wiyi Yani U Thangani: Securing our rights, securing our future report* (October 2020) <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/wiyi-yani-u-thangani>>.
- ¹⁷⁰ Australian Human Rights Commission, 'First Nations women to take leading role in addressing family and community violence' (Media Release, 13 September 2022) <<https://humanrights.gov.au/about/news/media-releases/first-nations-women-take-leading-role-addressing-family-and-community>>.
- ¹⁷¹ See 'Wiyi Yani U Thangani First Nations Women's Safety Policy Forum Delegate Statement' *Australian Human Rights Commission* (Web Page, September 2022)

<https://humanrights.gov.au/sites/default/files/delegate_statement_wyut_womens_safety_forum_final_2.pdf>.

¹⁷² Australian Human Rights Commission, *A National System for Domestic and Family Violence Death Review Report* (December 2016) <<https://humanrights.gov.au/our-work/sex-discrimination/publications/national-system-domestic-and-family-violence-death-review>>.

¹⁷³ Australian Human Rights Commission, *Children's Rights Report 2015* (2015) 99 <<https://www.humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>>.

¹⁷⁴ Australian Human Rights Commission, *Children's Rights Report 2015* (2015) 124–126 <<https://www.humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>>.

¹⁷⁵ Victorian Royal Commission into Family Violence, *Summary and Recommendations* (March 2016) <<http://www.rcfv.com.au/Report-Recommendations>>.

¹⁷⁶ Australian Institute of Health and Welfare, *Child Protection: Snapshot* (15 June 2021) <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2020-21/contents/summary>>; Institute of Health and Welfare, *Child Protection: Snapshot* (18 May 2021) <<https://www.aihw.gov.au/reports/australias-welfare/child-protection>>.

¹⁷⁷ Australian Human Rights Commission, *Keeping Kids Safe and Well - Your Voices* (July 2021) <<https://humanrights.gov.au/safeandwell>>.

¹⁷⁸ For example, the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report Findings and Recommendations, 2017*, 22; Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations, 2017* 35–41; Senate Standing Committees on Community Affairs Parliament of Australia, *Inquiry into out of home care list of recommendations* (2015)

¹⁷⁹ Australian Human Rights Commission, *Children's Rights Report 2019–In Their Own Right: Children's Rights in Australia* (2019) 129 <<https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2019>>.

¹⁸⁰ Australian Human Rights Commission, *Children's Rights Report 2019–In Their Own Right: Children's Rights in Australia* (2019) 129 <<https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2019>>.

¹⁸¹ Australian Institute of Health and Welfare, *The Aboriginal and Torres Strait Islander Child Placement Principle indicators* (26 August 2022) <<https://www.aihw.gov.au/reports/child-protection/atsicpp-indicators/contents/about>>.

¹⁸² Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018) 485.

¹⁸³ Katherine McFarlane, 'The faulty child welfare system is the real issue behind our youth justice crisis' *The Conversation* (online), 13 February 2017 <<https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>>.

¹⁸⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Preface and executive summary* (December 2017) 15 <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_preface_and_executive_summary.pdf>.

¹⁸⁵ See 'National Redress Scheme' *National Redress* (Web Page) <<https://www.nationalredress.gov.au/>>.

¹⁸⁶ Australian Human Rights Commission, *National Principles for Child Safe Organisations* (2019) <https://chidsafe.humanrights.gov.au/sites/default/files/201902/National_Principles_for_Child_Safe_Organisations2019.pdf>.

¹⁸⁷ National Children's Commissioner Anne Hollonds, 'Towards a National Child Wellbeing Strategy' (Speech to the Parliamentary Friends of Early Childhood, 25 February 2021) <<https://humanrights.gov.au/about/news/speeches/towards-national-child-wellbeing-strategy>>; Australian Human Rights Commission, Submission to Human Rights Council, *Australia's*

