

## ***The Right to Health in Prison***

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My submission to the Inquiry into Australia's Human Rights Framework is in relation to the right to health, specifically for people in prisons and juvenile detention. This submission will discuss the relevant international treaties related to health that Australia is party to, and how Australia is violating its obligations under those treaties by not providing people in custody with equivalent healthcare to that available in the general community. It will also discuss the lack of recourse prisoners currently have to improve their human rights.

This submission makes the following recommendations:

1. That Federal Parliament should enact human rights legislation which recognises the right to health as belonging to all Australians, including those in custody
2. That Federal Parliament should create effective methods of recourse for people in custody to challenge violations of their human rights

### ***Australia's obligations in relation to the right to health in prison***

Australia is party to four relevant treaties regarding the right to health for people in prison. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states everyone is entitled to the "highest attainable standard of physical and mental health".<sup>1</sup> This has been specifically found to mean prisoners have the right to equivalent health care.<sup>2</sup> Article 7 of the International Covenant on Civil and Political Rights (ICCPR) prohibits "cruel, inhuman or degrading treatment or punishment."<sup>3</sup> It has been held at the Human Rights Council that withholding mental health treatment in prison is cruel and degrading.<sup>4</sup>

The Convention of the Rights of Persons with Disabilities (CRPD), and the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), are both particularly relevant

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<sup>1</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>2</sup> Anita Mackay, 'The relevance of the United Nations Mandela rules for Australian prisons' (2017) 42(4) *Alternative Law Journal*, 280.

<sup>3</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

<sup>4</sup> Craig Cumming et al, 'In sickness and in prison: the case for removing the Medicare exclusion for Australian prisoners' (2018) 26(1) *Journal of Law and Medicine*, 143-5.

given the disproportionate amount of Indigenous Australians and persons with disabilities in the prison system.<sup>5</sup> Article 24 of UNDRIP states that Indigenous people ‘have an equal right to the enjoyment of the highest attainable standards of physical and mental health’.<sup>6</sup> The CRPD, which Australia ratified in 2008, is becoming the standard reference point for people with disabilities who are impacted by the criminal justice system.<sup>7</sup> Article 15 of the CRPD provides that no person be ‘subjected to torture or to cruel, inhuman or degrading treatment or punishment’. It is argued that solitary confinement of people with mental health issues constitutes ‘cruel, inhuman or degrading treatment’.<sup>8</sup>

In addition to binding treaties, Rule 24(1) of the Nelson Mandela Rules states that prisoners should “enjoy the same standards of health care that are available in the community.”<sup>9</sup>

### *An overview of the lack of healthcare in Australian prisons*

Australia has eight separate prisons systems, one for each internal State and Territory. There are no Commonwealth prisons. Disturbingly, there is a distinct lack of national standards or coordination between our prisons systems in relation to healthcare in custody.<sup>10</sup> In violation of international treaties, there is also overwhelming evidence that Australia does not give people in prison equivalent healthcare to that available in the general community.<sup>11</sup>

There is a settled legal position that prisoners retain all rights not directly taken away as a result of the imprisonment itself.<sup>12</sup> Despite this, incarcerated people experience significantly longer wait times to see medical professionals compared to the general community, experience a restricted choice in health care providers,<sup>13</sup> and are not able to receive certain

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<sup>5</sup> Ibid.

<sup>6</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) (UNDRIP) 18.

<sup>7</sup> Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge, 2020) 47.

<sup>8</sup> Victorian Ombudsman, ‘Investigation into the Imprisonment of a Woman Found Unfit to Stand Trial’ (2018) 36-37 <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-the-imprisonment-of-a-woman-found-unfit-to-stand-trial>.

<sup>9</sup> United Nations, *United Nations Standard Minimum Rules for the Treatment of Prisoners*, Centre for Human Rights and Rehabilitation Comm) 8 (*‘Nelson Mandela Rules’*).

<sup>10</sup> Public Health Association Australia, ‘Prisoner Health Policy’ (2013) <<https://www.phaa.net.au/documents/item/239>>.

<sup>11</sup> Mackay (n 2) 280.

<sup>12</sup> *Raymond v Honey* [1983] I AC 1.

<sup>13</sup> Justice Health and Forensic Mental Health Network, ‘2021 Health Literacy Study: People in NSW Prisons and a High Secure Forensic Mental Health Setting’ (2022), 34

types of healthcare at all.<sup>14</sup> They also have no choice of when they can access medical services,<sup>15</sup> and have never been able to access Medicare in custody, nor any services available through Medicare, such as the Pharmaceutical Benefits Scheme (PBS).<sup>16</sup> Without PBS, they have access to significantly less medications than the general community.<sup>17</sup> A 2018 parliamentary inquiry found that existing health services in NSW prisons were not adequately resourced to meet needs, especially in relation to mental health.<sup>18</sup> Disturbingly, these findings echo those of the 1978 Royal Commission into New South Wales Prisons,<sup>19</sup> indicating little had changed in the intervening 40 years.

