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## Stopping Solitary Confinement

Submission to the Royal Commission into Violence, Neglect and  
Exploitation of People with Disability: Criminal Justice System  
issues paper

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31 March 2020

#StopSolitary

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## Contents

1.	EXECUTIVE SUMMARY	2
2.	WHAT IS SOLITARY CONFINEMENT?	4
3.	WHY SHOULD SOLITARY CONFINEMENT BE BANNED?	5
	3.1 Solitary confinement causes harm	5
	3.2 Solitary confinement is counter-productive	6
	3.3 Solitary confinement allows for abuse behind bars to flourish	7
4.	EXPERIENCES OF PEOPLE WITH DISABILITY	8
	4.1 Women with disability	11
	4.2 Children and young people with disability	12
	4.3 Aboriginal and Torres Strait Islander people with disability	17
5.	HOW DO WE STOP SOLITARY CONFINEMENT?	19
	5.1 Findings	19
	5.2 Recommendations	19
	5.3 Ongoing oversight and accountability	20

# 1. Executive Summary

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1. This submission focuses on the experience of people with disability – particularly psychosocial disability – who are subjected to the practice of solitary confinement in prisons across Australia. The submission also looks at the immediate and long harm associated with solitary confinement practices for people with disability and how their experiences may be compounded by their age, gender and Aboriginal and Torres Strait Islander status.
2. Examination of the use of solitary confinement on people with disability falls squarely within the scope of the Royal Commission’s terms of reference. In particular, the Royal Commission’s *Issues Paper on the Criminal Justice System* states that “violence and abuse within prisons and forensic mental health facilities can include... seclusion (solitary confinement) and other restrictive practices”.
3. Solitary confinement is an archaic way of treating people and is known to inflict long term and irreversible harm. Each of the elements inherent in solitary confinement – isolation, lack of stimulation and loss of control over daily activities – can be distressing on their own. When they are all put together, they are “a potent mix”.<sup>1</sup>
4. As documented in the *Sourcebook on Solitary Confinement*, “there is remarkable consistency in research findings on the health effects of solitary confinement throughout the decades”.<sup>2</sup> There is unequivocal evidence that solitary confinement has a profound and mostly negative impact on health and wellbeing, particularly for those with pre-existing psychosocial disability, and that it may also actively cause psychosocial disability.<sup>3</sup>
5. Under international law, solitary confinement may only be imposed in exceptional circumstances, and ‘prolonged’ solitary confinement, in excess of 15 consecutive days, is regarded as a form of torture.
6. In Australian prisons, there are a raft of practices that may lead or amount to the solitary confinement of persons: isolation, separation, seclusion, segregation and lockdown. These practices are allowed to exist because of overly broad laws in each jurisdiction that permit their use. The use of these different terms and the lack of consistency in the governing legislation and/or policies across states and territories has resulted in a broadening of circumstances in which people may be isolated in a cell without meaningful human contact. As a result, solitary confinement can be used as a tool to punish, manage, protect and/or treat people in prison.

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<sup>1</sup> Sharon Shalev, *A sourcebook on solitary confinement* (2008) Solitary confinement, 17 [http://solitaryconfinement.org/uploads/sourcebook\\_web.pdf](http://solitaryconfinement.org/uploads/sourcebook_web.pdf).

<sup>2</sup> *Ibid* 10.

<sup>3</sup> *Ibid*.

7. It is crucial in the midst of an evolving health pandemic – the coronavirus (COVID-19) – that the Royal Commission investigate the extent of the use of such practices and its impact on the people in prisons, in light of the fact that prisons often respond to public health crises with increased use of solitary confinement and similar restrictive practices.<sup>4</sup> The use of solitary confinement as a means to prevent the spread of COVID-19 is both inappropriate and ineffective. It is a harmful practice that does not solve the issue of the daily influx of staff and other people coming in and out of prisons. People in solitary are also not able to easily alert prison staff if they develop symptoms or if their condition worsens.
8. Outside the current public health crisis, solitary confinement is misused as a punitive, behaviour management tool on people with disability who are being detained in solitary confinement as a substitute for proper medical care and appropriate accommodations within the prison environment. In addition, when in solitary confinement, they are denied access to programs or mental health services that may address their health needs and deteriorating mental health conditions. The consequences of prolonged isolation, absence of meaningful social contact and lack of activity can have long-term adverse effects on the mental well-being of people with psychosocial or cognitive disabilities.
9. To bring Australia in line with international law and current research from leading health experts on the harm caused by the practice of solitary confinement, particularly for people with disability, the Royal Commission should find that the practice of solitary confinement can amount to violence, abuse or neglect of persons with disability. The Royal Commission should also find that prolonged solitary confinement can amount to cruel, inhuman and degrading treatment and in some circumstances, torture, of persons with disability.
10. The Royal Commission should recommend that State and Territory laws, policies and guidelines be amended to:
  - (a) prohibit the use of solitary confinement in Australian prisons. In particular, the use of solitary confinement on children should be strictly prohibited; and
  - (b) clearly define the exceptional circumstances in which a person may be separated from other people in prison and clearly stipulate appropriate safeguards to make sure that this is not abused, and should include a requirement that the individual circumstances of the person be taken into account, including consideration of their disability and health needs, gender, race, age, cultural or sexual identity.

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<sup>4</sup> See The Marshall Project, *When Purell is Contraband, How Do You Contain Coronavirus?* 6 March 2020 [www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus](http://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus).

