

NSWCCL SUBMISSION

UNITED NATIONS SUBCOMMITTEE ON THE PREVENTION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (SPT)

AUSTRALIA VISIT

2 SEPTEMBER 2022

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the United Nations Sub-Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) regarding its upcoming visit to Australia.

1 Introduction

- 1.1 The New South Wales Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the United Nations Subcommittee on Prevention of Torture (**SPT**). As the international body established by the Optional Protocol to the Convention against Torture (**OPCAT**), the SPT has a dual mandate:
- (1) To monitor conditions in detention and treatment of persons deprived of their liberty through country visits (like this one to Australia); and
 - (2) To advise on OPCAT implementation, in particular to support the establishing and functioning of National Preventive Mechanisms (NPM).
- 1.2 This submission focuses on key issues regarding Australia's patchy implementation of its obligations under the OPCAT, particularly in New South Wales, and makes recommendations to improve Australia's compliance with OPCAT. NSWCCL also calls on SPT to consider the following key issues of concern during the visit to Australia in October 2022:
- (1) Mandatory indefinite detention of asylum seekers under Australia's Asylum Seeker Policy; and
 - (2) The gross rates of over-incarceration of First Nations people in Australia.
- 1.2 This submission is not a comprehensive analysis of the conditions faced by asylum seekers and First Nations people in places of detention or the treatment of those people deprived of their liberty. It focuses on key policies and alarming statistics as a recommendation for inquiry by the SPT during its visit to Australia.

2 The patchy implementation of OPCAT in Australia (particularly in NSW)

- 2.1 The OPCAT is an international protocol aimed at preventing torture and other cruel, inhumane or degrading treatment or punishment. It was established in 2002 and entered into force in 2006. The rationale of the OPCAT is to assist in the implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (**CAT**) and create a system of independent monitoring and inspections for places of detention.¹
- 2.2 Australia ratified the OPCAT on 21 December 2017, which entered into force in Australia on 20 January 2018, as a direct response to the Royal Commission into the Protection and Detention of Children in the Northern Territory.
- 2.3 In compliance with obligations under the OPCAT, Australia must execute two simple functions for the establishment of the principles of the OPCAT into law. *First*, to set up, designate and maintain a network of Commonwealth, state and territory inspectorates (each referred to as NPM Bodies) responsible for inspecting and making recommendations about places of detention within their jurisdiction. *Second*, to facilitate visits to Australia, including to places of detention under Australia's jurisdiction and control, by the SPT.
- 2.4 NSWCCL submits that Australia has not fulfilled the above obligations as at the time of writing.
- 2.5 At the time of ratification of the OPCAT, Australia invoked Article 24 of the protocol to enable postponement of its obligations to establish an NPM until January 2022.

¹ Explanatory Statement to the Ombudsman Amendment (National Preventive Mechanism) Regulations 2019.

