NSW Council for Civil Liberties Inc.
PO Box A1386, Sydney South,
NSW 1235, Australia

e: office@nswccl.org.au
t: 02 8090 2952
www.nswccl.org.au

@nswccl
@nswccl

NSWCCL SUBMISSION

UNITED NATIONS COMMITTEE AGAINST TORTURE

SIXTH PERIODIC REPORT OF AUSTRALIA

3 October 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).

Contact NSW Council for Civil Liberties

http://www.nswccl.org.au
office@nswccl.org.au
Correspondence to: PO Box A1386, Sydney South, NSW 1235

The NSW Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the United Nations Committee against Torture (CAT) in regard to the Sixth Periodic Report of Australia.

1 Introduction

1.1 The New South Wales Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission the Committee against Torture (the **CAT**) for the Sixth Periodic Report of Australia.

1.2 Under Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the **Convention**) the CAT is mandated to examine reports on the measures that State parties are taking to implement the provisions of the Convention. The CAT has a dual mandate:

(1) To undertake confidential inquiries when reliable information is received with well-founded indication that torture is being systemically practiced in a State party is received (Article 20, the Convention).

(2) To consider individual complaints in relation to the implementation of the Convention (Article 22, the Convention).

1.3 The Convention defines "torture" to mean "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or which the consent or acquiescence of public official or other person acing in an official capacity."

1.4 Australia ratified the Convention on 13 November 1980, yet still has a significant way to go with respect to meeting its obligations under the Convention. This submission focuses on key issues regarding Australia's patchy implementation of its obligations under the Convention and calls on the CAT to consider the following key issues of concern during its review of the Convention and Australia's implementation in October/November 2022:

(1) Mandatory indefinite detention of asylum seekers under Australia's Asylum Seeker Policy;

(2) The gross rates of over-incarceration of First Nations people in Australia;

(3) Australia's woefully inadequate juvenile detention regime;

(4) Prison conditions and preventive detention mechanisms; and

(5) The detention of people living with disability (including those in aged care).

1.5 This submission is not a comprehensive analysis of the conditions faced by vulnerable individuals 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 CAT during its review of the Convention.

2 Mandatory indefinite detention of asylum seekers under Australia's Asylum Seeker Policy

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. In March 2015, the United Nations Special Rapporteur on Torture found that aspects of Australia's asylum seeker policies violated the Convention. NSWCCL submits that seven years on, Australia's policy of indefinite detention of asylum seekers remains a clear form of torture in contravention of the intentions of the Convention.

2.2 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.

2.3 Further, under the Migration Act there is no limit to the duration of detention applicable to a designated person and very limited recourse for 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 a shocking 689 days (almost two years), compared with 55 days in the United States and 14 days in Canada.[1]

2.4 NSWCCL 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 (**AHRC**) reported that conditions in immigration detention were becoming more difficult due to greater use of force, the use of restraints and high-security accommodation.[2]

2.5 There is also limited means for 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.[3] There are numerous reported cases of both suicide and attempted suicide within immigration detention facilities within Australia and limited medical and psychiatric support provided to the detainees.

Conclusion: Australian asylum seeker policy is a gross breach of human rights and decency.

2.6 On the basis that the Commonwealth's position regarding asylum seekers is inconsistent with its obligations under international law, NSWCCL makes the following submissions to reform the current position. Australian asylum seeker policy must change such that:

(1) Australia's commitment to respect and fulfil international human rights obligations is restored by committing to a review and substantive reform of Australia's asylum seeker policy.

(2) Indefinite detention that asylum seekers are currently subject to is abolished.

(3) There is 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) Pathways to permanent protection visas for all categories of asylum seekers are reinstated.

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[1] '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] '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>.

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

(5) 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, are separated.

(6) Unfair and unwarranted visa cancellations of those who have been provided with bridging visas or other temporary visas are ceased.

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

3.1 The issue of 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 (**Royal Commission**)[4] and the 2021 New South Wales Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (**NSW Inquiry**).[5]

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".[6] 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 New South Wales 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.[7] 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 (**AIHW**).

(1) **Population of First Nations persons in Australia and New South Wales[8]**

(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 New South Wales.

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[4] *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.

[5] 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.

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

[7] NSW Inquiry (2021), *Final Report* <Report (nsw.gov.au)>, ix.

[8] 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>.

(2) **Incarcerated persons**[9]

(a) As at June 2022, there are 40,330 people in custody across Australia and of those incarcerated, 12,317 are in New South Wales.

(b) 12,566 of those incarcerated are identified as First Nations people.

(3) **Average imprisonment rates**[10]

(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.***

(4) **Average youth imprisonment rates**[11]

(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 AIHW following their four-year study into youth detention in Australia.[12]

[9] ABS (2022) *Prisoners in Australia* <Prisoners in Australia, 2021 | Australian Bureau of Statistics (abs.gov.au)>.
[10] Ibid.
[11] 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.
[12] Ibid.

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 small 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.[13]

Conclusion: the over-incarceration of First Nations people must be addressed.

3.9 NSWCCL is deeply concerned about the unacceptably high level of First Nations people in custody. The Convention recognises the equal and inalienable rights of all members of the human family and the inherent foundation of freedom, justice and peace. Accordingly, NSWCCL submits that the CAT must review the gross rates of over-incarceration of First Nations people in Australia.

3.10 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.

3.11 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.

[13] Ibid, vi.