## 2. What is solitary confinement?

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11. Solitary confinement is the confinement of people in prison for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement is solitary confinement for a time period in excess of 15 consecutive days.<sup>5</sup>
12. Under international law, solitary confinement may only be imposed in exceptional circumstances. Prolonged solitary confinement and the “deliberate infliction of severe mental pain or suffering may well amount to psychological torture”.<sup>6</sup> Frequently renewed measures which, in conjunction, amount to prolonged solitary confinement are also a form of torture.<sup>7</sup>
13. In solitary confinement, a person will spend 22 or more hours a day in a concrete cell smaller than a single car park space. Before they are put in the cell, the person will be subjected to a full body strip search. They are then locked in a cell with limited ventilation and natural light. Meals are delivered through a slot in the solid steel doors and then eaten alone in the cell, within arm’s reach of the toilet. They lack opportunities for meaningful social interaction with other people and most contact with prison staff is perfunctory and may be wordless. If and when a person is allowed out of their cell, exercise is usually alone, in a concrete pen or fully caged yard, for no more than an hour. While in solitary confinement, people may be denied visits from family, access to medical care, telephone calls and reading materials.
14. The term ‘solitary confinement’ is not, however, explicitly referred to in any Australian laws, but the practices that may lead or amount to solitary confinement occur daily and exist by different names: isolation, separation, seclusion, segregation and lockdown. These practices are allowed to exist because of overly broad laws around Australia that permit their use.
15. The use of these different terms and the lack of consistency in the laws across states and territories has resulted in a broadening of circumstances in which people may be isolated in a cell without meaningful human contact. As a result, solitary confinement has become a common prison practice that can be used as a tool to control, punish and/or manage.
16. This submission calls on the Royal Commission to recommend that governments across the country prohibit the use of solitary confinement, regardless of how it is labelled.

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<sup>5</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (*Mandela Rules*) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 44.

<sup>6</sup> Nils Melzer, ‘United States: prolonged solitary confinement amounts to psychological torture, says UN expert’ (Media Release, 28 February 2020).

<sup>7</sup> Nils Melzer, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment*, UN Doc A/HRC/43/49 (14 February 2020) 15.

### 3. Why should solitary confinement be banned?

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#### 3.1 Solitary confinement causes harm

17. Solitary confinement should be banned because it is “strikingly toxic to mental functioning” and causes long-term, irreversible harm to people.<sup>8</sup> The practice can be damaging to any person subjected to it, with negative health effects likely to occur after only a few days. Virtually everyone exposed to solitary confinement is affected in some way, with disturbances often observed in person who have had no prior history of any mental illness.<sup>9</sup>
18. Subjecting people to such a dehumanising practice can also lead to their early and preventable death, with a recent study tracking post release mortality rates of persons held in solitary confinement in Denmark prisons which found that the persons who were formerly incarcerated and placed in solitary confinement were almost ten times more likely than people in the general population to die within 5 years of their release.<sup>10</sup>
19. The experience of solitary confinement can vary for each individual, but one man detained at Port Phillip Prison in Victoria described his experience as follows:

In total I was put in the slot [Charlotte Unit] for nine months. I've never been the same since. A letterbox flap would drop outside, and I'd jump. Or it would be just the sounds; people walking around behind me ... The day I was let out of here, they led me out of the slot in handcuffs to the front gate ... I jumped off the bus early and started crying ... Do you know how hard that is, when the only person you've seen for the last nine months was yourself in the mirror?<sup>11</sup>
20. Existing literature on solitary confinement has established that “[t]he empirical record compels an unmistakable conclusion: this experience is psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term... damage.”<sup>12</sup> There is not a single study of solitary confinement where non-voluntary confinement for longer than 10 days failed to result in negative psychological effects.<sup>13</sup>
21. Studies have “underscored the importance of social contact for the creation and maintenance of ‘self.’”<sup>14</sup> In other words, in the absence of interaction with others, a person’s very identity is at risk of disintegration.

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<sup>8</sup> Stuart Grassian, ‘Psychiatric Effects of Solitary Confinement’ (2006) 22 *WASH. U. J. L. & POL’Y* 325, 354.

<sup>9</sup> Craig Haney and Mona Lynch, ‘Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement’ (1997) 23 *N.Y.U. Rev. L. & Soc. Change* 477, 500.

<sup>10</sup> Christopher Wildeman and Lars Andersen, ‘Solitary confinement placement and post-release mortality risk among formerly incarcerated individuals: a population based study’ (2020) 5(2) *The Lancet Public Health*.

<sup>11</sup> Victorian Ombudsman, ‘Investigation into the imprisonment of a woman found unfit to stand trial’ (Investigation Report, 16 October 2018) 8.

<sup>12</sup> Haney and Lynch (n 9).

<sup>13</sup> *Ibid* 531.

<sup>14</sup> *Ibid* 503.

22. The most widely reported effects of solitary confinement are its psychological effects. Symptoms can include anxiety, depression, anger, cognitive disturbances, perceptual distortions and paranoia and psychosis.<sup>15</sup>
23. Although psychological effects are most commonly associated with solitary confinement, physiological effects are also commonly reported. Signs and symptoms recorded include gastro-intestinal, cardiovascular and genito-urinary problems, migraine headaches, heart palpitations (awareness of strong and/or rapid heartbeat while at rest), diaphoresis (sudden excessive sweating), insomnia, back and other joint pains, deterioration of eyesight, poor appetite, weight loss and sometimes diarrhoea, profound fatigue, lethargy, weakness, tremulousness (shaking), feeling cold and aggravation of pre-existing medical problems.<sup>16</sup>
24. Contemporary studies have also shown that self-harm (including banging one's head against the cell wall) and suicide are more common in solitary confinement than in the general prison population.<sup>17</sup> Other forms of self-harm, like self-mutilation or cutting, are also prevalent in solitary confinement.<sup>18</sup>
25. Australia, as a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), is responsible for ensuring "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" and to prevent "acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture".<sup>19</sup> The practice of solitary confinement can amount to torture within the definition of Article 1 of CAT, when it is intentionally inflicted on a person by a public official to punish or intimidate them, or for any reason based on discrimination of any kind.
26. The negative health impacts that often arise from being subjected to solitary confinement highlight that at best, the use of solitary confinement amounts to cruel, inhuman or degrading treatment or punishment and, at worst, the use of solitary confinement amounts to torture.

