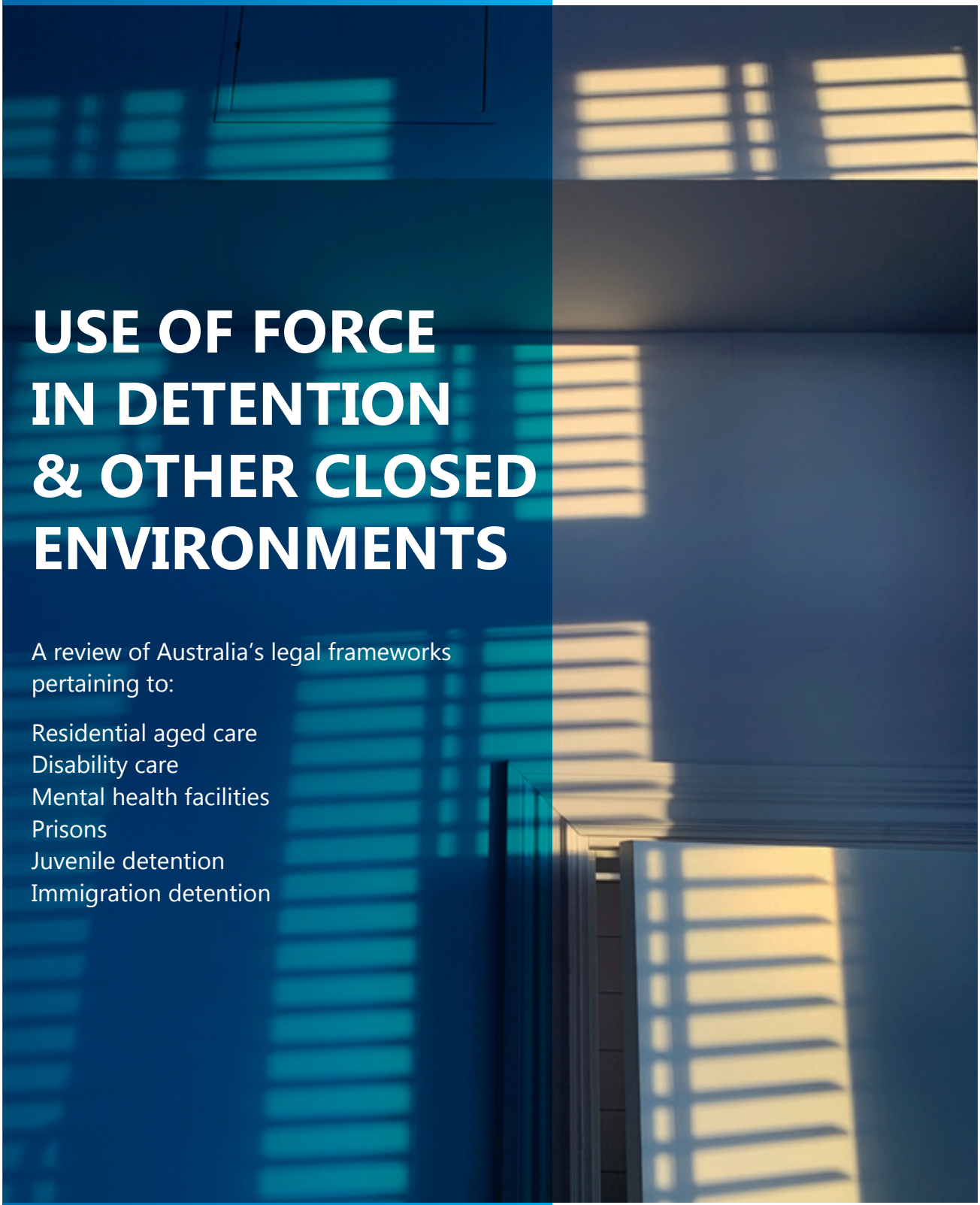
MONASH University

CASTAN CENTRE FOR HUMAN RIGHTS LAW



USE OF FORCE IN DETENTION & OTHER CLOSED ENVIRONMENTS

A review of Australia's legal frameworks pertaining to:

Residential aged care
Disability care
Mental health facilities
Prisons
Juvenile detention
Immigration detention

Warning: Aboriginal and Torres Strait Islander readers are advised that this report contains names of deceased persons.