3.12 The overrepresentation of First Nations peoples in the criminal justice system is a symptom of historical and ongoing systemic discrimination, perpetuating a cycle of intergenerational disadvantage that First Nations peoples have little power to ameliorate.[14]

3.13 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 Australia's woefully inadequate juvenile detention regime

4.1 As the statistics above highlight, First Nations young people are almost ***20 times more likely*** to be detained on any given night. Given what is known about the intergenerational trauma and ongoing effects of the colonial legacy in Australia – this is completely unacceptable. First Nations peoples are disproportionately affected by all aspects of the criminal justice system, and First Nations children are disproportionately affected by the low age of criminal responsibility. In addition to the negative impacts of incarceration, First Nations young people also suffer from disconnection from their culture and communities and are subject to widespread discrimination on the basis of their cultural identity and their status as First Nations peoples.

4.2 NSWCCL submits that the impacts of the juvenile detention regime in Australia disproportionately affect First Nations young people and this cohort should be specifically considered in any reviews of the system.

4.3 Nevertheless, the juvenile detention regime in Australia is woefully inadequate across the board. NSWCCL submits that no child under the age of 14 years should even be considered for criminal punishment, and the minimum age of criminal responsibility must be raised. Further, a 'justice reinvestment' approach must be prioritised in the juvenile detention system, to avoid the institutional perpetuation of disconnected youth and lifelong effects of incarcerating children.

Minimum age of criminal responsibility

4.4 The term 'minimum age of criminal responsibility' (**minimum age**) refers to the legal age at which a child is considered to have understood that their actions were wrong and can be held criminally responsible.[15] In all Australian jurisdictions, the minimum age is 10 years,[16] one of the lowest in the world.

4.5 In addition to the minimum age, the rebuttable legal presumption of *doli incapax* also operates in Australia. The prosecution must prove beyond reasonable doubt that a child over 10 years, but under 14 years, knew that the act was seriously wrong as opposed to merely naughty or mischievous. From the age of 14 years, offenders may be held fully responsible for their actions, although they may be subject to different sanctions than adults committing the same offences.[17]

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[14] For more on this please see NSWCCL 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/nswccl/pages/6367/attachments/original/1655425007/Submission_30.pdf?1655425007.

[15] Amnesty International, 'Explainer: Why we need to raise the age of criminal responsibility', 25 January 2022. <https://www.amnesty.org.au/why-we-need-to-raise-the-minimum-age-of-criminalresponsibility/#:~:text=The%20age%20of%20criminal%20responsibility%20is%20the%20age%20in%20which,at%20only%2010%20years%20old>

[16] *Children (Criminal Proceedings) Act 1987* (NSW), s 5; *Young Offenders Act 1993* (SA), s 5; *Criminal Code Act 1899* (Qld) subs 29(1); *Children, Youth and Families Act 2005* (Vic), s 344; *Criminal Code Act Compilation Act 1913* (WA), s 29; *Criminal Code Act 1924* (Tas), subs 18(1); *Criminal Code Act 1983* (NT), subs 38(1); *Criminal Code 2002* (ACT), s 25; *Crimes Act 1914* (Cth), s 24M.

[17] Gregor Urbas, 'The Age of Criminal Responsibility', *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, November 2000).

4.6 Australia has been criticised internationally for its low minimum age and has been strongly encouraged to raise the age.[18] Imprisoning children at such a young age, and in some cases in facilities akin to an adult prison, is a woefully inadequate mechanism for rehabilitation of young persons. It is a form of severe pain and suffering inflicted on the individuals, which NSWCCL submits should be considered by the CAT in its review.

4.7 The following sections provide examples of this failing juvenile detention system(s) in Australia. The submissions first comment on the juvenile detention regime in New South Wales. The equivalent juvenile detention regimes in Western Australia and Victoria have received particular scrutiny and in the case of the latter, comparatively positive reform initiatives in the past few years. Western Australia has a disproportionately high number of First Nations children who are incarcerated relative to the total population and has received recent media attention on the issue. Victoria is an example of a jurisdiction making efforts to positively reform its juvenile detention system. Consideration of the juvenile detention regimes in those States provides a more complete background of the system in Australia.

Juvenile detention in New South Wales

4.8 New South Wales currently has 6 juvenile detention centres, known as Youth Justice Centres, which detain children who the State has refused bail or sentenced to detention. It has long been established that incarceration facilitates recidivism and criminalisation, rather than rehabilitation and therefore detention should only be used as a last resort.

4.9 As with many other jurisdictions, the legislation governing criminal responsibility for children in New South Wales states that a court must only sentence a young offender to detention if no other sentence is appropriate in the circumstances.[19] Other, non-custodial sentences include good behaviour bonds, fines and community-based orders. There are similar provisions in relation to bail and holding children on remand – bail should generally be granted where a young person is not considered a risk to the community or there is not a real risk they will fail to appear in court. Once detained, the *Children (Detention Centres) Act 1987* (NSW) sets out the procedures as how young people will be treated in detention, which provides very few protections for vulnerable children being held in these facilities, making them inappropriate for child development.