### 3.2 Solitary confinement is counter-productive

27. Subjecting people to solitary confinement is counter-productive. Use of the harmful practice does nothing to address the underlying causes of challenging behaviour, and can even exacerbate those behaviours as a person's mental and physical health deteriorates. Subjecting people to these conditions and treatment for days, weeks or years and then releasing them from prison at the conclusion of their sentence does not make our communities

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<sup>15</sup> Shalev (n 1).

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) arts 1 and 16.

safer. It actually jeopardises public safety, has a negative impact on rehabilitation and can be linked with higher rates of recidivism.<sup>20</sup>

28. In the submission by the Australia OPCAT Network to the Sub-Committee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment, examples of the increased risk and potential for harm to the individual or members of the community included:

- (a) a person being moved into isolation in the last month of sentence and then released straight into the community;
- (b) a person suffering delusions put into isolation 24/7 from observation cells and then released straight into the community; and
- (c) a person under 20 years of age with an intellectual disability put into isolation for mental health reasons prior to release.<sup>21</sup>

29. It must be acknowledged that the vast majority of people in prison will be released and will spend the rest of their lives living in the community. Restrictive practices like the use of solitary confinement can seriously undermine rehabilitation efforts and jeopardise community safety.

### 3.3 Solitary confinement allows for abuse behind bars to flourish

30. Broad laws allow for the practice of solitary confinement to take place and can be, and often are, subject to abuse. As set out in **Appendix 1** to this submission, there are various legislative provisions in each Australian jurisdiction that highlight the inconsistent language used to describe the diverse range of practices that can amount to solitary confinement.

31. The extent to which laws can be abused was illustrated during the Royal Commission into the Protection and Detention of Children in the Northern Territory, which found that staff within detention facilities showed a disregard for compliance with the legislation in placing children and young people in isolation for extended periods, including beyond the statutory limits prescribed by the law.<sup>22</sup> The Royal Commission found that such practices were endemic in “detention system seemingly intent on ‘breaking’ rather than ‘rehabilitating’ the children and young people in their care, particularly those with difficult and complex behaviours”.<sup>23</sup>

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<sup>20</sup> First Peoples Disability Justice Consortium, Submission No. 39 to Senate Community Affairs References Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (April 2016) 10.13 citing A Solomon et al, *Understanding the challenges of prisoner reentry: Research findings from the Urban Institute’s Prisoner Reentry Portfolio* (Washington DC, 2006) and M Alexander, D Martin and M Williams, *Report on Queensland Correctional Centres* (Prisoners Legal Service and Catholic Prison Ministry, 2011); M Haswell et al, *Returning home, back to community from custodial care: Learnings from the first year pilot project evaluation of three sites around Australia* (Manuscript submitted for publication, 2014).

<sup>21</sup> Australia OPCAT Network, ‘The Implementation of OPCAT in Australia’, Submission to the Sub-Committee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the United Nations working Group on Arbitrary Detention (January 2020).

<sup>22</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (November 2017) vol 2A, 330.

<sup>23</sup> *Ibid.*

32. The Crime and Corruption Commission in Queensland also recently expressed serious concerns around the interpretation and application of broad legislative powers and their misuse in prisons.<sup>24</sup> With respect to safety orders – which can lead to a person being locked in solitary confinement – the Crime and Corruption Commission found that there was:
- (a) inconsistent and incorrect selection of legislative criteria for issuing the orders;
  - (b) insufficient reasons provided for using the orders because they lacked clear, detailed and individualised documentation; and
  - (c) insufficient information (for example, in case notes) given in order to determine whether a person had received an adequate explanation of a safety order, or its reasons and conditions.<sup>25</sup>
33. As is evident, the use of different terms – like isolation, separation, seclusion, segregation and lockdown – and the lack of consistency in the legislation and/or policies across states and territories has resulted in a broadening of circumstances in which people may be isolated in a cell without meaningful human contact. Tinkering with existing policies and guidelines will not resolve this. As found during the Royal Commission into the Protection and Detention of Children in the Northern Territory, policy and training are not enough.<sup>26</sup>
34. Specific legislative obligations must be placed on people to ensure compliance and to remove uncertainty between legislation and policy.<sup>27</sup> As a result, there needs to be a legislative prohibition on the use of solitary confinement and clearly defined laws which stipulate the exceptional circumstances in which a person may be separated from others.

## 4. Experiences of people with disability

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35. People with disability, particularly a cognitive or psychosocial disability, are overrepresented in Australian criminal legal systems, comprising around 18 percent of the country's population, but almost 50 per cent of people entering prison.<sup>28</sup>
36. Human Rights Watch's report, *I Needed Help, Instead I Was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia*, found that people with psychosocial or cognitive disabilities are disproportionately represented in the solitary confinement regimes across the prisons they visited. Nearly all solitary confinement units visited by Human Rights Watch were

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<sup>24</sup> Crime and Corruption Commission, 'Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons' (Research Report, 14 December 2018) 14.

<sup>25</sup> *Ibid.*

<sup>26</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory (n 22) vol 2A, 264.

<sup>27</sup> *Ibid.*

<sup>28</sup> Human Rights Watch, 'Abuse and Neglect of Prisoners with Disabilities in Australia' (Report, 6 February 2018).