- 2.6 In April 2019, the Commonwealth introduced the *Ombudsman Amendment (National Preventive Mechanism) Regulations 2019 (the Regulations)* as part of its first commitment under the OPCAT. The Regulations confer on the Commonwealth Ombudsman the roles and functions of the NPM Coordinator and of the NPM Body for places of detention under the control of the Commonwealth in compliance with the commitment under the OPCAT. Under the OPCAT, NPMs are the responsible authority for monitoring places of detention and providing regular and independent reporting. Further, NPMs are expected to provide regular public reporting about their monitoring activities, observations and recommendations to the NPM Coordinator to address risks that they observe of ill treatment of people in places of detention. The NPM Coordinator is expected to report the findings of the NPMs to the SPT.
- 2.7 Later that year, in September 2019, the Commonwealth Ombudsman published a report concerning Australia's readiness to implement the OPCAT and the need to nominate Commonwealth, state and territory NPMs (**Ombudsman Report**).² The report concluded that there are gaps in oversight, scope and resourcing to fully implement the OPCAT into law. Further, the report questioned the lack of independence that some inspecting bodies have in various jurisdictions.
- 2.8 In June 2020, an Australian Human Rights Commission (**AHRC**) Report³ concluded that further work was still needed to implement the OPCAT. The report highlighted the necessity of the conclusion of the NPM network to ensure a complete system of independent monitoring to minimise risk and make recommendations to the Commonwealth Ombudsman.
- 2.9 Despite the January 2022 deadline, as at the time of writing, the Australian Capital Territory, the Northern Territory, Tasmania and Western Australia are the only states and territories who have nominated an NPM Coordinator. Further, the OPCAT has only been implemented in legislation by the Australian Capital Territory, the Northern Territory and Tasmania.⁴
- 2.10 New South Wales has yet to nominate an NPM Coordinator or implement the OPCAT into law. The NSW Ombudsman, the NSW Inspector of Custodial Services and the Official Visitors Program make up the relevant oversight and inspection bodies within New South Wales. The Ombudsman Report identifies multiple issues with these bodies that fail to properly adhere to the OPCAT. NSWCCCL highlights three main concerns raised by the Ombudsman Report:
- (1) The NSW Inspector of Custodial Services and Official Visitors Program have inspection and oversight capabilities, however, the NSW Ombudsman only has an oversight role.⁵
 - (2) All bodies in New South Wales have the power to complete post-visit reports and recommendations for improvement, yet there is no obligation on these bodies (with the exception of the Official Visitors Program).
 - (3) There is no ability for these bodies to have direct and confidential contact with the SPT – such contact would require a specific statutory authorisation.
- 2.11 NSWCCCL submits that these concerns would be rectified with an elected NPM coordinator, and legislation that adheres to the spirit of the OPCAT.
- 2.12 Given that New South Wales, South Australia, Queensland and Victoria have not nominated a NPM representative, we consider that Australia is non-compliant with the objectives of the OPCAT. The absence of a network of NPM representatives in all states and territories in Australia means that the NPM Coordinator cannot provide regular public reporting about their

² Michael Manthorpe, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, Commonwealth Ombudsman, September 2019.

³ Sophie Farthing et al, *Implementing OPCAT in Australia*, Australian Human Rights Commission, June 2020.

⁴ See Ombudsman Regulations 2017 (Cth); *Monitoring of Places of Detention (Optional Protocol to the Convention against Torture) Act 2018* (ACT); *Monitoring of Places of Detention (Optional Protocol to the Convention against Torture) Act 2018* (NT); *OPCAT Implementation Act 2021* (Tas).

⁵ *Ombudsman Act 1974* (NSW); *Inspector of Custodial Services Act 2012* (NSW); *NSW Mental Health Act 2007* (NSW); *Drug and Alcohol Treatment Act 2007 No 7* (NSW).

monitoring activities, observations and recommendations to address risks of ill treatment of people in places of detention.

3 Key issues for concern

- 3.1 To implement the second function of the OPCAT, Australia will facilitate a visit of the SPT in October 2022 to enable inspection of places of detention under Australia's jurisdiction and control.
- 3.2 During this visit, NSWCCCL calls on SPT to consider the following key issues of concern:
 - (1) Mandatory indefinite detention of asylum seekers under Australia's Asylum Seeker Policy; and
 - (2) The gross rates of over-incarceration of First Nations people in Australia.
- 2 The shocking state of Australian Asylum seeker policy – a gross breach of human rights and decency
 - 2.1 Australia's mandatory immigration detention of asylum seekers is a gross breach of human rights and decency. It is also a clear breach of Australia's international obligations.
 - 2.2 On 22 January 1954, Australia ratified the Convention relating to the Status of Refugees (the **Refugee Convention**). The Refugee Convention sets out the rights of refugees and asylum seekers and the responsibilities of nations that grant asylum. As a party to the Refugee Convention, Australia has an international obligation to protect the human rights of all asylum seekers and refugees who arrive in Australia.
 - 2.3 Under the Refugee Convention, Australia is required to consider the claim for refugee status of any person arriving on its shores. Signatory states must not impose penalties, on account of an asylum seeker or refugee's illegal entry or presence on the nation's territory (Article 7). Australia is also a signatory to the International Covenant on Civil and Political Rights (the **ICCPR**), which states that no person is to be arbitrarily detained (Article 9(1)) and the Convention on the Rights of the Child (the **CRC**), which states that no child is to be arbitrarily deprived of their liberty (Article 37(b)).
 - 2.4 Despite Australia's international obligations and commitment to the Refugee Convention, ICCPR and CRC, Australia's asylum seeker policies and practices endure as gross breaches of human rights and decency.
 - 2.5 Australia has a well-documented policy involving mandatory immigration detention of asylum seekers, which is partially imbedded in the *Migration Act 1958 (Cth)* (the **Migration Act**). The Migration Act states that a "designated person" who enters Australia without a visa, and who is not a citizen of Australia, is to be held in an immigration detention centre until that person either leaves Australia, or obtains a visa. A "designated person" includes a person who has not presented a visa, has not been granted a visa or who has been designated this status by the Department of Home Affairs.
 - 2.6 Further, under the Migration Act there is no limit to the duration of detention applicable to a designated person and very limited recourse to review by the courts. As at March 2022 more than 1,500 people remain detained in Australian immigration detention facilities. The average period spent in onshore immigration detention is 689 days, compared with 55 days in the United States and 14 days in Canada.⁶