CONTENTS

ACKNOWLEDGEMENTS

This report is the product of the contributions of many colleagues and supporters of the Castan Centre for Human Rights Law.

The idea behind a project on the use of force in closed environments arose from discussions between Marius Smith (now VACRO), Dr Stephen Gray, Professor Sarah Joseph (now Griffith University) and Professor Bronwyn Naylor (now RMIT). Marius Smith, Adam Fletcher (now RMIT) and Eleanor Jenkin (now Victoria Legal Aid) managed the implementation of the project that led to the publication of this report.

Castan Centre Policy Manager, Karin Frodé, was the main author of the report with support and input from Research and Policy Assistant Andrea Olivares Jones. Legal research and preparation of tables of legislation and background information were provided by Danita Moshinsky, Timothy Peyton and Sally Shera-Jones.

Editorial input and support were provided by the Director of the Castan Centre Professor the Hon. Kevin H Bell AM QC, Associate Professor Julie Debeljak, Dr Stephen Gray, Professor Sarah Joseph, Professor Colin Campbell, Professor Bronwyn Naylor, Professor Elizabeth Grant (RMIT), Christopher Charles and Josef Szwarc.

Janice Hugo, Alan Shanks, Elly Mitchell and Heather Trevisan provided support with the launch of the report. Staff at the Monash Law Library assisted with research software and tools.

Design and layout: JMarketing

Cover: Photo by Trude Jonsson Stangel on Unsplash

ACRONYMS AND ABBREVIATIONS

ACQSC	Aged Care Quality and Safety Commission
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
Beijing Rules	UN Standard Minimum Rules for the Administration of Juvenile Justice
CAT	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
Havana Rules	UN Rules for the Protection of Juveniles Deprived of their Liberty
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
Mandela Rules	UN Revised Standard Minimum Rules for the Treatment of Prisoners
NDIS	National Disability Insurance Scheme
NPM	National Preventive Mechanism
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
PJCHR	Parliamentary Joint Committee on Human Rights
SPT	UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UDHR	Universal Declaration of Human Rights
UNICEF	UN Children's Fund
UN Body of Principles	UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

GLOSSARY

Closed environment	'[A]ny place where persons are or may be deprived of their liberty by means of placement in a public or private setting in which a person is not permitted to leave at will by order of any judicial, administrative or other order'[1]
Concluding observations	A set of concerns and recommendations by a UN treaty body to a State party following a review of its compliance with the human rights instrument which the treaty body is monitoring. See 'Treaty', 'Treaty body' and 'State party' below.
Declaration	Non-binding instrument that sets out standards and principles agreed to by signatories. State practice and intention to be bound by the content of such principles may turn principles into international law.
Deprivation of liberty	'[A]ny form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other Authority'.[2]
Dualist legal system	International obligations are not applicable in the domestic legal system until it has been incorporated into national law, for example through the enactment of national legislation.
General Comment/ Recommendation	An interpretation by a UN treaty body of provision(s) of a UN human rights treaty or a relevant thematic issue to clarify and elaborate upon treaty obligations. See 'Treaty' and Treaty body' below.
Individual complaint/ communication	A mechanism to bring an individual complaint to a UN treaty body for an alleged violation of provision(s) of a UN human rights treaty. See 'Treaty' and 'Treaty body' below.
Juvenile	A person above the age of minimum criminal responsibility and below the age of 18.
Places of detention	'[A]ny place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'.[3]
Reservation	An exclusion by a State party to the legally binding nature of certain provision(s) of a treaty. See 'Treaty' and 'State party' below.