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- full and most people with disability interviewed had spent time in one. This indicates that the placement of people with disability in solitary confinement is a regular occurrence in Australia.
37. By way of example, one man with a psychosocial disability spent more than 19 years in solitary confinement. In another case, a woman with a psychosocial disability was put in solitary confinement for 28 days. During that time, she did not have access to a toilet and was forced to use cardboard urine test containers.<sup>29</sup>
38. This is despite international law prohibiting the use of solitary confinement on people with mental or physical disabilities when their conditions would be exacerbated by such measures.<sup>30</sup> It is increasingly becoming accepted that the imposition of solitary confinement “of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment.”<sup>31</sup> This is because research shows that solitary confinement can cause “a ‘severe exacerbation of a previously existing mental condition or the appearance of a mental illness where none had been observed before’”.<sup>32</sup>
39. The United Nations Special Rapporteur on torture has noted that “the longer the duration of solitary confinement or the greater the uncertainty regarding the length of time, the greater the risk of serious and irreparable harm to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.”<sup>33</sup> The United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment has confirmed this, and recommended that solitary confinement not be used on people with mental disability.<sup>34</sup>
40. The World Medical Association agrees, and has recommended that the use of solitary confinement be prohibited in the case of prisoners with physical disabilities or other medical conditions where their conditions would be exacerbated by such measures.<sup>35</sup>
41. The Convention on the Rights of Persons with Disabilities states that governments must ensure people with disability who are deprived of their liberty in prison are given equal and effective legal protection against discrimination and that all appropriate steps are taken to ensure that reasonable accommodations are provided.<sup>36</sup> The Committee which monitors implementation of this treaty has explained that “persons with disabilities who are sentenced

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<sup>29</sup> Ibid.

<sup>30</sup> *Mandela Rules* (n 5) rule 45.

<sup>31</sup> Juan E. Méndez, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/66/26 (5 August 2011).

<sup>32</sup> Ibid, 17-18 (references omitted).

<sup>33</sup> Ibid.

<sup>34</sup> Ibid, 17 [58].

<sup>35</sup> The World Medical Association, *Statement on Solitary Confinement*, adopted by the 65 WMA General Assembly, Durban, South Africa, October 2014 and revised by the 70 WMA General Assembly, Tbilisi, Georgia, October 2019.

<sup>36</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 14(2).

- to imprisonment for committing a crime should be entitled to reasonable accommodation in order not to aggravate incarceration conditions based on disability."<sup>37</sup>
42. This is not happening. Psychological treatment is extremely difficult to access in prison.<sup>38</sup> There is also a lack of appropriate mental health support within the prison environment more generally, as well as issues associated with staffing numbers, training and capability to manage the complex needs and behaviours of people in prison.<sup>39</sup>
43. Lack of treatment options leaves people with psychosocial disability at increased risk of internal prison discipline and management processes.<sup>40</sup> As a result, people with disability are being placed in more restrictive settings or being subjected to highly restrictive management conditions due to their unmet needs and challenging behaviour, including solitary confinement.<sup>41</sup> These issues are especially acute for those with coexisting mental health issues and other issues, including acquired brain injuries, autism and intellectual disability.<sup>42</sup>
44. In short, this means that people with disability are increasingly being detained in solitary confinement as a substitute for proper medical care and appropriate accommodations. Then, when in solitary confinement, people are not able to access programs or mental health services and the administration's response largely consists of medication being distributed through the slot in the cell door.
45. The stress of a closed environment, absence of meaningful social contact and lack of activity can exacerbate mental health conditions and have long-term adverse effects on the mental well-being of people with psychosocial or cognitive disabilities. In most cases documented by Human Rights Watch, people with disability said their psychological condition deteriorated after spending time in solitary confinement.<sup>43</sup>
46. Solitary confinement is a fundamentally cruel practice that causes irreparable harm to the people who are subjected to it. The Royal Commission should find that the use of solitary confinement on people with disability can constitute abuse in the form of cruel, inhuman and degrading treatment and may amount to torture.

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<sup>37</sup> Office of the High Commissioner for Human Rights, *Statement on article 14 of the Convention on the Rights of Persons with Disabilities*, September 2014.

<sup>38</sup> Mental Health Legal Centre, Submission No 0002.0032.0107\_0014 to the Victorian Government, *Royal Commission into Victoria's Mental Health System*, 5 July 2019, 13.

<sup>39</sup> Victoria Legal Aid, Submission No 0002.0030.0217 to the Victorian Government, *Royal Commission into Victoria's Mental Health System*, July 2019, 41.

<sup>40</sup> Fitzroy Legal Service, Submission No 0002.0032.0021 to the Victorian Government, *Royal Commission into Victoria's Mental Health System*, 5 July 2019.

<sup>41</sup> Victoria Legal Aid (n 39) 41.

<sup>42</sup> *Ibid.*

<sup>43</sup> Human Rights Watch (n 28).

#### 4.1 Women with disability

47. Women with disability are often at greater risk of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.<sup>44</sup>
48. Women entering prison are more likely to report a history of mental health conditions (62%) than men entering prison (47%). In addition, between 70 per cent and 90 per cent of women in prison have been physically, sexually or emotionally abused as children or adults.<sup>45</sup>
49. Criminalised women are also often highly marginalised due to their experience of intersectional disadvantage, with many women in prison experiencing disability, poverty, homelessness, family violence and racism.<sup>46</sup>
50. Trauma and mental health conditions experienced by women can be exacerbated by being locked in solitary confinement. This is especially the case in circumstances where male officers might be undertaking tasks, such as inspecting women's cells at night and observing (often naked) women in isolation cells.<sup>47</sup>
51. Women with disability are often overrepresented in solitary confinement and discriminated against by being viewed as a management issue. As explained by a nurse at a women's prison:

Women with disabilities are overrepresented in punishment [detention] units. Some of the girls with mental health problems get sent "down the back" [punishment units] because they're seen as a management issue.<sup>48</sup>
52. As described by Sisters Inside:

Solitary confinement is both a status and a place; this means a woman may be placed in conditions of solitary confinement in her cell (rather than in a special unit); this is common in situations where Detention Units are full.<sup>49</sup>
53. Sisters Inside also report that the overlapping use of solitary confinement for discipline and mental health management is a significant issue impacting women. In addition to its use as explicit punishment (for example, for actual or alleged disciplinary breaches), Sisters Inside understand that solitary confinement is routinely used to manage women in prison who are unwell or otherwise deemed uncontrollable or difficult by corrective services officers.<sup>50</sup>

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<sup>44</sup> *Convention on the Rights of Persons with Disabilities* (n 35) preamble.