While prisoners do indeed receive free healthcare, the reality is that prisons cannot deliver certain health services as they are too expensive to afford without Medicare rebates.<sup>20</sup> Of particular note is the fact there is little to no psychological counselling in prison.<sup>21</sup> People in the community are able to access free or subsidised counselling through a Mental Health Care Plan, though this service is only available through Medicare, and no non-Medicare equivalent is available in custody. Accordingly, Australia routinely denies mental health treatment to people in prison.<sup>22</sup> As I noted above, this is a direct violation of Australian's international obligations to the ICCPR.

In the absence of available treatment, the typical response to a prisoner reporting suicidal thoughts is to place them in solitary confinement on protective grounds.<sup>23</sup> As noted earlier, solitary confinement of people with mental health issues is considered 'cruel, inhuman or degrading treatment', a violation of the CRPD.

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<<https://www.justicehealth.nsw.gov.au/publications/2021-health-literacy-study-report-final-web-version.pdf>>.

<sup>14</sup> Damien Linnane, Donna McNamara and Lisa Toohey, 'Ensuring universal access: The case for Medicare in prison' (2023) *Alternative Law Journal*

<sup>15</sup> Anita Mackay, *Towards human rights compliance in Australian prisons* (Australian National University Press, 2020) 36.

<sup>16</sup> Tessa M Plueckhahn et al, 'Are some more equal than others? Challenging the basis for prisoners' exclusion from Medicare' (2015) 203(9) *Medical Journal of Australia*, 360.

<sup>17</sup> Linnane et al (n 14)

<sup>18</sup> Inspector of Custodial Services, 'Health Services in NSW Correctional Facilities' (2021) <[https://www.inspectorcustodial.nsw.gov.au/content/dam/dcj/icsnsw/documents/Health\\_Services\\_in\\_NSW\\_Correctional\\_Facilities.pdf](https://www.inspectorcustodial.nsw.gov.au/content/dam/dcj/icsnsw/documents/Health_Services_in_NSW_Correctional_Facilities.pdf)>.

<sup>19</sup> *Royal Commission into New South Wales Prisons*, 4 April 1978) ('*Nagle Royal Commission*').

<sup>20</sup> Plueckhahn et al (n 16)

<sup>21</sup> Plueckhahn et al (n 16)

<sup>22</sup> Damien Linnane, Donna McNamara and Lisa Toohey, *Medicare in Prisons: The Case for Reform* (University of Newcastle, 2022).

<sup>23</sup> David Brown and Meredith Wilkie, *Prisoners as citizens: Human rights in Australian prisons* (Federation Press, 2002) 233

Placing people in solitary confinement because of their mental health issues, however, is common practice in Australia to this day,<sup>24</sup> despite the Victorian Auditor General condemning it as unacceptable in 1999.<sup>25</sup>

Another service not provided in prisons due to the Medicare exclusion is Medicare item 715, the annual health check for Aboriginal and Torres Strait Islander people. According to the Department of Health and Aged Care, this check “helps keep people healthy by identifying risks of ill health early to prevent chronic conditions from developing.”<sup>26</sup> Considering how disproportionately Indigenous people are imprisoned in Australia, and their increased rates of many health issues, the need for such an assessment is clear. However, the 2022 Inquest into the death of Mootijah Shillingsworth, an Indigenous man who died in prison from an ear infection that was ruled to be preventable, noted that no similar equivalent of this health assessment exists outside of the Medicare system.<sup>27</sup>

While some State correctional websites claim that prisoners do receive equivalent healthcare, these self-serving assertions, which provide no sources as supporting evidence, do not withstand much scrutiny. For example, the Victorian Corrections webpage on prisoner healthcare states that the “quality and standard of health care provided to prisoners is the same as that provided in the community through the public health system”. However, the 2022 Inquest into the death in custody of Victorian prisoner Veronica Nelson heard considerable testimony from healthcare professionals working in prisons about the lack of treatment available for prisoners,<sup>28</sup> with Coroner Simon McGregor making adverse findings about the overall quality of healthcare in the State’s prisons.<sup>29</sup> Further, a 2018 report from the

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<sup>24</sup> Linnane et al (n 14)

<sup>25</sup> Brown (n 23) 233.

<sup>26</sup> Department of Health and Aged Care, ‘Annual health checks for Aboriginal and Torres Strait Islander People’ <<https://www.health.gov.au/topics/aboriginal-and-torres-strait-islander-health/primary-care/annual-health-checks>>

<sup>27</sup> Coroners Court of New South Wales, ‘Inquest into the death of Mootijah Douglas Andrew Shillingsworth’ (2022) <[https://coroners.nsw.gov.au/coroners-court/download.html/documents/findings/2022/Inquest\\_into\\_the\\_death\\_of\\_Mootijah\\_Douglas\\_Andrew\\_Shillingsworth.pdf](https://coroners.nsw.gov.au/coroners-court/download.html/documents/findings/2022/Inquest_into_the_death_of_Mootijah_Douglas_Andrew_Shillingsworth.pdf)>.