1 B Naylor, J Debeljak, A Mackay: Strategic Framework for Implementing Human Rights in Closed Environments (2015) 218-219.

2 Optional Protocol to the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (OPCAT) Article 4(2).

3 Ibid Article 4(1).

Restraint	Different types of measures and/or instruments to restrict a person's movement, for example through the administration of drugs (chemical restraint) or physical force (physical restraint).
Restrictive practice	Umbrella term sometimes used to describe different forms of restraints.
State party	A State which has ratified/accepted the legal obligations of a treaty See 'Treaty' below.
Substituted decision-making	Decisions are taken by a 'substitute decision-maker' (e.g. a guardian) who base the decision on what they believe to be in the 'best interest' of the person concerned. A substitute decision-maker may be appointed other than by the person concerned against their will.
Supported decision-making	Decisions by the person concerned are facilitated through different support options that give primacy to the concerned person's 'will and preferences'. A support person must be formally chosen by the person concerned.
Treaty	A binding agreement between States parties. Also referred to as 'convention' or 'covenant'.
Treaty body	A committee of independent experts with the mandate to monitor the implementation of a particular human rights treaty by reviewing State compliance, issuing general comments/recommendations, and in some instances, receiving individual communications/complaints.

CHAPTER 1.

INTRODUCTION

1.1 Background to this report

As Nelson Mandela famously observed, '[i]t is said that no one truly knows a nation until one has been inside its jails [⋯]'.[4] The same can be said in respect of other closed environments. In Australia, revelations of excessive force and restraints in places such as juvenile detention centres, residential aged care and immigration detention centres have resulted in growing fears over the treatment of persons behind closed doors.

Concerns for the wellbeing, dignity and rights of persons in closed environments motivated the Castan Centre to review Australia's legal frameworks concerning the use of force and restraint in:

- Residential aged care;
- Disability care;
- Mental health facilities;
- Prisons;
- Juvenile detention; and
- Immigration detention.

Persons in these environments are often vulnerable and subject to a power imbalance in comparison with the officials and providers in charge of the relevant facilities.[5] The lack of transparency that surrounds closed environments also means that human rights violations, or risks thereof, may go unnoticed.[6]

The COVID-19 pandemic has shown with resounding clarity the importance of ensuring the wellbeing, dignity and rights of persons in closed environments. It has placed vulnerable persons, many of whom reside in closed environments, at heightened risk of devastating consequences, including death.

'We are shocked by the video footage that has emerged from Don Dale youth detention centre in the Northern Territory in Australia, showing children as young as 10, many of whom are Aboriginal children, being held in inhumane conditions and treated cruelly.'

Spokesperson Rupert Colville for the UN High Commissioner for Human Rights, 29 July 2016.

'The neglect that we have found in this Royal Commission, to date, is far from the best that can be done. Rather, it is a sad and shocking system that diminishes Australia as a nation.'

Media Release by the Royal Commission into Aged Care Quality and Safety, 31 October 2019.

'In relation to nine of the complaints, I found that there was a use of force that was contrary to the requirements of article 10 of the International Covenant on Civil and Political Rights (ICCPR).'

Australian Human Rights Commissioner Emeritus Professor Rosalind Croucher AM to the Federal Government after investigating 14 complaints of excessive force in immigration detention, May 2019.

4 United Nations: 'Nelson Mandela International Day 18 July'.

5 B Naylor, J Debeljak, A Mackay: Strategic Framework for Implementing Human Rights in Closed Environments (2015).

6 Ibid.

The aged care sector has been particularly hard hit by COVID-19 in Australia, resulting in thousands of active cases and hundreds of deaths in aged care homes, the majority of which (as of August 2020) are in Victoria.[7]

This report (up-to-date as of August 2020) is the culmination of the Castan Centre's review of the legal frameworks governing the use of force and restraint in closed environments and contains our recommendations for critical reforms necessary to bring Australia in line with its obligations under international human rights law. We also interpret our findings of these existing frameworks in light of the added concerns arising from the pandemic. While each sector-specific chapter contains its own conclusion and recommendations, we underline both the similarities and differences in regulation throughout the report. By reviewing the legal frameworks across the six sectors, this report is the start of a conversation on the need for rights-based and comprehensive protection for the wellbeing, dignity and rights of persons in all closed environments.