4.10 As at the date of writing there were an average of 201 children in detention on any given day – 73 who were serving a sentence and 128 awaiting proceedings to be finalised (that is, who have been refused bail).[20] On average, 40% of those children are First Nations – a statistic which is grossly disproportionate to the total population of First Nations young people. It is difficult to comprehend that principles of 'detention as a last resort' and prioritising children remaining at home with uninterrupted education[21] are being adhered to in reality if 200 kids in New South Wales alone are in detention each day. Even more shockingly, as revealed in a recent New South Wales Budget Estimates hearing, there are at least 9 children under the age of 14 years in juvenile detention.[22]

4.11 That hearing also revealed that the New South Wales Government spends approximately $713,940 annually to imprison each child in youth detention. NSWCCL submits that this taxpayer money could be far better spent on diversion and other justice reinvestment programs, which cover prevention and mitigation initiatives such as family support services, child care, youth workers and safe crisis accommodation services. Such programs uphold the rights of

[18] United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) [49(a)].
[19] *Children (Criminal Proceedings) Act 1987*.
[20] NSW Department of Communities & Justice, *Statistics: Young people in custody* (15 June 2022) <www.youthjustice.dcj.nsw.gov.au/Pages/youth-justice/about/statistics_custody>.
[21] *Children (Criminal Proceedings) Act 1987* s 6.
[22] Charles Rushforth, 'NSW Government pays $713,940 per year to hold a single child in youth detention' *Junkee* (31 August 2022) <https://junkee.com/youth-detention-nsw/340133>.

children far better than the juvenile detention regimes in New South Wales.[23] The practice of youth detention must end in order for Australia to fully comply with its obligations under the Convention.

Case study: Western Australia

4.12 In Western Australia a Judge may, at their unfettered discretion, sentence a young person to a period of imprisonment where no other form of sentencing is considered appropriate.[24]

4.13 Currently across the Magistrate, District and Supreme Courts of Western Australia there is only one First Nations Judge. Unsurprisingly, Western Australia has the second highest number of First Nations children in detention centres across the country.[25]

4.14 When sentenced to a period of imprisonment, if the offender is under the age of 18 years, the individual will serve the sentence in a detention centre unless an express order is made otherwise.[26] Where a person, 16 years or older, is serving a period of detention, an application can be made to have the young person transferred from a detention centre to an adult prison.[27] In the event of transfer to an adult facility, the young person is to be kept separate from adult prisoners.[28]

4.15 In July 2022 the Western Australian Department of Corrections transferred 17 children, aged between 14 years and 17 years, from a youth detention facility to an adult prison.[29] Although the transfer of children under the age of 16 years to adult facilities is prohibited under State legislation,[30] authorities used the loop hole of section 13 of the *Young Offenders Act 1994* to avoid this restriction. Family members and experts pointed to the shocking statistic saying the majority of children transferred to the adult prison were Aboriginal.[31] Children were sedated and heavily handcuffed when authorities relocated these children to a selected area of the adult prison which was designated as a Youth Detention Centre.[32] The temporary centre is said to be in a separate building away from the adult prisoners, however family members of those young people have indicated that this is not completely true and the boys have been able to communicate with adult prisoners through the fence when outside.

4.16 Retired Children's Court Justice Denis Reynolds highlighted that the State's actions of moving the boys to an adult facility compromises the work of the Children's Court.[33] In an interview with ABC his Honour explained "As a sitting judge and magistrate, if you have to decide on whether or not a child is sentenced to a period of detention, and that person's going to go to a facility where he or she is going to be treated harshly, inhumanely and possibly unlawfully, it weighs heavily on your mind." These actions [relocating children to adult facilities] has caused the court to lose all confidence in the department in delivering proper rehabilitation programs to children.

4.17 This is not the first time a Judge has commented on the disregard for children's human rights in detention centres. Judge Quail described the experience of a 13-year-old child at Western Australia's juvenile detention centre (Banksia Hill) as "harsh, punitive and of no rehabilitative

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[23] Ibid.
[24] *Sentencing Act 1995* WA s 39(3); *Young Offenders Act 1994* WA ss 118. 120.
[25] AIHW, above n 8.
[26] *Young Offenders Act 1994* WA s 118.
[27] *Young Offenders Act 1994* WA s 178.
[28] *Young Offenders Act 1994* WA s 7(i).
[29] Government of Western Australia, 'Media release: Disruptive detainees relocated to temporary facility' (20 July 2022) <https://www.wa.gov.au/government/announcements/disruptive-detainees-relocated-temporary-facility>.
[30] *Young Offenders Act 1994* WA s 178(2).
[31] Michael Park, 'Handcuffed and sedated children transferred to adult prison in WA' (21 July 2022) <https://www.sbs.com.au/nitv/article/handcuffed-and-sedated-children-transferred-to-adult-prison-in-wa/kgvp7247t>.
[32] Park, above n 21.
[33] Rhiannon Shine, 'Transfer of Banksia Hill detainees to Casuarina Prison a sign of a 'broken' system, retired judge says' (3 August 2022) <https://www.abc.net.au/news/2022-08-03/western-australia-youth-justice-system-broken-banksia-hill/101292948>.

effect." His Honour said "of greater concern, that is the second time this week that I have come to that conclusion in sentencing a young Aboriginal child at Banksia Hill."[34] According to the boy's detention management report read out in court, he was "very keen to learn" and had undertaken extra work in his cell while in the detention facility. His teachers reported that he had been enthused about learning, was focused, and consistently demonstrated good behaviour. But rolling lockdowns causing staff shortages meant the boy's access to education and counselling was diminished and his behaviour deteriorated. He wound up in the Intensive Supervision Unit (ISU) after acting out and threatening self-harm.

Case study: Victoria

4.18 Victoria has consistently been regarded as the leader in youth justice across Australia with significantly lower rates of young people on remand or serving custodial sentences than any other Australian jurisdiction. Unlike most Australian States and Territories, Victoria has implemented a *Charter of Human Rights and Responsibilities* under which it is a requirement that children accused of an offence or detained must be separated from all detained adults, they must be brought to trial as quickly as possible and if convicted, must be treated in a way appropriate for their age.