<sup>45</sup> Hayley Gleeson with Julia Baird, 'Why are our prisons full of domestic violence victims?', *ABC News* (online) 18 December 2019 <[www.abc.net.au/news/2018-12-20/womens-prisons-full-of-domestic-violence-victims/10599232](http://www.abc.net.au/news/2018-12-20/womens-prisons-full-of-domestic-violence-victims/10599232)>

<sup>46</sup> Sisters Inside, Submission No 79 to the Law Council of Australia, *The Justice Project*, 30 September 2017, 4.

<sup>47</sup> Sisters Inside, Submission No 45 to the Queensland Productivity Commission, *Inquiry into Imprisonment & Recidivism*, June 2019, 8.

<sup>48</sup> Human Rights Watch (n 28).

<sup>49</sup> Sisters Inside (n 47) 8.

<sup>50</sup> Sisters Inside, Submission to Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices) Project*, November 2018, 6.

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54. The Victorian Ombudsman conducted an investigation into the placement of a woman in prison whose disability made her unfit to stand trial – Rebecca (a pseudonym) – where she was locked in a cell for 22-23 hours a day for more than 18 months. The Victorian Ombudsman concluded that these arrangements were not compatible with Rebecca’s right to humane treatment when deprived of liberty, the prohibition on cruel, inhuman and degrading treatment or Rebecca’s right to enjoy her human rights without discrimination under the Charter.<sup>51</sup> The Victorian Ombudsman also observed that Rebecca’s case was not isolated.<sup>52</sup>
55. The United Nations Rules for the Treatment of Women Prisoners (**Bangkok Rules**) state that solitary confinement is not an appropriate punishment other than in the most exceptional circumstances and that, whenever possible, it should be avoided and steps taken to abolish it.<sup>53</sup> The Bangkok Rules explicitly provide that the use of solitary confinement on pregnant women and women with children should be avoided.<sup>54</sup>
56. Despite this, there continues to be a reliance on solitary confinement as a tool to ‘manage’ women with disability in prison in line with the ongoing failure by governments and prison administrators to provide appropriate facilities and services for women with complex needs.
57. The Royal Commission should recommend that State and Territory laws be amended to strictly prohibit the use of solitary confinement. When defining the exceptional circumstances in which a person may be separated, appropriate safeguards must be put in place and should include a requirement that the individual circumstances of the person be taken into account, including consideration of their disability, gender, race, age, cultural or sexual identity.

## 4.2 Children and young people with disability

58. Solitary confinement of children – regardless of whether or not they live with disability – should be prohibited because of the risk posed to the emotional, psychological and physical health and wellbeing of children,<sup>55</sup> with proven negative health effects including insomnia, confusion, compounded trauma, hallucinations and psychosis.<sup>56</sup>
59. The United Nations Convention on the Rights of the Child states that no child or young person, no matter their circumstances, should be subjected to torture or cruel, inhuman or degrading treatment or punishment. CAT, the Subcommittee on Prevention of Torture, the Committee on the Rights of the Child and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment confirm that the imposition of solitary confinement, of any

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<sup>51</sup> Victorian Ombudsman (n 11) 43.

<sup>52</sup> *Ibid*, 65.

<sup>53</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*Bangkok Rules*) UN Doc A/C 3/65/L. 5, rule 22.

<sup>54</sup> *Ibid*.

<sup>55</sup> Committee on the Rights of the Child, *General comment no. 10*, UN Doc CRC/C/GC/10 (25 April 2007).

<sup>56</sup> ‘The Istanbul Statement on the use and effects of solitary confinement’ (9 December 2007) *International Psychological Trauma Symposium, Istanbul*.

duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture.<sup>57</sup> The Rules for the Protection of Juveniles Deprived of their Liberty (**Havana Rules**) also ‘strictly’ prohibit solitary confinement and ‘any other punishment that may compromise the physical or mental health’ of a child or young person.<sup>58</sup>

60. The psychological harm caused by solitary confinement can be ‘more pronounced’ in children and young people, with many experts on child and adolescent psychology contending that the practice can cause or exacerbate mental disabilities or other serious mental health problems.<sup>59</sup>
61. Children are also particularly vulnerable because they are undergoing crucial stages of development – socially, psychologically and neurologically – and these developmental processes can be interrupted or damaged as a result of isolation.<sup>60</sup>
62. There are also high rates of children and young people with disability being trapped in the legal system. One example of this is the prevalence of children with fetal alcohol spectrum disorder (**FASD**) in prison, which can result in impairment in executive function, memory, language, learning and attention in young people. A recent Telethon Kids Institute study of young people in Western Australian prisons found that 36% met the criteria for FASD and 89% had at least one form of severe neurodevelopmental impairment.<sup>61</sup>
63. The Victorian Children’s Commissioner’s 2017 report, *The Same Four Walls: inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, found that children in Victoria’s youth justice centres are subjected to unacceptable levels of isolation. No matter what the purpose or intention behind the isolation, the Victorian Children’s Commissioner said that “the result was usually the same: children and young people enclosed alone between four walls with limited access to fresh air, human interaction, stimulation, psychological support and, in some circumstances, basic sanitation”.<sup>62</sup>
64. In response to the Victorian Government’s failure to respond to *The Same Four Walls* report, and recognising the significant harm caused by the practice of solitary confinement on children, the Victorian Ombudsman recently conducted an investigation and recommended that the Victorian Government establish a legislative prohibition on ‘solitary confinement’.<sup>63</sup>

<sup>57</sup> Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), 9. See also Méndez (n 31) [77] and [86]; Juan E. Méndez, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/68/295 (9 August 2013) [61]; Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/22/53/Add.1 (1 February 2013), [73]; Committee on the Rights of the Child (n 55) 89.