1.2 Significant developments in regulation

In recent years, Australia has undergone several significant changes relevant to the regulation of use of force and restraint.

2017

Australia ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). OPCAT establishes a system of international and domestic monitoring of places of detention (discussed further in chapter 2):

- At the domestic level, OPCAT requires Australia to set up a National Preventive Mechanism (NPM) at the federal level and in each state and territory to monitor closed environments, which must be fully implemented by 2022.
- At the international level, OPCAT allows the UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) to visit Australia's closed environments and recommend ways to protect the rights of persons deprived of liberty. The SPT also supports the establishment of the NPM.

2018

The new National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework began to roll out across Australia. The framework is a transition towards nationally consistent regulation of disability care and services (discussed further in chapter 4).

2019

The Federal Government established the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and the Royal Commission into Aged Care Quality and Safety (discussed further in Chapters 3 and 4).

2021

Australia's human rights record will come under global scrutiny during the third cycle of the Universal Periodic Review at the UN Human Rights Council. In addition, the SPT was set to inspect Australia's places of detention and closed environments (in 2020), however the Subcommittee's mission has been suspended due to the pandemic. Restricted access is one way in which the COVID-19 response has exacerbated existing concerns on the treatment of persons in closed environments, including through the lack of transparency and the subsequent risk that human rights violations will not come to light.

Despite the challenges of the pandemic, this backdrop provides an opportunity for Australia to reflect on past, present and future calls for reform to better protect the wellbeing, dignity and rights of persons in closed environments. This will be essential in order to not only to return to where we were, but also to 'build back better' by ensuring a human rights-based approach to COVID-19 is adopted in all closed environments.

7 Australian Government Department of Health: COVID-19 cases in aged care services – residential care (20 August 2020).

1.3 Methodology

The starting point for this report is the Strategic Framework for Implementing Human Rights in Closed Environments developed by Professor Bronwyn Naylor, Associate Professor Julie Debeljak and Dr Anita Mackay as part of a Castan Centre project funded by the Australian Research Council in 2014. This framework consists of three interlinked and mutually enforcing pillars:

Pillar I. Regulatory Framework	**Pillar II. Preventive Monitoring Mechanisms**	**Pillar III. Organisational Culture Change**
A regulatory framework with comprehensive human rights obligations, adequate remedies and effective enforcement mechanisms is necessary to protect human rights in closed environments. Three elements are crucial: a. International human rights obligations: Many international instruments contain obligations that are relevant to the treatment of persons in detention and other closed environments. b. Comprehensive national human rights legislation: This is necessary to give effect to international obligations in domestic law and ensure access to effective remedies. c. Environment-specific legislation: Human rights obligations must also be protected through sector-specific legislation. This is necessary to ensure that duty-bearers have clarity on what they must do to comply with their duties to respect, protect and fulfil the rights of the persons in a particular environment.	External monitoring of closed environments is necessary to ensure that the regulatory framework under Pillar I is complied with. Since ratifying OPCAT in 2017, Australia has an obligation to ensure effective monitoring of places where persons are deprived of liberty by international and national bodies: a. International: By allowing visits from the SPT. As mentioned above, a visit by the SPT to Australia was scheduled for 2020 but has been postponed. b. National: By establishing and operating a NPM. Australia appointed the Office of the Commonwealth Ombudsman as the NPM Coordinator, making that Office responsible for facilitating and coordinating the work of NPMs across all Australian jurisdictions (see further details in chapter 2).	To effectively implement a regulatory framework, organisations must ensure a human rights culture in the day-to-day delivery of care and services in closed environments. This may include staff training on the human rights obligations under the regulatory framework under Pillar I.