4.19 Under Victorian legislation detained young people have the following rights:[35]

(1) to have their development needs catered for;

(2) to receive visits from parents, relatives, legal practitioners and other persons;

(3) for reasonable efforts to be made to meet their medical, religious and cultural needs, including, in the case of First Nations children, their needs as members of the First Nations community;

(4) to receive information on the rules of the centre in which they are detained;

(5) to complain to the Secretary or the Ombudsman about the standard of care, accommodation or treatment; and

(6) to be advised of their entitlements under this sub-section.

4.20 The legislation also prohibits certain actions in relation to a young person in detention, including:[36]

(1) the use of isolation as punishment;

(2) the use of physical force unless it is reasonable and necessary, or unless otherwise authorised;

(3) the administering of corporal punishment;

(4) the use of any form of psychological pressure intended to intimidate or humiliate;

(5) the use of physical or emotional abuse; and

(6) the adoption of any kind of discriminatory treatment.

4.21 These specific provisions for juvenile justice reflect the structural procedures Victoria has put in place to protect young people from the undeniable harms of incarceration. Whilst they represent an important step away from business-as-usual over-incarceration, in reality, it is important to

[34] Ibid.

[35] *Children, Youth and Families Act 2005* (Vic) s 482(2).

[36] *Children, Youth and Families Act 2005* (Vic) s 487.

remember they are not always upheld. NSWCCL submits that more needs to be done to keep children out of detention in the first place, particularly First Nations children.

4.22 An investigation in 2017 by the Victorian Ombudsman and, most recently, by the Commissioner for Children and Young People, detailed concerns about circumstances within youth justice centres and the treatment of young people held in those facilities.[37] These investigations found that young people had been subjected to conditions that breach their rights as provided for by the *Children and Young People Act 2005* (Vic) and the *Charter of Human Rights and Responsibilities 2006* (Vic). Following these findings, Victorian governments have alleged that they will place a greater focus on their youth justice system, including adherence to the protections previously discussed.

4.23 The exact changes to come out of this review are not yet clear but according to recent statistics released by the Australian Government Productivity Commission, Victorian youth detention rates have decreased consistently over the three year period from 2018 to 2021. The average daily number of young people in detention centres fell from 119 in 2017-18 to 102 in 2020-21 of which on average 10 individuals were First Nations.[38]

Conclusion: a juvenile detention regime in need of overhaul.

4.24 Australia's juvenile justice regime is inconsistent and woefully inadequate. NSWCCL submits that Australia must raise the minimum age, in line with international standards, and adopt more uniform and stringent approaches to juvenile detention. The system as it stands is in contravention of Australia's obligations under the Convention and should be a focus of the review by the CAT.

5 Prison conditions and preventive detention mechanisms

Prison Conditions

5.1 The purported purpose of imprisonment is to act as a deterrent to committing crimes as well as to offer rehabilitation – though the latter is often severely lacking.

5.2 Every person is entitled to human rights and freedoms, including the right:

(1) to be treated with dignity and respect;

(2) to not be subjected to torture, or cruel, inhuman or degrading treatment or punishment;

(3) to communicate with friends and family;

(4) to be free from discrimination; and

(5) to education.

[37] Victorian Ombudsman, *Report on Youth Justice* (6 February 2017), <https://www.ombudsman.vic.gov.au/our-impact/news/report-on-youth-justice/>.

[38] Australian Government Productivity Commission, *Report on Government Services 2022: Part 17 - Youth Justice Services* (25 January 2022), <https://www.pc.gov.au/ongoing/report-on-government-services/2022/community-services/youth-justice>.

These rights apply to everyone, including people who are incarcerated. As discussed in the previous section, additional special protections should be afforded to juvenile prisoners which take their age into account.[39]

5.3 In addition to the Convention, Australia has ratified an additional 6 key international human rights treaties.[40] Many of these treaties impose international obligations on State parties to protect individuals in places of detention, including prison. Most notably, the Convention requires State parties to take measures to prevent acts of torture in any Territory under its jurisdiction and states there is no circumstance where torture will be justifiable. In addition, for example, the *International Covenant on Civil and Political Rights* (**ICCPR**) states that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (Article 10, ICCPR). As seen in the example of the juvenile detention regimes above, this has created an inconsistent and inadequate system.

5.4 Despite being a signatory to the Convention, Australia has no national enforceable standards for treatment of prisoners, State and Territory governments are each responsible for running their respective prisons. The Australian Government produced the 'Guiding Principles for Corrections in Australia' which are informed by international rules including the Mandela, Bangkok and Tokyo Rules. However, these are not binding,[41] and have not been incorporated into State and Territory legislation within Australia.

5.5 As at June 2022, there are 40,330 people in custody across Australia and of those incarcerated, 12,317 are in New South Wales. 12,566 or approximately 30% of those incarcerated are identified as First Nations people.[42] As discussed in sections 3 and 4 above, NSWCCL submits there is a gross overrepresentation of First Nations people in the prison population. In addition, the Australian Government Productivity Commission reported in 2022 that 45.2% or prisoners return to prison within two years of their release.[43]

5.6 Australia's imprisonment rate has grown alarmingly since the 1980s, despite the homicide rate decreasing over the same period.[44] The increase in imprisonment is largely attributed to policy and the changes in the nature and reporting of crime. Changes in criminal justice policy have made it harder to access bail with the default position of remand being accepted for many offences, which has led to more people in custody.[45] There have also been changes to the types of crimes being committed, for example there has been an increase in the reporting of certain serious crimes such as domestic violence, which were previously under-reported.[46]

5.7 People who are incarcerated are amongst the most vulnerable groups in society, often coming from disadvantaged backgrounds, and experience higher rates of homelessness, unemployment and poor mental health.[47] In addition, imprisonment of these vulnerable groups significantly

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[39] Australian Human Rights Commission, 'Human Rights and Prisoners' (Factsheet) <https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_prisioners.pdf>.