⁶ 'What's happening to Australia's refugees?' NSW Council for Civil Liberties (Web Page, 8 March 2022) <https://www.nswccl.org.au/whats_happening_to_refugees>.

- 2.7 NSWCCCL is deeply concerned about the individuals who remain in indefinite immigration detention facilities in Australia. People who are detained are subjected to prison-like conditions with very little opportunity to communicate with the outside world. In 2019, the Australian Human Rights Commission reported that conditions in immigration detention were becoming more difficult due to greater use of force, the use of restraints and high-security accommodation.⁷
- 2.8 There is also no independent review of the conditions of detention facilities, meaning that the asylum seekers are vulnerable to abuse and medical neglect with limited scrutiny. Studies show that indefinite detention causes psychological harm to asylum seekers who have been detained. This is caused by uncertainty about their future, lack of independence, concerns about family members, impact of being detained in prison-like conditions, and impacts of past torture or trauma.⁸ There are reported cases of both suicide and attempted suicide within immigration detention facilities within Australia and limited medical and psychiatric support provided to the detainees.
- 2.9 On the basis that the Commonwealth's position regarding asylum seekers is inconsistent with its obligations under international law, NSWCCCL makes the following submissions to reform the current position. Australian asylum seeker policy must change such that:
- (1) The restoration of Australia's commitment to respect and fulfil international human rights obligations by committing to a review and substantive reform of Australia's asylum seeker policy.
 - (2) The abolition of the indefinite detention asylum seekers are currently subject to.
 - (3) Greater transparency into the conditions which prevail at detention centres and increased access to basic human rights including medical attention and communication with those outside of detention centres.
 - (4) The reinstatement of a pathway to permanent protection visas for all categories of asylum seekers.
 - (5) The separation of border security measures which require persons who enter Australia to have their stay regularised by the appropriate visa, and national security which has been used as a justification for the detention of asylum seekers.
 - (6) Ceasing unfair and unwarranted visa cancellations of those who have been provided with bridging visas or other temporary visas.

3 Gross rates of over-incarceration of First Nations' people in Australia

- 3.1 The issue of the over-incarceration of First Nations peoples worldwide and in Australia is well-documented.
- 3.2 Several inquiries and royal commissions have examined this issue and provided recommendations, including the 1987 Royal Commission into Aboriginal Deaths in Custody

⁷ 'Risk management in immigration detention' *Australian Human Rights Commission* (Web Page, 18 June 2019) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.

⁸ 'Australia's detention policies' *Refugee Council of Australia* (Web Page, 20 May 2020) <<https://www.refugeecouncil.org.au/detention-policies/3/>>.

(**Royal Commission**)⁹ and the 2021 NSW Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (**NSW Inquiry**).¹⁰

- 3.3 The Final Report of the Royal Commission found that First Nations people do not necessarily *die* at a higher rate than non-Indigenous people in custody, but rather the rate at which First Nations people are taken *into custody* is “overwhelmingly different”.¹¹ At the time of the Royal Commission’s Final Report in 1991, First Nations people were 8 times more likely to be imprisoned than non-Indigenous people.
- 3.4 The Final Report of the NSW Inquiry was tabled in the NSW Parliament almost exactly 30 years after the Royal Commission, yet we are no closer to addressing the gross over-representation of First Nations people in the criminal justice system.¹² Many of the recommendations made in the Royal Commission’s 1991 Final Report have still not been implemented. In particular, the recommendations in relation to ensuring discretion to arrest and detain First Nations people was exercised as a last resort have clearly not been implemented, given the statistics below.
- 3.5 The following statistics highlight the gravity of the issue in Australia using current statistics from the 2021 official national census (and even more recent periodic updates to it) and the Australian Institute of Health and Welfare.