This report focuses particularly on the regulatory framework under Pillar I. **Chapter 2** provides an overview of international human rights and obligations relevant to the treatment of persons in closed environments (Pillar I(a)). This chapter also discusses the failure to incorporate many international obligations into Australian law given the lack of a domestic charter of rights (Pillar I(b)).

Chapters 3 to 8 cover analyse environment-specific legislation against international obligations (Pillar I(c)). A table with an overview of the existing legal frameworks (as of August 2020) against certain indicators and minimum standards is annexed to each of these

chapters. Given the interlinked and mutually enforcing aspects of the three pillars, we also consider the need for effective monitoring in line with OPCAT (Pillar II) and requirements in respect of organisational change (Pillar III) that are important safeguards to uphold the regulatory framework.

1.4 Terminology

While all uses of force have the ability to adversely impact on the wellbeing, dignity and rights of the person subjected to the force in question, the terminology around use of force varies across sectors. When force is used to control a person's movement or behaviour in a closed environment, it is often referred to as a measure or instrument of 'restraint'. Restraint may be applied in a variety of ways. For example, straps may be used to mechanically restrain a person to a chair, and medication may be administered to sedate a person in order to control their behaviour.

In the disability care, mental health care and aged care sectors, 'restrictive practices' is often used as a collective term for different forms of restraint. As the Royal Commission into Aged Care Quality and Safety has noted, the definition of 'restrictive practices' varies both in guidance and legislation, as well as across sectors. This adds a level of complexity to the identification and regulation of the use of force which in turn adds to the inconsistencies in regulation discussed further in chapters 3 to 8.

For the purposes of this report, 'restrictive practices' and 'restraints' are used to describe a collection of different forms of force and restraint used for the purpose of controlling a person's behaviour, including:

Physical restraint	Use of physical force to restrict a person's movement	For example: The use of physical force to restrict a person from leaving a room
Mechanical restraint	Use of mechanical instruments or equipment to restrict a person's movement	For example: The use of spit hoods, straps, handcuffs or belts to hold a person to a chair
Chemical restraint	Use of medication to control a person's behaviour or restrict movement (other than for the purposes of treatment)	For example: The use of psychotropic medication (other than for the purpose of treatment) to prevent a person moving around a facility

There are many other forms of restraint. For example, the 'National Framework for Reducing and Eliminating the Use of Restrictive Practices in Disability Service Sector' recognises that restraint may also include psychosocial restraint through 'power control' strategies.[8] Other examples include neglect by failing to provide basic services and the use of seclusion to control behaviour, for example to stop the spread of COVID-19. While we do not cover these in detail in our report, we recognise that neglect and seclusion may in fact have the same impact on the wellbeing, dignity and rights of a person as other treatment, such as physical and chemical restraint. Our analysis is therefore relevant to more forms of restraint than those specifically presented in this report.

Finally, the focus of this report is on the treatment of persons already deprived of liberty. However, Australia's detention regimes, and associated cross-cutting issues such as the overrepresentation of Indigenous peoples in the criminal justice system and the system of offshore immigration detention, are broader human rights issues that must be kept in mind in respect of any reforms.

8 Department of Social Services: National Framework for Reducing and Eliminating the Use of Restrictive Practices in Disability Service Sector (2014) 5.

CHAPTER 2.

INTERNATIONAL HUMAN RIGHTS LAW

2.1 Background

> 'Respecting fundamental human rights and freedoms, and building them into the fabric of society, makes Australia and the world safer and more secure.'
>
> Media release from the 2019 Human Rights Day Speech delivered by Minister for Foreign Affairs, Senator the Honourable Marise Payne, 10 December 2019.