<sup>28</sup> Dunstan, Joseph, ‘Evidence from Veronica Nelson’s final days casts a bright light into Victoria’s prison system’, *ABC News* (online, 14 May 2022) <<https://www.abc.net.au/news/2022-05-14/veronica-nelson-aboriginal-death-in-custody-coronial-inquest/101063268>>

<sup>29</sup> Ore, Adeshola, ‘Complete, unmitigated disaster’: inquest into Veronica Nelson’s death urges overhaul of ‘discriminatory’ Victorian bail laws’, *The Guardian* (online, 30 January 2023) <<https://www.theguardian.com/australia-news/2023/jan/30/inquest-veronica-nelson-death-urges-overhaul-victoria-bail-laws>>

Victorian Ombudsman found many issues in relation to the healthcare available to people with disabilities in custody, which led to a woman with severe mental health issues being locked in solitary confinement for over 18 months as there was no adequate place in the Victorian prison system to provide the treatment she would have received if she was in the public health care system. The Ombudsman's report noted the case was not isolated.<sup>30</sup>

### ***The lack of recourse to improve human rights and healthcare in prison***

While the lack of healthcare in prison is concerning in its own right, even more disturbing is the fact that in the absence of a Human Rights Framework in Australia, prisoners have no recourse to improve their health in custody. Incarcerated people cannot challenge the Medicare exclusion in custody with their respective State or Territory prisons, as the exclusion is created by federal legislation.<sup>31</sup> State and Territory prisoners also cannot complain about human rights issues to the Australian Human Rights Commission, as the organisation only has the authority to deal with complaints against Commonwealth agencies.<sup>32</sup> As mentioned earlier, there are no Commonwealth prisons.

In the 1999 case of *Collins v South Australia*, Justice Millhouse said he believed the international human rights of Collins, a prisoner, had been violated. Justice Millhouse, however, lamented he was not able to enforce the basic human rights set out in the relevant international conventions.<sup>33</sup> Legal precedent has determined that neither the High Court nor the Federal Court has the jurisdiction to hear a human rights complaint brought by an individual claiming an ICCPR violation by a State prison.<sup>34</sup> It has also been established in Victoria that prisoners do not have the right to legally challenge violations of the *Corrections Act 1986*, the act which governs prisons and prisoners' rights.<sup>35</sup> Ironically, the act technically provides rights for prisoners, but provides no remedies for violations of those rights. It has long been argued that there are no legal remedies available for the violations of human rights in prison,<sup>36</sup> an issue that has now been exacerbated as State governments refused to allow United Nations OPCAT inspectors into Australian prisons in 2022. Other complaints avenues

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<sup>30</sup> Victorian Ombudsman (n 8) 45-48

<sup>31</sup> Plueckhahn et al (n 16)

<sup>32</sup> Brown (n 23) 196-7.

<sup>33</sup> Ibid 199.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid 200-201.

<sup>36</sup> Ibid 203.

in prison, such as the Ombudsman, have been found to be unreliable in protecting human rights, and many shortfalls in the Ombudsman's approach to prisoner complaints have been identified.<sup>37</sup>

### **Conclusion**

The lack of equivalent healthcare available to prisoners, and their inability to recourse this issue in the absence of a Human Rights Framework, is a clear problem requiring action. I therefore submit that Federal Parliament should enact human rights legislation which recognises the right to health as belonging to all Australians, including those in custody, and that effective methods to challenge violations of these human rights should also be created.

While some people will not have sympathy for the rights and health of prisoners, as noted by the World Health Organisation:

Sooner or later most prisoners will return to the community, carrying back with them new diseases and untreated conditions that may pose a threat to community health and add to the burden of disease in the community. Thus, there is a compelling interest on the part of society that this vulnerable group receive health protection and treatment for any ill health.<sup>38</sup>

There is strong evidence that improving the health of prisoners reduces recidivism,<sup>39</sup> and improving healthcare in prison is far cheaper than the cost of re-incarceration.<sup>40</sup> In addition to being a human rights issue, improving health in prison will reduce crime, reduce strain on the public health system once prisoners are released, and have substantial economic benefits for both the Australian Government and taxpayers.

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<sup>37</sup> Mackay (n 15) 102-104.

<sup>38</sup> Stefan Enggist et al, *Prisons and health* (World Health Organization. Regional Office for Europe, 2014) 2.

<sup>39</sup> Gideon Meyerowitz-Katz, 'Whatever you do, don't get sick', *Inside Story*, 20 December 2018) <<https://insidestory.org.au/whatever-you-do-dont-get-sick/>>.

<sup>40</sup> Judith M Laing, *Care Or Custody?: Mentally Disordered Offenders in the Criminal Justice System* (Oxford University Press New York, 1999) 209.