- Third Universal Periodic Review* (July 2020) <<https://humanrights.gov.au/our-work/legal/submission/australias-third-universal-periodic-review>>.
- ¹⁸⁸ International Labour Organization, Walk Free, and International Organization for Migration, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, 2022.
- ¹⁸⁹ Samantha Lyneham, Christopher Dowling and Samantha Bricknell, *Estimating the dark figure of human trafficking and slavery victimisation in Australia* (Australian Institute of Criminology, Statistical Bulletin 16, February 2019).
- ¹⁹⁰ 'NSW Anti-slavery Commissioner Appointed' *NSW Government* (Web Page, 29 June 2022).
- ¹⁹¹ Commonwealth of Australia, *National Action Plan to Combat Modern Slavery 2020-25* (2020) <[National Action Plan to Combat Modern Slavery 2020-25 \(homeaffairs.gov.au\)](https://www.homeaffairs.gov.au/national-action-plan-to-combat-modern-slavery-2020-25)>.
- ¹⁹² Commonwealth of Australia, *Australia's international engagement strategy on human trafficking and modern slavery: Delivering in partnership* (2022) <[Australia's International Engagement Strategy on Human Trafficking and Modern Slavery: Delivering in Partnership \(2022\) \(dfat.gov.au\)](https://www.dfat.gov.au/engagements-international/trafficking-slavery)>.
- ¹⁹³ See <[Bali Process](#)>.
- ¹⁹⁴ See <[Home - ASEAN-Australia Counter Trafficking \(aseanact.org\)](https://aseanact.org/)>.
- ¹⁹⁵ See <[Ratifications of ILO conventions: Ratifications by Convention](#)>.
- ¹⁹⁶ Kieran Hardy and George Williams, 'Two decades of Australian counter-terrorism laws' (2022) 46(1) *Melbourne University Law Review*, 45.
- ¹⁹⁷ Divisions 104 and 105 of Part 5.3 of the Criminal Code contain the control order and preventative detention order (PDO) regimes respectively. See for example: Australian Human Rights Commission, *Submission to the Acting Independent National Security Legislation Monitor* (15 May 2017) <https://www.humanrights.gov.au/sites/default/files/20170515_AHRC_Submission_INSLM_Statutory_Deadline_Review.pdf>; Australian Human Rights Commission, *Submission and supplementary submission to the Parliamentary Joint Committee on Intelligence and Security review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (2017) <<https://www.aph.gov.au/DocumentStore.ashx?id=7ba218bc-14b2-468b-bed4-4c9fd3a9ac71&subId=516302>> and <<https://www.aph.gov.au/DocumentStore.ashx?id=766df2d3-b918-4b17-aadf-28ccca57bca5&subId=516302>>; Human Rights and Equal Opportunity Commission, *Submission No 158, 158A and 158B to Senate Legal and Constitutional Legislation Committee, Inquiry into the Anti-Terrorism Bill (No 2) 2005*, 11 November 2005 <<http://www.humanrights.gov.au/submission-anti-terrorism-bill-no-2-2005>>; Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008) <<https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws>>.
- ¹⁹⁸ Australian Human Rights Commission, *Submission to the Acting Independent National Security Legislation Monitor* (15 May 2017) <https://www.humanrights.gov.au/sites/default/files/20170515_AHRC_Submission_INSLM_Statutory_Deadline_Review.pdf>; Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019* (22 August 2019) <<https://www.aph.gov.au/DocumentStore.ashx?id=3dbcd3df-cdaa-470c-9f6c-a4c570ff1b41&subId=668924>>; and Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-Terrorism Legislation Amendment Bill 2019* (8 March 2019) <<https://www.aph.gov.au/DocumentStore.ashx?id=e1748951-b005-409c-ba6e-50d704e45c51&subId=667096>>.
- ¹⁹⁸ Australian Human Rights Commission, *Submission to the Acting Independent National Security Legislation Monitor* (15 May 2017)

<https://www.humanrights.gov.au/sites/default/files/20170515_AHRC_Submission_INSLM_Statutory_Deadline_Review.pdf>; Australian Human Rights Commission, *Submission and supplementary submission to the Parliamentary Joint Committee on Intelligence and Security review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (2017) <<https://www.aph.gov.au/DocumentStore.ashx?id=7ba218bc-14b2-468b-bed4-4c9fd3a9ac71&subId=516302>> and <<https://www.aph.gov.au/DocumentStore.ashx?id=766df2d3-b918-4b17-aadf-28ccca57bca5&subId=516302>>.

¹⁹⁹ Australian Security Intelligence Organisation Amendment Act 2020 (Cth) sch 1 Item 10.