Australia is a dualist legal system, whereby its international legal obligations operate independently from domestic legal obligations. This means that international legal obligations are only enforceable in Australia if they are incorporated into the domestic legal system through Australian laws and regulations. This is the case, for example, of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Ratification of ICERD in 1975 created international legal obligations, which were incorporated into domestic law through the passing of the Race Discrimination Act 1975 (Cth).

The Australian Capital Territory, Victoria and Queensland have adopted human rights legislation that translate, to a varying degree, international human rights into state and territory law.[9] For example, the Victorian Charter incorporates most of the civil and political rights contained the International Covenant on Civil and Political Rights (ICCPR). In addition to civil and political rights, the Queensland Human Rights Act also contains some economic, social and cultural rights that can be found in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Regrettably, Australia does not have comprehensive human rights legislation at the federal level, and only a limited number of human rights have been incorporated into domestic law, leaving a gap in domestic human rights protection.[10]

Federalism adds another dimension to implementation of human rights obligations in Australia. The Australian Constitution nominates the areas over which the Federal Parliament can make laws. Very few areas of regulation are reserved solely to the Federal Government, and most areas of regulation given to the Federal Government are shared with the states. Areas not listed in the Constitution are reserved for regulation by the states. The Federal Parliament has the power to make laws for territories but has permitted self-governance for the Australian Capital Territory and the Northern Territory. For this reason, the regulation of use of force in different settings may be provided for at the federal level, state level and/or territory level, with no guarantee of consistency between the regulation where more than one jurisdiction is involved. Nevertheless, the nature of the international obligations remains the same and must be given effect in Australia, whether it is by states, territories or the Commonwealth.

9 Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic); and Human Rights Act 2019 (Qld).

10 Contrary to Pillar I(b) of the Strategic Framework, B Naylor, J Debeljak, A Mackay: Strategic Framework for Implementing Human Rights in Closed Environments (2015).

By ratifying international human rights instruments, Australia is committed to respect, protect and fulfil the fundamental rights and reedoms that these instruments contain. This includes taking legislative and other steps necessary to give effect to human rights in Australian law. This chapter considers relevant rights and obligations under international law relevant to the regulation of the use of force in closed environments, as well as specific rules applicable to certain settings and for certain groups.[11] Chapters 3 to 8 go on to consider the application of the international rights in environment-specific domestic legislation.[12]

2.2 Relevant rights and obligations

Australia has ratified a majority of the core UN human rights treaties and their optional protocols, most recently the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in December 2017.[13]

A selection of human rights instruments ratified by Australia

Convention	Ratified
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	30 September 1975
International Covenant on Economic, Social and Cultural Rights (ICESCR)	10 December 1975
International Covenant on Civil and Political Rights (ICCPR)	13 August 1980
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	28 July 1983
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)	8 August 1989
Convention on the Rights of the Child (CRC)	17 December 1990
Convention on the Rights of Persons with Disabilities (CRPD)	17 July 2008
Optional Protocol to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (OPCAT)	21 December 2017

The use of force and restraint in closed environments may conflict with many fundamental rights and prohibitions protected in these instruments. Some of these rights are elaborated upon below.

Right to be free from torture and other cruel, inhuman or degrading treatment or punishment

> 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation' – ICCPR Article 7

The use of force and restraint in closed environments is often assessed against the prohibition on torture and other cruel, inhuman or degrading treatment or punishment (the 'prohibition'). The prohibition is contained in Article 7 of the ICCPR and a number of other

11 Pursuant to Pillar I(a) of the Strategic Framework, B Naylor, J Debeljak, A Mackay: Strategic Framework for Implementing Human Rights in Closed Environments (2015).