(1) **Population of First Nations persons in Australia and New South Wales**¹³

- (a) 812,728 people identified as being First Nations, which is approximately 3.2% of the total Australian population of ~25.5 million people.
- (b) 278,000 of those people who identified as First Nations reside in NSW.

(2) **Incarcerated persons**¹⁴

- (a) As at June 2022, there are 40,330 people in custody across Australia and of those incarcerated, 12,317 are in NSW.
- (b) 12,566 of those incarcerated are identified as First Nations people.

(3) **Average imprisonment rates**¹⁵

- (a) The average imprisonment rate of the total population is 201 persons per 100,000 people.
- (b) The average imprisonment rate for First Nations males is 4,180 per 100,000 – *that is 20 times the rate for the total population.*
- (c) The average imprisonment rate for First Nations females is 411 per 100,000 – *that is twice the rate for the total population.*

⁹ Note: the Royal Commission’s Terms of Reference included both Aboriginal and Torres Strait Islander people, despite Torres Strait Islander people not being included in the Royal Commission title: see page 56 of the National Archives Collection on the Royal Commission, available at: Research Guide - Aboriginal Deaths in Custody - the royal commission and its records 1987-91 (naa.gov.au). See also: <https://www.naa.gov.au/explore-collection/first-australians/royal-commission-aboriginal-deaths-custody>.

¹⁰ Parliament of New South Wales: Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, *Inquiry Homepage* (2021), available at: <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=266>.

¹¹ Royal Commission (1991) *National Report Volume 1* <www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/12.html> 1.3.

¹² NSW Inquiry (2021), *Final Report* <[Report\(nsw.gov.au\)](http://Report(nsw.gov.au))>, ix.

¹³ Australian Bureau of Statistics (ABS) *2021 Census Data* <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-people-census/latest-release>>.

¹⁴ ABS (2022) *Prisoners in Australia* <[Prisoners in Australia, 2021 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/statistics/people/prisoners-in-australia)>.

¹⁵ *Ibid.*

(4) **Average youth imprisonment rates¹⁶**

- (a) First Nations children comprise only 6% of the total population of children aged between 10-17 years old.
- (b) There were 819 children in detention in 2021 and 410 of them, which is just over 50%, were First Nations young people. *That is a gross over-representation of First Nations children in the prison population.*
- (c) The number of First Nations young people in detention varies across state and territory jurisdictions, but remains disproportionate in all instances. Please refer to Table 1 below for a summary of the data produced by the Australian Institute of Health and Welfare (AIHW) following their four-year study into youth detention in Australia.¹⁷

Table 1: Percentage of First Nations young people detained across jurisdictions in 2021 (descending order)

| Jurisdiction | First Nations young people as a percentage of the youth detention population (%) ¹¹ | First Nations people as a percentage of jurisdiction's population (%) ¹² |
|------------------------------------|--|---|
| Northern Territory (NT) | 94 | 30.9 |
| Western Australia (WA) | 79 | 4.1 |
| Queensland | 62 | 4.1 |
| South Australia (SA) | 58 | 2.6 |
| Tasmania | 44 | 5.7 |
| New South Wales (NSW) | 40 | 3.5 |
| Australian Capital Territory (ACT) | 27 | 1.9 |
| Victoria | 11 | 0.9 |

- 3.6 These statistics are unacceptably high. In the 30+ years since the Royal Commission, which highlighted to Governments and civil society the gross and unjustified over-representation of First Nations people in custody, the rate of imprisonment for First Nations people has almost tripled.
- 3.7 The number of First Nations young people as a percentage of the youth detention population is disproportionately high across the majority of Australian jurisdictions, reaching a peak of 94% in the Northern Territory, followed closely by 79% in Western Australia and 62% in Queensland. In New South Wales, First Nations young people make up 40% of the population of children in detention. These statistics are particularly concerning given the typically minute proportion of First Nations peoples in the total population of each jurisdiction.
- 3.8 The AIHW study found that First Nations children are on average **20 times more likely** to be in detention on a given night.¹⁸

¹⁶ Australian Institute of Health and Welfare, *Youth detention population in Australia 2021 – Data Visualisation* (Report no. JUV 136, Australian Institute of Health and Welfare, 14 Dec 2021) vi.