<sup>58</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty (*Havana Rules*), UN Doc A/RES/45/113, [67].

<sup>59</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report*, (November 2017) 286.

<sup>60</sup> Australian Children’s Commissioners and Guardians, *Statement on conditions and treatment in youth justice detention* (November 2017), 20.

<sup>61</sup> Carol Bower, Rochelle Watkins, Raewyn Mutch, et al, ‘Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia’ (2018) 8(2) BMJ.

<sup>62</sup> Commission for Children and Young People, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, *Report* (2017).

<sup>63</sup> Victorian Ombudsman, ‘OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people’ (Investigation report, 5 September 2019) 254.

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65. This recommendation was made following a number of findings made by the Victorian Ombudsman, which included instances of young people in Port Phillip prison being subject to prolonged solitary confinement contrary to the Mandela Rules and potentially incompatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
66. In light of the harm caused by solitary confinement, the Australian Children’s Commissioners and Guardians have stated that “solitary confinement constitutes cruel, inhuman or degrading treatment” and that “children should never be subjected to solitary confinement”.<sup>64</sup>
67. The impacts of solitary confinement are felt more acutely by children with disability, which is a significant number of children trapped in the criminal legal system. Many children enter detention with serious cognitive disabilities, mental illness and addiction issues.<sup>65</sup> The symptoms of these conditions are only exacerbated by being placed in solitary confinement.
68. This is particularly the case where children are at risk of suicide or self-harm. Subjecting a child to solitary confinement in those circumstances is likely to increase their distress and suicidal ideation and rumination.<sup>66</sup>
69. Victoria Legal Aid recently published a report highlighting how solitary confinement is harming children, with a particular focus on how solitary confinement is used to “manage” people living with mental health conditions.<sup>67</sup> A range of issues and specific factors within the prison environment that have the potential to cause significant harm to children and young people in custody were noted, including:
- (a) the frequency of lockdowns, including rolling lockdowns, impacting the ability of young people to attend programs and education;
  - (b) issues associated with staff training, retention and wellbeing and the contribution of these factors to the frequency of lockdowns and use of solitary confinement to manage complex behaviours;
  - (c) the use of solitary confinement for young people with mental illness, disability or other complex needs;
  - (d) the use of solitary confinement for young people transferred to adult facilities as children;
  - (e) delays in assessments when a person is received into prison, contributing to issues associated with behaviour; and

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<sup>64</sup> Australian Children’s Commissioners and Guardians, ‘Human rights standards in youth detention facilities in Australia: the use of restraints, disciplinary regimes and other specified practices’ *Report* (April 2016) 63.

<sup>65</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report* (31 March 2017) 38.

<sup>66</sup> Elizabeth Grant, Rohan Lulham and Bronwyn Naylor, ‘The Use of Segregation for Children in Australian Youth Detention Systems: An Argument for Prohibition’ (2017) 3 *Advancing Corrections* 117, 125.

<sup>67</sup> Victoria Legal Aid, Submission to the Victorian Ombudsman, *Investigation into the use of solitary confinement and young people in Victoria*, May 2019.

- (f) access to appropriate care and treatment for any underlying concerns, and their ability to become eligible for parole.<sup>68</sup>
70. The use of lock-downs to manage children and young people is getting worse. The Victorian Children's Commissioner's Annual Report for 2019 highlighted that lock-downs due to safety and security reasons (largely because of insufficient staff) tripled in 2018–2019, compared to 2017–2018. At Parkville, each child and young person was detained at a rate of 317 lock-downs in 2018–2019, compared to a rate of 92 lock-downs per year the previous year.<sup>69</sup>
71. This is all compounded by the fact that children and young people get limited access to medical care while detained in solitary confinement. While inconsistent and inadequate access to health services and medications is experienced across all prisons, it is experienced more acutely by young people and can have significant consequences for their long-term wellbeing. In 2019, the Victorian Ombudsman surveyed young people in prison and found that:
- (a) Nineteen per cent reported that they were 'never' able to see a psychologist or psychiatric nurse during separation; twenty-nine per cent reported that they were 'sometimes' able to speak with a psychologist; and thirty-one per cent reported that they were 'sometimes' able to speak to a psychiatric nurse during separation.<sup>70</sup>
- (b) Twenty-seven per cent reported that they were 'never' able to speak with a doctor during separation; and twenty-three per cent reported that they were only 'sometimes' able to speak to a doctor.<sup>71</sup>
72. Subjecting children and young people to solitary confinement is also counter-productive. In a submission to the Victorian Inquiry into youth justice centres, the Royal Australian and New Zealand College of Psychiatry said:
- Punitive approaches to the management of youth justice services, however, are unlikely to resolve the behavioural issues of detainees; instead, they serve to reinforce the sense of mistrust experienced by many children and young people in custody. Without a trauma informed approach to the management of youth justice centre, at-risk children and young people will continue to face significant obstacles in their paths to recovery and rehabilitation, and staff in youth detention centre will continue to face significant difficulties in managing children and young people in their care.<sup>72</sup>
73. Despite this, the use of solitary confinement on children still happens. In VALS' submission to the Royal Commission into Victoria's Mental Health System, they reiterated that Aboriginal young people with poor mental health are still being subjected to harmful practices that undermine their social and emotional wellbeing and compound trauma, like solitary

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<sup>68</sup> Ibid.

<sup>69</sup> Commission for Children and Young People, *Annual report 2018–19*, Commission for Children and Young People.

<sup>70</sup> Ibid, 128.

<sup>71</sup> Ibid.

<sup>72</sup> Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into youth justice centres in Victoria*, (March 2018) 93.