[40] The seven main international human rights treaties are the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT), Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD).

[41] Government of Australia, 'Guiding Principles for Corrections Australia' (Report, 2018) <https://files.corrections.vic.gov.au/2021-06/guiding_principles_correctionsaustrevised2018.pdf>.

[42] ABS (2022) *Prisoners in Australia* <Prisoners in Australia, 2021 | Australian Bureau of Statistics (abs.gov.au)>.

[43] Australian Government Productivity Commission, 'Report on Government Services 2022' (Report, 2022) <https://www.pc.gov.au/ongoing/report-on-government-services/2022/justice>.

[44] Australian Government Productivity Commission, 'Australia's prison dilemma' (Research Paper, October 2021) [2] <https://www.pc.gov.au/research/completed/prison-dilemma/prison-dilemma.pdf>.

[45] Ibid [3].

[46] Ibid.

[47] Australia Institute of Health and Welfare, 'Health of prisoners' (Web page, 7 July 2022) <https://www.aihw.gov.au/reports/australias-health/health-of-prisoners#_Toc30748007>.

impacts on their families for the duration of the sentence. This continues well after the completion of the sentence as people with past criminal convictions struggle to find employment.

5.8 Australia's prison conditions have received substantial attention due to breaches of international obligations pertaining to human rights concerns. The AHRC has reported Australian prisons suffer from overcrowding, inadequate mental health services and inadequate drug and alcohol rehabilitative services. [48]

5.9 Also under scrutiny in Australia are practices such as routine strip searching (including for women and children in prisons) and solitary confinement[49] - practices that are in clear contravention of the intentions of the Convention. NSWCCL submits that strip searches are dehumanising, invasive and can be extremely traumatic for those with existing traumas. Similarly, solitary confinement, where a person is isolated for 22 or more hours a day, has irreversible physical psychological consequences and is harmful and cruel.[50]

5.10 Australia's prison conditions reflect a breach of its international obligations under the Convention due to poor oversight, a lack of enforceable standards of treatment for people who are incarcerated and the dehumanising treatment of prisoners of all ages. There is growing evidence which suggests rehabilitation is more beneficial for reducing recidivism (for example through diversion or justice reinvestment programs) and that imprisonment can potentially increase reoffending.

Preventive detention

5.11 Preventive detention regimes for high risk terrorist offenders operate at the Commonwealth level and in NSW[51] and South Australia.[52] Preventive detention regimes for high risk sex and violence offenders operate in most Australian states and territories.[53] All permutations of the regimes allow for the state to detain and or supervise individuals who are considered to post some degree of ongoing risk of committing serious offences if released to the community without supervision after the expiry of their sentence for crime(s) committed under the criminal law. While the regimes all operate in different ways, the burden of proof consistently falls short of the criminal standard. These regimes are also consistently purported to be preventive and not punitive in nature. Despite numerous constitutional challenges, Australian courts support the view that these regimes are preventive and has consistently upheld their constitutional validity.[54] We examine two such regimes, by way of example.

5.12 Continuing detention under such preventive regimes is indistinguishable from a custodial sentence under the criminal law. Extended supervision under such preventive regimes often presents in ways akin to periods of home detention and commonly involves electronic monitoring, non-association conditions and compliance with pre-approved schedules of movements. Article 10 of the ICCPR, mentioned above, also applies to those in detention meaning detainees (who have been detained under so-called "preventive" circumstances) must still be treated with humanity and respect.

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[48] Australian Human Rights Commission, 'Human Rights and Prisoners' (Factsheet) <https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_prisioners.pdf>.

[49] Human Rights Law Centre, 'Dignity for people in prison' (Webpage) <https://www.hrlc.org.au/prisoner-rights>.

[50] Human Rights Law Centre, 'Explainer: Solitary Confinement of people in Prison' (Factsheet, 15 September 2020) <https://www.hrlc.org.au/factsheets/2020/9/15/explainer-solitary-confinement-of-people-in-prison>.

[51] *Terrorism (High Risk Offenders) Act 2017* (NSW); see also Josh Pallas 'Heed the Call: The Implied Freedom of Political Communication and the Terrorism High-Risk Offenders Regime' (2022) (1) *Current Issues in Criminal Justice* 1.

[52] *Criminal Law (High Risk Offenders) Act 2015* (SA).

[53] See for example, *Crimes (High Risk Offenders) Act 2006* (NSW); *High Risk Serious Offenders Act 2020* (WA) (see *Garlett v State of Western Australia* [2020] HCA 30); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

[54] *Garlett v State of Wester Australia* [2020] HCA 30; *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1.

By way of example, Division 105A of the *Criminal Code 1995*[55] (NSW) empowers the Minister for Home Affairs to seek continuing detention or extended supervision orders over eligible terrorist offenders who are aged at least 18 years, have been in continuous custody since the time of their conviction, and have been convicted of at least one of the offences contained within s. 105A.3(1)(a) of the *Criminal Code*.[56] For an order to be made, a court must be satisfied 'to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence [i.e. serious terrorism offence] if released to the community', and 'that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.'[57] Such orders can last for three years, and there is no limit in the number that can be sought consecutively. NSWCCL has consistently argued that this regime is contrary to human rights and ought to be abolished.[58]

5.13 Another form of preventive detention occurs where an authority deems there is a threat of a terrorist attack that is capable of being carried out, and could occur, within the next 14 days, or immediately after a terrorist attack to preserve any evidence of the attack.[59] A person can be detained for a maximum of 48 hours. Each of the States and Territories have separate legislation for preventive detention, under which a person can be detained for a period of up to 14 days.