²⁰⁰ Australian Human Rights Commission, *Submission and supplementary submission to the Parliamentary Joint Committee on Intelligence and Security, review of the 'declared area' provisions* (2017) <<https://www.aph.gov.au/DocumentStore.ashx?id=b7a13ba8-ccdf-4855-8591-4310fbd24fe1&subId=560683>> and <<https://www.aph.gov.au/DocumentStore.ashx?id=23470519-e723-4263-9e5b-fc0dda2eed66&subId=560683>>.

²⁰¹ Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019* (22 August 2019) <<https://www.aph.gov.au/DocumentStore.ashx?id=3dbcd3df-cdaa-470c-9f6c-a4c570ff1b41&subId=668924>>; and Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-Terrorism Legislation Amendment Bill 2019* (8 March 2019) <<https://www.aph.gov.au/DocumentStore.ashx?id=e1748951-b005-409c-ba6e-50d704e45c51&subId=667096>>.

²⁰² Australian Human Rights Commission, *Submission to the Acting Independent National Security Legislation Monitor* (15 May 2017) <https://www.humanrights.gov.au/sites/default/files/20170515_AHRC_Submission_INSLM_Statutory_Deadline_Review.pdf> Australian Human Rights Commission, *Submission and supplementary submission to the Parliamentary Joint Committee on Intelligence and Security review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (2017) <<https://www.aph.gov.au/DocumentStore.ashx?id=7ba218bc-14b2-468b-bed4-4c9fd3a9ac71&subId=516302>> and <<https://www.aph.gov.au/DocumentStore.ashx?id=766df2d3-b918-4b17-aadf-28ccca57bca5&subId=516302>>.

²⁰³ Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015* (9 December 2015) <<https://www.aph.gov.au/DocumentStore.ashx?id=080c06ef-59cb-4d40-9132-f1664588c82c&subId=407290>>; Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-Terrorism Legislation Amendment Bill 2019* (8 March 2019) <<https://www.aph.gov.au/DocumentStore.ashx?id=e1748951-b005-409c-ba6e-50d704e45c51&subId=667096>>.

²⁰⁴ Australian Human Rights Commission, *Submission to the INSLM Review of Prosecution and Sentencing of Children for Commonwealth Terrorist Offences* (15 June 2018) <https://www.inslm.gov.au/sites/default/files/australian_human_rights_commission.pdf>; Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019* (22 August 2019) <<https://www.aph.gov.au/DocumentStore.ashx?id=3dbcd3df-cdaa-470c-9f6c-a4c570ff1b41&subId=668924>>; and Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-*

Terrorism Legislation Amendment Bill 2019 (8 March 2019)

<<https://www.aph.gov.au/DocumentStore.ashx?id=e1748951-b005-409c-ba6e-50d704e45c51&subId=667096>>; See also: Australian Human Rights Commission, *Submission and supplementary submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (8 March 2019)

<<https://www.aph.gov.au/DocumentStore.ashx?id=372fe9e7-3d94-4ba4-9bad-eff0c1084111&subId=667095>> and Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of ASIO's Questioning and Detention Powers* (22 January 2018) <<https://www.aph.gov.au/DocumentStore.ashx?id=a7f45ce3-66ed-426a-919a-24c5c572230f&subId=563202>>.