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confinement. VALS provides an example of a 16 year old girl who was placed in a room by herself for the entirety of her period on remand due to concerns for her safety. This included 21 days, followed by 52 days, followed by 21 days. This occurred in 2019.<sup>73</sup>

74. This is not just the case in Victoria. In the Northern Territory, the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory found that isolation has continued to be used inappropriately, punitively and inconsistently with the law, which has caused suffering to many children and young people and, very likely in some cases, lasting psychological damage.<sup>74</sup> The Royal Commission was confident that the misuse of isolation was systemic, and that the number of children and young people isolated indicated that it was commonplace practice, not the emergency measure it should be.
75. In New South Wales, the Inspector of Custodial Service has raised concerns about the use of solitary confinement, where children and young people have been held in their rooms for a period as punishment for misbehaviour.<sup>75</sup>
76. In South Australia, the Ombudsman recently called for the South Australian Government to ban extended periods in isolation beyond 22 hours in any circumstances and to consider removing the provisions in their youth justice legislation that authorises segregation and isolation.<sup>76</sup> This followed an inquiry by the Ombudsman's into complaints made by two teenage Aboriginal boys at the Adelaide Youth Training Centre. The Ombudsman found that the two boys were locked in small rooms for extended periods of time without sufficient access to other young people, education, vocational training, exercise, stimulation and their families. In doing so, the Government failed to provide the boys with humane care, which in turn led them, foreseeably, displaying poor behaviour and being propelled into the adult prison system.
77. Challenging or difficult behaviour should not result in children being detained in solitary confinement to try and change their behaviour. The response should be trauma informed and include therapeutic interventions and access to appropriate medical assistance.
78. In light of this, the Royal Commission should recommend that State and Territory laws be amended to strictly prohibit the use of solitary confinement on children and clearly define and limit the circumstances in which children may be temporarily separated from others.

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<sup>73</sup> Victorian Aboriginal Legal Service, Submission No 002.0030.0226 to the Victorian Government, *Royal Commission into Victoria's Mental Health System*, 5 July 2019, 59.

<sup>74</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (November 2017).

<sup>75</sup> NSW Inspector of Custodial Services, *Use of Force, Separation, Segregation and Confinement in NSW Juvenile Justice Centres*, Report (December 2018) 117.

<sup>76</sup> Ombudsman SA, 'Investigation into the treatment of young people in the Adelaide Youth Training Centre' (Investigation Report, November 2019) 144.

### 4.3 Aboriginal and Torres Strait Islander people with disability

79. Available information indicates that Aboriginal and Torres Strait Islander people with disability are about 14 times more likely to be imprisoned than the general population.<sup>77</sup> Aboriginal and Torres Strait Islander people with disability face particular disadvantages in the criminal legal system and often experience discrimination at the intersection of racism and ableism.<sup>78</sup>

80. The Royal Commission into Aboriginal Deaths in Custody found that solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander people in prison. The Royal Commission noted the ‘extreme anxiety suffered by Aboriginal prisoners committed to solitary confinement’ and said that “it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention.”<sup>79</sup>

#### **Aboriginal and Torres Strait islander women with disability**

81. Aboriginal and Torres Strait Islander women in prison are the fastest growing prison population, and 21 times more likely to be incarcerated than non-Indigenous women.

82. Aboriginal and Torres Strait Islander women with disabilities are also overrepresented, with 86 percent of Aboriginal and Torres Strait Islander women in prison in Queensland diagnosed with psychosocial disability.<sup>80</sup> In Victoria, 92 percent of Koori women in prison have a lifetime diagnosis of mental illness and nearly half were suffering from post-traumatic stress disorder.<sup>81</sup>

83. Djirra – the Aboriginal Family Violence Prevention and Legal Service in Victoria – has received anecdotal information that some Aboriginal women have been placed in isolation because they are at risk of self-harm or suicide, or in psychosis, or even just for periods of high emotional expression or distress (for example, in relation to a court date or a family or interpersonal incident). Solitary confinement should never be used like this to ‘manage’ women experiencing mental health issues.<sup>82</sup>

84. One Aboriginal woman with a psychosocial disability told Human Rights Watch:

It’s hard, you have to wait two to three weeks to see a doctor. In the meantime you suffer. You put on weight from the meds and are in turmoil. You end up ‘down the back’ [to the punitive

<sup>77</sup> Australian Civil Society CRPD Shadow Report Working Group, ‘Disability Rights Now 2019’, submission to the UN CRPD Committee, *List of issues prior to the submission of the combined second and third periodic reports of Australia*, 26 July 2019, 24.

<sup>78</sup> Eileen Baldry et al, “It’s just a big vicious cycle that swallows them up”: Indigenous people with mental and cognitive disabilities in the criminal justice system’ (2016) 8(22) *Indigenous Law Bulletin* 10, 11.

<sup>79</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Final report* (1991).

<sup>80</sup> Edward Heffernan, Kimina Andersen, Abhilash Dev and Stuart Kinner, ‘Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons,’ (2012) 197(1) *Medical Journal of Australia* 37-41.

<sup>81</sup> James Ogloff et al, ‘Koori Prisoner Mental Health and Cognitive Function Study’ (February 2013) *Centre for Forensic Behavioural Science, Monash University & Victorian Institute of Forensic Mental Health & Victorian Aboriginal Community Controlled Health Organisation*, 13. Available at <<https://www.corrections.vic.gov.au/publications-manuals-and-statistics/koori-prisoner-mental-health-and-cognitive-function-study>

<sup>82</sup> Djirra, Submission No 0002.0029.0288 to the Victorian Government, *Royal Commission into Victoria’s Mental Health System*, July 2019, 30.

segregation unit] because of your mental health because you can't see a doctor. It's a cry for help but you get punished and put down the back. It's too long, you deteriorate.<sup>83</sup>

85. The Royal Commission should recommend that State and Territory laws be amended to strictly prohibit the use of solitary confinement. When defining the exceptional circumstances in which a person may be separated, appropriate safeguards must be put in place and should include a requirement that the individual circumstances of the person be taken into account, including consideration of their age, gender and Aboriginal and Torres Strait Islander status.