¹⁷ Ibid.

¹⁸ Ibid, vi.

- 3.9 NSWCCCL is deeply concerned about the unacceptably high level of First Nations people in custody. The CAT recognises the equal and inalienable rights of all members of the human family and the inherent foundation of freedom, justice and peace. Accordingly, NSWCCCL submits that the SPT must review the gross rates of over-incarceration of First Nations people in Australia. As the Uluru Statement from The Heart declares, First Nations people “are not an innately criminal people”, yet First Nations peoples are incarcerated, policed and criminalised at a significantly higher rate than non-First Nations peoples.
- 3.10 The harmful impacts of being imprisoned are multi-faceted and long-lasting, affecting not only prisoners (both during incarceration and post-release) but also their families and communities. For First Nations peoples, this is compounded by the systemic discrimination they face in the criminal justice system.
- 3.11 The overrepresentation of First Nations peoples in the criminal justice system is argued to be a symptom of historical and ongoing systemic discrimination, perpetuating a cycle of intergenerational disadvantage that First Nations peoples have little power to ameliorate.¹⁹
- 3.12 Furthermore, Australia’s failure to implement recommendations arising from the Royal Commission is indicative of Australia’s poor efforts to monitor conditions of detention and treatment of First Nations people who are deprived of their liberty through places of detention within Australia.

4 Recommendations

- 4.1 During the visit to Australia, NSWCCCL recommends SPT focus on:
- (1) Australia’s patchy implementation of the OPCAT including failure to appoint NPMs in each state and territory and failure to legislate obligations under OPCAT;
 - (2) Mandatory indefinite detention of asylum seekers under Australia’s Asylum Seeker Policy, together with the inhumane conditions within immigration detention facilities around Australia; and
 - (3) Gross rates of over-incarceration of First Nations people within Australia.
- 4.2 NSWCCCL submits that the NPM Coordinator should ensure that the NPM network is established immediately with all remaining states nominating an NPM representative. NSWCCCL further submits that the NPM network must:
- (1) be independent of the entity they inspect/oversee;
 - (2) have full access to people, places and records in detention facilities;
 - (3) be able to visit facilities announced or unannounced;
 - (4) are free to report publicly and to make recommendations;
 - (5) are free to allocate their resources as they see fit; and
 - (6) be able to visit facilities regularly, rather than in response to a complaint, as part of an investigation.
- 4.3 Australia needs to introduce meaningful reforms to:

¹⁹ For more on this please see NSWCCCL submission to Senate Legal and Constitutional Affairs References Committee, in regard to the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia Inquiry: https://assets.nationbuilder.com/nswcccl/pages/6367/attachments/original/1655425007/Submission_30.pdf?1655425007.

- (1) its mandatory detention of asylum seekers to fulfil its international human rights obligations and ensure individuals are not subject to indefinite detention without criminal conviction; and
- (2) the criminal justice system and associated systems to ensure that First Nations peoples are not over-incarcerated, over-policed and over-criminalised, but are given the opportunity to fully engage with their rights in society.

4.4 Inadequate implementation of the OPCAT and Australia's failure to appoint NPM representatives in all states and territories is a failure to the system. Without an NPM Coordinator each state and territory cannot provide regular public reporting, observations and recommendations to address risks of ill treatment of people in places of detention. NSWCCCL submits that a collaborative approach to government is necessary should there be legislative hurdles to the implementation of a completely independent NPM network.

We trust that this submission assists the Committee in its work and would be pleased to offer further assistance if it would be of use.

Yours sincerely,

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NSW Council for Civil Liberties