5.14 Commentary from the Law Council of Australia has suggested that the Commonwealth legislation is too broad, arguing there is potential to capture situations where there is not a real risk of a terrorist attack.[60] Additionally, the *Criminal Code 1995* (Cth) (ss 105.38 and 105.51) restricts a detainee's right to legal access, and the communications between lawyer and detainee can potentially be monitored.[61]

5.15 In addition, the preventive detention of prisoners under the *Criminal Code* cannot be judicially reviewed in the usual way, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[62] This means detainees struggle to challenge the legality of their detention as well as the conditions of their detention[63] in circumstances where they are often detained due to a suspected intention to commit a terrorist attack.

5.16 Preventive detention schemes are not based on whether an individual has allegedly or has been proven to have committed an offence but, in our view, lead to punitive outcomes which are inconsistent with human rights obligations. It is founded on the basis of whether an individual *may* commit an offence in future. NSWCCL submits that this is a gross breach of the Convention. Subjecting an individual to preventive detention breaches the fundamental legal principle that an individual may only be imprisoned upon proof that they have breached a

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[55] For more see, Andrew Dyer and Josh Pallas 'Why Div 105A of the Criminal Code 1995 (Cth) is incompatible with human rights (and what to do about it) (2022) *Public Law Review* 33 PLR 61.

[56] *Criminal Code 1995* (Cth) 105.3A.

[57] *Criminal Code 1995* (Cth) s 105A.7(1).

[58] New South Wales Council for Civil Liberties, 'Submission to the Independent National Security Legislation Monitor in relation to the Review into Division 105A of the Criminal Code (Cth)' (1 September 2021) [3] <https://www.inslm.gov.au/sites/default/files/2021-12/1.NSW-Council-for-Civil-Liberties-and-Sydney-Institute-of-Criminology.pdf>.

[59] Australian Government Attorney-General's Department, 'Preventative detention orders' (Webpage) <https://www.ag.gov.au/national-security/australias-counter-terrorism-laws/preventative-detention-orders>.

[60] Law Council of Australia, 'Stop, search and seizure powers, declared areas, control orders, preventive detention orders and continuing detention orders' (Report, 12 May 2017) [28].

[61] Ibid.

[62] *Administrative Decisions (Judicial Review) Act 1977* (Cth), Schedule 1.

[63] Law Council of Australia, 'Stop, search and seizure powers, declared areas, control orders, preventive detention orders and continuing detention orders' (Report, 12 May 2017) [29].

positive legal command.[64] We also consider that such regimes breach Article 9 (1) of the ICCPR which states that no one should be subjected to arbitrary arrest or detention.[65]

Conclusion: Australian prison conditions and preventive detention breach the Convention.

5.17 Australia is the only Western democracy without a Bill or Charter of Rights. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) enshrines civil, political and cultural rights into Victorian law and the *Human Rights Act (2004)* (ACT) achieves a similar purpose in the Australian Capital Territory, however, the rest of the States and Territories are yet to implement similar legislation. Since Australia lacks a constitutional or statutory human rights charter, people who are incarcerated and have experienced a breach of their human rights and those who are captured by preventive detention regimes have few avenues to challenge or remedy their situation.[66] NSWCCL submits that the conditions of Australian prisons are in breach of the Convention and must attract close scrutiny of the CAT.

6 The detention of people living with disability (including those in aged care)

6.1 In addition to the Convention, Australia has ratified a number of other human rights instruments which include express rights and obligations relating to people living with disability who interact with the criminal justice system, including the *Convention on the Rights of Persons with Disabilities* (**CRPD**), the ICCPR and the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**).[67] At the domestic level, the *Disability Discrimination Act 1992* (Cth) and the *National Disability Strategy* provide various rights and protections to people with disability who interact with the criminal justice system.[68]

6.2 Despite Australia's obligations under international and domestic laws, people with disability are overrepresented in Australia's criminal justice system.[69] Research by the AIHW indicates that people with disability comprise 29% of Australia's prison population despite making up only 18% of the general population.[70] Further, research conducted in Victoria and New South Wales indicates that people with an intellectual disability return to prison at more than twice the rate of people without disability.[71]

6.3 Children with disability are similarly overrepresented in the juvenile justice system.[72] Research by New South Wales Health and New South Wales Juvenile Justice indicates that 83% of young people in custody in New South Wales exhibit symptoms consistent with a psychological disorder,[73] with the prevalence of Foetal Alcohol Spectrum Disorder (**FASD**) being of particular

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[64] New South Wales Council for Civil Liberties, 'Submission to the Independent National Security Legislation Monitor in relation to the Review into Division 105A of the Criminal Code (Cth)' (1 September 2021) [3] <https://www.inslm.gov.au/sites/default/files/2021-12/1.NSW-Council-for-Civil-Liberties-and-Sydney-Institute-of-Criminology.pdf>.

[65] Ibid [14].

[66] As noted in *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1, 24 [69], 25 [72]-[73] (Gageler J).

[67] Australian Human Rights Commission, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (20 March 2022) 7 [31].

[68] Ibid.

[69] Ibid 94-95; Human Rights Watch, '"I Needed Help, Instead I Was Punished" - Abuse and Neglect of Prisoners with Disabilities in Australia' (Report 6 February 2018).

[70] Australian Institute of Health and Welfare (AIHW), *The health of Australia's prisoners 2018* (Report, 2019) 77-78.