12 Ibid, Pillar I(c).

13 Treaties and Optional Protocols that Australia has not ratified include: Convention for the Protection of All Persons from Enforced Disappearance; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

international instruments, including Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) and Convention on the Rights of Persons with Disabilities (CRPD).[14]

In response to the 2014 footage from Don Dale Youth Detention Facility in the Northern Territory, a spokesperson for the UN Office of the High Commissioner for Human Rights noted that the isolation, use of teargas and other abuses against the detained children could amount to a violation of CAT and the Convention on the Rights of the Child (CRC). The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Special Rapporteur on Torture) has noted that the use of prolonged restraints against persons with psychiatric and other conditions may amount to torture and ill-treatment.[15] The Committee on the Rights of Persons with Disabilities (CRPD Committee) has called for the elimination of restrictive practices in the context of the prohibition of torture under Article 15 of the CRPD.[16]

Right to be treated with dignity and humanity

> 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' - ICCPR Article 10(1)

Article 10(1) of the ICCPR protects the right of all persons deprived of liberty to be treated with humanity and dignity.[17] The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment, and imposes a positive obligation on States parties to take steps to prevent torture and any other treatment or punishment that undermines human dignity.[18] Permissible treatment in certain environments, such as prisons, are elaborated in specific rules discussed in section 2.3 below.

Right to equal recognition before the law

> 'Everyone shall have the right to recognition everywhere as a person before the law' – ICCPR Article 16

The right of everyone to equal recognition as a person before the law is protected under Article 16 of the ICCPR and other instruments. This includes Article 12 of the CRPD which requires States parties to recognise that persons with disabilities have legal capacity on an equal basis with others. Use of force without a person's free and informed consent conflicts with these rights. Chemical restraint also conflicts with the right to health under Article 12 of the ICESCR and Article 25 of the CRPD which prohibit non-consensual medical treatment.

Upon ratifying the CRPD, the Federal Government entered two reservations. First, that Australia understands that the CRPD allows, as a last resort, compulsory treatment subject to safeguards. Second, that Australia understands that the CRPD allows supported and substituted decision-making arrangements where necessary as a last resort. The CRPD Committee has called on Australia to eliminate substituted decision-making in favour of supported decision-making in order to recognise the legal capacity of persons with disability.[19]

Substituted versus supported decision-making

Substituted	Supported
Decisions are taken by a 'substitute decision-maker' (e.g. a guardian) who bases the decision on what they believe to be in the 'best interest' of the person concerned. A substitute decision-maker may be appointed against the will of the person concerned.	Decisions by the person concerned are facilitated through different support options that give primacy to the concerned person's 'will and preferences'. A support person must be formally chosen by the person concerned.

14 Other instruments that contain this prohibition include CAT and CRPD Article 15.

15 UN Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report 22/53 (February 2013) [63].

16 CRPD Committee: Concluding Observations on Australia (October 2019) [30].

17 A similar right is contained in CRC Article 37(c).

18 Human Rights Committee: General Comment No. 21 (1992) [3].

19 CRPD Committee: Concluding Observations on Australia (October 2019) [23]-[24].

The CRPD Committee also called on Australia to eliminate laws that allow forced medical interventions on persons with disabilities.[20] The use of force and restraint without consent amount to forced treatment, and denies legal capacity and recognition on an equal basis with others as persons before the law.

Rights to life and health

> 'Every human has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of [their] life' – ICCPR 6(1)

> 'The States Parties…recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' – ICESCR 12(1)

As the UN Human Rights Committee has clarified, the right to life imposes not only negative obligations on States to respect life, but also positive obligations to ensure the right to life.[21] It includes a duty on part of States parties to take steps to address 'general conditions' that may amount to 'direct threats to life' or which prevent individuals to enjoy a life with dignity.[22] The right to health encompasses State obligations to act in a way that is 'reasonably calculated to realize the enjoyment' of the right.[23] COVID-19 is a notable example of such a threat to life and to health.

The risks posted by COVID-19 to the rights to life and health of persons in closed environments add to and can exacerbate other rights-impacts that flow from the use of restrictive practices. Both forms of rights impacts may also be interlinked. For example, isolation in response to COVID-19 is a form of restraint.[24]

Right to an effective remedy

> 'Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms […] are violated shall have an effective remedy […]' – ICCPR 2(3)(a)

The right to an effective remedy is set out in full under Article 2(3) of the ICCPR and is protected in many other international instruments.[25] Persons whose human rights have been violated as a result of the use of force and restraint in closed environments must have access to an effective remedy.