- ²⁰⁵ Human Rights Council, *Report of the special rapporteur on the situation of human rights defenders on his mission to Australia* (28 February 2018) UN Doc A/HRC/37/51/Add.3) 7; *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth): *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (14 January 2015) <<https://www.humanrights.gov.au/our-work/legal/submission/inquiry-telecommunications-interception-and-access-amendment-data>>; Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the mandatory data retention regime* (1 July 2019) <<https://www.aph.gov.au/DocumentStore.ashx?id=b0f852cb-7ce3-4b96-a26e-e6a3ac099836&subId=668050>>; *Telecommunications and Other Legislation (Assistance and Access) Act 2018* (Cth). Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Telecommunication and Other Legislation Amendment (Assistance and Access) Bill 2018* (12 October 2018) <<https://www.aph.gov.au/DocumentStore.ashx?id=a7b9ff25-7c09-41e9-b97a-56dae1ac0e94&subId=661055>>; *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth); *Telecommunications Legislation Amendment (International Production Orders) Act 2020* (Cth).
- ²⁰⁶ See Kieran Hardy and George Williams, 'Two decades of Australian counter-terrorism laws' (2022) 46(1) *Melbourne University Law Review*, 34.
- ²⁰⁷ See e.g. INSLM, *Annual Report 2017-18* (2018) 10-11 <<https://www.inslm.gov.au/sites/default/files/inslm-annual-report-17-18.pdf>>; .
- ²⁰⁸ Kieran Hardy and George Williams 'Two decades of Australian counter-terrorism laws' (2022) 46(1) *Melbourne University Law Review*, 61.
- ²⁰⁹ Kieran Hardy and George Williams, 'Two decades of Australian counter-terrorism laws' (2022) 46(1) *Melbourne University Law Review*, 43.
- ²¹⁰ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 15 October 2019, UN Doc No CRPD/C/AUS/CO/2-3, 28(a), 28(b), 28(c), 28(e), 30(a), 32(a), 32(b), 32(c), 32(d), 32(e), 32(f), 34(a) 34(b) 34(c).
- ²¹¹ Australian Human Rights Commission, *A Future Without Violence: Quality, safeguarding and oversight to prevent and address violence against people with disability in institutional settings* (July 2018) <<https://humanrights.gov.au/our-work/disability-rights/publications/future-without-violence-2018>>.
- ²¹² Council of Australian Governments, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector* (1 May 2013) <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector>>.
- ²¹³ Australian Institute for Health and Welfare, *Mental health services in Australia* (August 2022) <<https://www.aihw.gov.au/reports/mental-health-services/mental-health-services-in-australia/report-content/restrictive-practices-in-mental-health-care>>.

- ²¹⁴ NDIS (*Restrictive Practices and Behaviour Support*) Rules 2018; Australian Government, Department of Social Services, 'NDIS Quality and Safeguarding Framework' (9 December 2016) <<https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-quality-and-safeguarding-framework-0>>.
- ²¹⁵ 'NDIS Commission Activity Reports', *NDIS Commission* (Web page) <<https://www.ndiscommission.gov.au/resources/reports-policies-and-frameworks/ndis-commission-activity-reports>>.
- ²¹⁶ Parliament of Australia, Senate Standing Committee on Community Affairs, Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, Including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with (25 November 2015) Recommendation 10.58 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report>.
- ²¹⁷ See Royal Commission into violence, abuse, neglect and exploitation of people with disability, *Issues Paper: Restrictive practices* (May 2020) <<https://disability.royalcommission.gov.au/publications/restrictive-practices>>.
- ²¹⁸ See Australian Human Rights Commission, *Information Concerning Australia's Compliance with the Convention on the Elimination of All Forms of Discrimination against Women* (12 June 2018) [25]; Australian Human Rights Commission, *Information Relating to Australia's Joint Fifth and Sixth Report under the Convention on the Rights of the Child, Second Report on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and Second Report on the Optional Protocol on the Involvement of Children in Armed Conflict* (1 November 2018) [204]-[205]; and Australian Human Rights Commission, *Submission to the UN Human Rights Committee: Information Concerning Australia's Compliance with the International Covenant on Civil and Political Rights* (18 September 2017) [61].
- ²¹⁹ See Australian Human Rights Commission, *Information Concerning Australia's Compliance with the Convention on the Elimination of All Forms of Discrimination against Women* (12 June 2018).
- ²²⁰ See eg, Australian Human Rights Commission, Submission No 5 to the Senate Community Affairs References Committee *The Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (20 November 2012) <<http://www.aph.gov.au/DocumentStore.ashx?id=3d3c9b64-7a59-4e30-bd96-e38d52fe85c8&subId=16108>>.
- ²²¹ Australian Human Rights Commission, Submission No 491 to the Productivity Commission, *Inquiry into the Social and Economic Benefits of Improving Mental Health* (18 April 2019) <<https://www.pc.gov.au/inquiries/current/mental-health/submissions>>.
- ²²² See Australian Human Rights Commission, Submission to the Committee on the Rights of Persons with Disabilities (July 2019), [66] <<https://www.humanrights.gov.au/our-work/legal/submission/information-concerning-australias-compliance-convention-rights-persons>>.
- ²²³ Australian Institute for Health and Welfare, *Mental health services in Australia* (August 2022) <<https://www.aihw.gov.au/reports/mental-health-services/mental-health-services-in-australia/report-content/restrictive-practices-in-mental-health-care>>.
- ²²⁴ Australian Human Rights Commission, *A Future Without Violence: Quality, Safeguarding and Oversight to Prevent and Address Violence against People with Disability in Institutional Settings* (June 2018) <<https://www.humanrights.gov.au/our-work/disability-rights/publications/future-without-violence-2018>>.
- ²²⁵ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (June 2019) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019/report-editions>>.