[71] Shasta Holland and Peter Persson, 'Intellectual disability in the Victorian prison system: characteristics of prisoners with an intellectual disability released from prison in 2003-2006' (2011) 17(1) *Psychology, Crime & Law* 25, 34; Vivienne Riches, Trevor Parmenter, Michele Wiese and Roger Stancliffe, 'Intellectual disability and mental illness in the NSW criminal justice system' (2006) 29(5) *International Journal of Law and Psychiatry* 386, 389.

[72] Law Council of Australia, 'The Justice Project Final Report - Part 1 - People with Disability' (Report, August 2018) <https://www.lawcouncil.asn.au/justice-project/final-report>;

[73] Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, '2015 Young People in Custody Health Survey: Full Report' (Final Report, November 2017) 65.

concern.[74] Further, 18% of young people were found to have an intellectual disability (IQ <70) and between 39-46% were found to have a borderline intellectual disability (IQ 70-79).[75]

6.4 For First Nations young people, the situation is considerably worse. The same study by New South Wales Health and New South Wales Juvenile Justice found that 87% of young people in custody in New South Wales exhibit symptoms consistent with a psychological disorder.[76] Further, First Nations children with a cognitive disability have been found more likely to be charged with a first offence at a younger age than those without.[77]

6.5 The AHRC has identified a number of systematic failures that have contributed to the overrepresentation of people with disability in Australia's criminal justice system including:

(1) negative attitudes and a lack of disability-specific awareness and education across the criminal justice system, particularly in relation to intellectual and psychosocial disability, and and amongst police officers as the criminal justice system's first point of contact;

(2) inadequate support and procedural accommodations to enable people with disability to effectively participate in the criminal justice system and access protection from police and courts;

(3) once incarcerated, people with disability lose access to support systems that serve, in part, to reduce the risk of harm posed to themselves and others; and

(4) inadequate access to diversionary programs that are disability specific and culturally appropriate.[78]

6.6 In addition to the above issues, NSWCCL is concerned that Australia's "fitness to plead" framework may lead to people with disability (including children) being detained for indefinite periods. At present, there is no nationally consistent approach to fitness to plead laws as they relate to people with disability.[79] In some jurisdictions, this may lead to people with disability who are charged with a crime but are found not guilty because of impairment or who are deemed "unfit to stand trial" serving longer periods of detention than if they had pleaded guilty and were imprisoned for the relevant offence.[80] Worryingly, anecdotal evidence suggests that some people with disability have pleaded guilty to crimes they have not committed in order to receive a shorter defined prison term rather than risk a term of indefinite detention.[81]

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[74] Australian Human Rights Commission, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (20 March 2022) 20 [96], 29-39 [147]-[153].

[75] Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, '2015 Young People in Custody Health Survey: Full Report' (Final Report, November 2017) 65.

[76] Ibid.

[77] Australian Human Rights Commission, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (20 March 2022) 20 [96], 20 [97]; Stephane Shepherd, James Ogloff, Yin Paradies and Jeffrey Pfeifer, 'Aboriginal prisoners with cognitive impairment: Is this the highest risk group?' (2017) 536 *Trends & Issues in Crime and Criminal Justice* 1, Australian Institute of Criminology <https://www.aic.gov.au/sites/default/files/2020-05/ti536_aboriginal_prisoners_with_cognitive_impairment.pdf> 8.

[78] Australian Human Rights Commission, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (20 March 2022) 20-21 [98]-[106].

[79] *Crimes Act 1914* (Cth) ss 20B, 20BC; *Crimes Act 1900* (ACT) ss 311, 315C, 316, 318-319; *Mental Health Act 2015* (ACT) s 117; *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 14, 16, 19-24, 27; *Criminal Code Act 1983* (NT) ss 43J, 43R, 43X, div 4; *Mental Health Act 2016* (Qld) ss 118, 122, pt 4 divs 2-3; *Criminal Law Consolidation Act 1935* (SA) ss 269H, 269M, 269O; *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 14-18; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 6, 18, pts 3, 5; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 12, 19; see also Ibid 24 [119].

[80] Australian Human Rights Commission, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (20 March 2022) 24 [118].

[81] Senate Community Affairs Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (Report, 29 November 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report/c03> [3.26]-[3.28].

6.7 NSWCCL submits that despite the systemic failures of Australia's legal framework, which lead to the arbitrary and indefinite detention of people with disability being well established,[82] the response from Australian governments has been woefully inadequate. As noted by the AHRC, the Australian Government is yet to respond to the *Senate Community Affairs References Committee's report Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia*.[83] Further, despite the States and Territories (other than South Australia) endorsing the *National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment*, the principles have yet to be implemented in State and Territory legislation, policies and procedures.[84] NSWCCL shares the AHRC's concerns in this regard.

6.8 Alarmingly, the indefinite detention of people with disability is not just limited to criminal contexts. In non-criminal contexts, people with disability can be involuntarily detained for indefinite periods under mental health legislation, disability and guardianship legislation, and through "restrictive practices", for example, in aged care settings.[85] Across all jurisdictions in Australia, disability frameworks allow for the detention of people with disability through a variety of formal and informal means.[86] The complexity of these frameworks has been criticised in and of itself for being a key contributor to indefinite detention and for facilitating environments of abuse.[87]

6.9 The nature of indefinite detention under guardianship frameworks is of particular concern to NSWCCL. Across all jurisdictions, people with impaired cognitive or psychiatric functioning can be subject to guardianship orders to protect their health and welfare.[88] However, unlike criminal and mental health regimes, indefinite detention operates more covertly under guardianship frameworks.[89] For example, in New South Wales, Queensland and Victoria, indefinite detention can occur through guardianship orders which include a form of "restrictive practices" function.[90] A restrictive practices function may have the effect of restricting a person's movement or freedom, for example, by ordering that a person reside in a locked facility.[91] Alarmingly, such orders often lack any process for oversight of the person's detention or of the guardians themselves.[92]

6.10 Similarly, informal, and in some instances unlawful, indefinite detention of people with disability also occurs in aged care, both within private homes and residential aged care facilities (**RACF**).[93] Data indicates that approximately half of people in RACFs are diagnosed with dementia with almost half of these people experiencing another diagnosed mental illness.[94] These conditions are routinely managed with detention.[95]

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[82] Australian Human Rights Commission, Submission to the Senate Community Affairs References Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (March 2016) 3 [4].