**Aboriginal and Torres Strait Islander children with disability**

86. The psychological effects of solitary confinement can be amplified for Aboriginal and Torres Strait Islander children, particularly from remote communities, due to specific cultural needs.
87. Aboriginal and Torres Strait Islander children interviewed by the Koori Youth Council as part of the *Ngaga-dji* project reported incidents where they had been isolated in "the slot". Children reported being left in the slot for hours and days and being fed through a hole in the door. Being held in the slot was described as being the worst experience of their life.<sup>84</sup>
88. This experience was confirmed in the recent Victorian Ombudsman's thematic investigation of practices related to solitary confinement of children and young people, Aboriginal and Torres Strait Islander young people were overrepresented in isolation data.<sup>85</sup>
89. In its submission to the Commission for Children and Young People's previous inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system, the Victorian Aboriginal Legal Service (**VALS**) said that isolation, separation and lockdowns re-traumatise Koori children and young people.<sup>86</sup> Cultural support workers told that inquiry that Koori children and young people find isolation particularly hard:

They are removed from country, removed from family – their families struggle to get enough money to come to visit. Community is everything for them...family – it's everything.<sup>87</sup>

90. This reflects the findings of the Royal Commission into Aboriginal Deaths in Custody:

The effects of institutionalisation on Aboriginal children is particularly destructive because Aboriginal culture and 'institutional' culture are virtually direct opposites, the former being permissive, egalitarian, strongly interactive, and kin based while the latter is authoritarian, punitive, hierarchical, individualistic and impersonal.<sup>88</sup>

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<sup>83</sup> Human Rights Watch (n 28).

<sup>84</sup> Koori Youth Council, *Ngaga-dji (hear me): young voices creating change for justice* (2018) 33.

<sup>85</sup> Victorian Ombudsman (n 63) 191.

<sup>86</sup> Commission for Children and Young People (n 62) 57.

<sup>87</sup> *Ibid.*

<sup>88</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Final report* (1991).

91. In light of this, the Commission for Children and Young People said that it is essential that “periods of isolation of Koori children and young people are managed sensitively and with due recognition of the accrued harms they, and their families, have suffered.”<sup>89</sup>
92. The Royal Commission should recommend that State and Territory laws be amended to strictly prohibit the use of solitary confinement on children in all circumstances.

## 5. How do we stop solitary confinement?

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### 5.1 Findings

93. The Royal Commission should find that the use of solitary confinement on people with disability can constitute abuse in the form of cruel, inhuman and degrading treatment. The Royal Commission should also find that subjecting people with disability to solitary confinement in prison can even amount to torture.

### 5.2 Recommendations

94. In response to COVID-19, the Royal Commission should recommend State and Territory governments look at granting people with disability (who do not pose a specific and immediate risk to the physical safety of another person) leave from prison, on health-related grounds, for the duration of the COVID-19 pandemic.
95. In order to stop the practice of solitary confinement on people with disability, the Royal Commission should recommend that State and Territory laws, policies and guidelines be amended to strictly prohibit the use of solitary confinement in Australian prisons.
96. In particular, The Royal Commission should recommend that State and Territory youth justice laws, policies and guidelines be amended to strictly prohibit the use of solitary confinement on children in Australian prisons.
97. The Royal Commission should recommend that State and Territory laws, policies and guidelines use consistent terminology to clearly define the exceptional circumstances in which a person may be separated from others in prison. Appropriate safeguards should include:
- (a) Ensuring that separation is a practice of last resort when all other measures to address risk or behaviour have been exhausted;
  - (b) Requiring that the individual circumstances of the person be taken into account and an assessment be conducted of the likely impact a period of separation will have on a

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<sup>89</sup> Commission for Children and Young People (n 62) 57.

person's physical and mental health (including consideration of their disability, age, gender and Aboriginal and Torres Strait Islander status);

- (c) Setting non-extendable timeframes for how long a person can be separated and regular review to ensure it does not extend longer than required;
- (d) Requiring that a separated person still be provided with access to family, lawyers, medical professionals, appropriate peers, access to education, access to outdoor exercise or recreation at regular time intervals and access to appropriate recreational material including reading material;
- (e) Requiring that a separated person be seen by a health professional prior to their separation, or within a reasonable timeframe after separation; and
- (f) Requiring that precise and transparent records (including reason for use, length of use as well as the age, Aboriginal and Torres Strait Islander status and gender of the person detained) and data be maintained and regularly published.

98. The Royal Commission should recommend that State and Territory Governments provide adequate medical and mental health care to people in prisons. In particular, State and Territory Governments should require that prisons systematically screen people for all types of disability upon entry and provide access to adequate medical and mental health services.

### 5.3 Ongoing oversight and accountability

99. On 15 December 2017, Australia ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**). The Australian Government has three years to implement OPCAT. OPCAT assists Australia in meeting its existing international human rights obligations. Under OPCAT, an independent National Preventative Mechanism (**NPM**) or multiple National Preventative Mechanisms (**NPMs**) must be established to conduct inspections of all places of detention.

100. Currently, there is a lack of commitment to implementing a NPM in Australia and concerns that this will result in a NPM lacking the essential powers, resources, independence, and uniformity necessary to fulfil its OPCAT obligations. There are particular concerns regarding a lack of legislative basis, lack of funding and resources across jurisdictions and inconsistencies with existing inspection bodies.<sup>90</sup>

101. The Royal Commission should therefore recommend that Federal, State and Territory Governments prioritise developing and adequately funding a NPM and establish an advisory relationship with civil society, including for the designation and implementation stages.

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<sup>90</sup> Australia OPCAT Network, 'The Implementation of OPCAT in Australia', Submission to the Sub-Committee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the United Nations working Group on Arbitrary Detention (January 2020).