- ²²⁶ Royal Commission into Aged Care Quality and Safety, *Summary of the Final Report* (March 2021) 68 <<https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>>.
- ²²⁷ Royal Commission into Aged Care Quality and Safety, *Summary of the Final Report* (March 2021) 68 <<https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>> citing data collated by KPMG.
- ²²⁸ Australian Government, *National Plan to Respond to the Abuse of Older Australians (2019–2023)* (July 2019) <<https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023>>.
- ²²⁹ Royal Commission into Aged Care Quality and Safety, *Summary of the Final Report* (March 2021) 79 <<https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>>.
- ²³⁰ Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (ALRC Report 131, June 2017) <<https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/>>.
- ²³¹ Senate Select Committee on COVID-19, *First interim report* (December 2020) 53.
- ²³² Senate Select Committee on COVID-19, *Final Report* (April 2022) [4.26] citing Caroline Egan, 'Australia has one of the world's highest rates of COVID death in nursing homes, royal commission hears', *HelloCare*, 10 August 2020.
- ²³³ Senate Select Committee on COVID-19, *Final Report* (April 2022) [4.32].
- ²³⁴ See Michael Buckland, Felix Zerbib, Connor Wherrett, *Counting the cost of Australia's delayed vaccine rollout* (APO Report, April 2021) <<https://apo.org.au/node/311761>>.
- ²³⁵ Senate Select Committee on COVID-19, *Final Report* (April 2022) [4.39].
- ²³⁶ Senate Select Committee on COVID-19, *Final Report* (April 2022) [4.46].
- ²³⁷ Senate Select Committee on COVID-19, *Final Report* (April 2022) [4.46] citing Royal Commission into Aged Care Quality and Safety, *A Summary of the Final Report* (March 2021) 128–129.
- ²³⁸ Australian Human Rights Commission, *Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions* (October 2021) <<https://humanrights.gov.au/intersex-report-2021>>.
- ²³⁹ Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, UN doc no CRC/C/AUS/CO/5-6 [31].
- ²⁴⁰ Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 1 December 2017, UN doc no CCPR/C/AUS/CO/6 [25].
- ²⁴¹ Senate Standing Committee on Community Affairs, *Involuntary or coerced sterilisation of intersex people in Australia* (2013) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index>.
- ²⁴² Commonwealth, *Parliamentary Debates*, Senate, 17 June 2015, 3755-3769 (Senator Fifield).
- ²⁴³ Australian Human Rights Commission, *Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions* (October 2021) <<https://humanrights.gov.au/intersex-report-2021>>.
- ²⁴⁴ Victorian Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 144, citing Marion Pitts et al, *Private lives: A report on the health and wellbeing of GLBTI Australians* (La Trobe University, Australian Research Centre in Sex, Health and Society, No 57, 2006), 51-52.
- ²⁴⁵ Victorian Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 143.
- ²⁴⁶ Bianca Fileborn, *Sexual violence and gay, lesbian, bisexual, trans, intersex, and queer communities* (ACSSA Resource Sheet No 3, Australian Institute of Family Studies, 2012)

<<https://aifs.gov.au/publications/sexual-violence-and-gay-lesbian-bisexual-trans-intersex-and-queer-communiti>>.

²⁴⁷ Law Council of Australia, *Justice Project Final Report: LGBTI+ People* (August 2018) 15

<<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/LGBTI%20People%20%28Part%201%29.pdf>>.

²⁴⁸ Association for the Prevention of Torture, *LGBTI persons deprived of their liberty: a framework for preventive monitoring* (2013) 2 <<https://cdn.penalreform.org/wp-content/uploads/2016/01/lgbti-framework-2nd-ed-v7-web.pdf>>.

²⁴⁹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights* (June 2015) 69 <<https://humanrights.gov.au/our-work/lgbti/publications/resilient-individuals-sexual-orientation-gender-identity-intersex>>.

²⁵⁰ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights* (June 2015) 3 <<https://humanrights.gov.au/our-work/lgbti/publications/resilient-individuals-sexual-orientation-gender-identity-intersex>>.

²⁵¹ *Births, Deaths and Marriages Registration Act 2003* (Qld) s 22; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B.

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