[83] Australian Human Rights Commission, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (20 March 2022) 24 [122].

[84] Ibid 25 [123].

[85] Senate Community Affairs Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (Report, 29 November 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report/c03> ch 7-8.

[86] Ibid 153-154 [8.1]-[8.9].

[87] Ibid.

[88] Ibid 157 [8.21].

[89] Ibid 158 [8.22].

[90] Ibid 158-159 [8.22]-[8.27].

[91] Ibid 169 [8.69].

[92] Ibid 158-159 [8.23]-[8.27].

[93] Ibid 166 [8.60]; Sara Dehm, Claire Loughnan and Linda Steele, 'COVID-19 and Sites of Confinement: Public Health, Disposable Lives and Legal Accountability in Immigration Detention and Aged Care' (2021) 44(1) UNSW Law Journal 60, 64-65.

[94] Richard Fleming, Kate Swaffer, Lyn Phillipson and Linda Steele, Submission to Senate Community Affairs Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (7 April 2016) 2.

[95] Ibid.

6.11 Evidence submitted to the *Senate Community Affairs References Committee's report Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia* indicates that across jurisdictions, indefinite detention in aged care settings occurs informally, that is without express legislative authority.[96] Much like detention under guardianship frameworks, indefinite detention occurs through a variety of restrictive practices,[97] for example, through the provision of locked dementia specific units used to confine residents to a single area.[98]

6.12 Despite the expectation that residents in aged care receive support, security and protection, the *Royal Commission into Aged Care Quality and Safety* (**Aged Care Royal Commission**) described Australia's aged care framework as "woefully inadequate".[99] Other commentators have described the legal regimes that regulate RACFs as "authorising and enabling sites of control, confinement and social isolation" and creating "places of structural harm for marginalised populations".[100] The Aged Care Royal Commission has further acknowledged that in many instances, people receiving aged care services have their identity ignored and their basic human rights denied.[101] Such views are also supported by court decisions which have found unlawful detention in RACFs.[102]

Conclusion: Australia must address the systematic failures which result in people with disability being denied access to justice and/or detained indefinitely.

6.13 NSWCCL submits that a multi-level approach is necessary to address the systemic failures which result in people with disability being denied access to justice and detained indefinitely in Australia. NSWCCL recommends that the Australian Government work with State and Territory Governments to implement strategies to help people with disability avoid unnecessary contact with the criminal justice system and to ensure that appropriate supports and services are available to those that do. At a minimum, disability-specific and culturally appropriate education programs should be implemented throughout the criminal justice system with a view to enhancing understanding of disability and expanding supports to people with disability. Australian governments must also work to end indefinite detention of people with disability both in criminal and non-criminal contexts. Australia must develop a nationally consistent approach to fitness to plead laws which provide for regular reviews of the need for detention and impose appropriate limits on the total detention period. Similar reforms should also be considered under disability and guardianship frameworks to prevent indefinite detention in non-criminal contexts, such as aged care.

7 Recommendations

7.1 In undertaking a review of the Convention and the Sixth Periodic Report of Australia, NSWCCL submits that the CAT focus on:

(1) mandatory indefinite detention of asylum seekers under Australia's Asylum Seeker Policy;

(2) the gross rates of over-incarceration of First Nations people in Australia;

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[96] Senate Community Affairs Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (Report, 29 November 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report/c03> 167-168 [8.63]-[8.65].

[97] Ibid.

[98] Global Action on Personhood Australia, Submission to Senate Community Affairs Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (2016) 2.

[99] *Royal Commission into Aged Care Quality and Safety* (Interim Report, 31 October 2019) vol 1, 12.

[100] Sara Dehm, Claire Loughnan and Linda Steele, 'COVID-19 and Sites of Confinement: Public Health, Disposable Lives and Legal Accountability in Immigration Detention and Aged Care' (2021) 44(1) UNSW Law Journal 60, 71.

[101] *Royal Commission into Aged Care Quality and Safety* (Interim Report, 31 October 2019) vol 1, 12.

[102] *Public Advocate v C, B* (2019) 133 SASR 353.

(3) Australia's woefully inadequate juvenile detention regime;

(4) prison conditions and preventive detention mechanisms; and

(5) the detention of people living with disability (including those in aged care).

7.2 NSWCCL recommends that the CAT report urges for the introduction of the following reforms within Australia:

(1) its mandatory detention of asylum seekers to fulfil its international human rights obligations and ensure individuals are not subjected to indefinite detention without criminal conviction;

(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;

(3) the juvenile detention regime, most notably increasing the minimal age in line with international standards and adopting more uniform and stringent approaches to juvenile detention;

(4) its prison system by implementation of national enforceable standards for the treatment of prisoners, such as the adoption of a national human rights act, and the preventive detention regime by removing the power for the State to imprison individuals without charge or access to judicial review; and

(5) improve access to justice for people living with disability with increased awareness and education across the criminal justice system, improved support and procedural accommodations to enable effective participation in the criminal justice system and a refocus of attention on the unlawful indefinite detention of people living with disability in aged-care facilities.

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.