States have legal duties to prevent human rights violations by its agents and private persons, investigate violations committed, identify perpetrators, impose appropriate punishment and give victims adequate compensation.[26] States must also exercise due diligence in the exercise of these functions. Failing to act with due diligence to prevent a violation, may render the State responsible for the lack of due diligence. [27] This extends State responsibility beyond solely acts or omissions that are directly attributable to the State or its organs.

Given the relative powerlessness of persons behind closed doors compared to officials and providers, it is crucial that States parties take steps to ensure that persons in the settings considered in Chapters 3 to 8 of this report can access avenues of redress. This will not be possible if, for example, officials and providers are exempted from civil and criminal liability when carrying out functions in closed environments.

20 Ibid [28].

21 Human Rights Committee: General Comment No 36 (30 October 2018) [21].

22 Ibid [26].

23 See International Commission of Jurists: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (22 - 26 January 1997) [7].

24 See e.g. United Nations: COVID-19 Guidance (2020).

25 Other instruments that contain the right include, for example: CAT Article 14; CEDAW Article 2; ICERD Article 6.

26 Human Rights Committee: General Comment No. 31 (2004) [8]; UN General Assembly: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) Principle 2.

27 Human Rights Committee: General Comment No. 31 (2004) [8].

2.3 Specific rules and obligations

UN bodies have elaborated upon the meaning of international human rights and corresponding obligations in respect of both specific closed environments and in respect of specific groups of persons across all settings.

For example, the rights in the CRC apply to children in all settings. Similarly, the CRPD applies to the treatment of persons with disabilities in all settings. There are also statements of the minimum rules and principles that are specific to certain closed environments. For example, rules on the treatment of prisoners and juveniles in detention. Many of these statements apply to a number of closed environments, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988. These rules apply to persons deprived of liberty more broadly and encompass immigration detention, which in Australia is an administrative form of detention.

It is important to recognise that more than one set of international human rights rules and obligations may be relevant to the treatment of persons in closed environments. For example, a child with a disability may be held in immigration detention which means that rules that apply to all persons, to children, to persons with disabilities and to persons in immigration detention are relevant.

Examples of specific rights and obligations and applicable settings and groups

Specific rights and obligations	Applicable
UN Revised Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) 2015	Prisoners, juvenile detainees, immigration detainee
UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) 1990	Juvenile detainees
UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988	Prisoners, juvenile detainees, immigration detainees
Convention on the Rights of Persons with Disabilities (CRPD)	Persons with disabilities in all settings
Convention on the Rights of the Child (CRC)	Children in all settings

As a result, minimum requirements around the use of force and restraint vary in different settings and depend on the vulnerability of the person against whom the force or restraint is directed to. In prisons and youth detention, UN rules generally allow force and restraint, albeit under very strict requirements and safeguards (one of which is that it must be a measure of last resort). The use of force and restraint is also generally allowed in immigration detention, albeit to a lesser extent because administrative detention does not necessarily follow a criminal conviction.

Aged care, disability care and mental health care facilities where people may not be allowed to leave of their own free will may constitute closed environments. However, these environments differ from prisons and youth detention, where restrictions to movement often follow a criminal conviction. Accordingly, these closed environments require unique regulation of the use of force and restraint. For example, the CRPD Committee recognises that the use of restrictive practices against persons with disabilities in any settings should be eliminated.[28] Similarly, the UN Special Rapporteur on Torture has noted that 'prolonged' restraints on persons with psychiatric and other conditions may constitute torture and ill-treatment.[29] The Special Rapporteur called for an 'absolute ban' on restraints against persons with psychosocial or intellectual disabilities in all closed environments.[30]

28 CRPD Committee: Concluding Observations on Australia (October 2019) [30].

29 UN Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report 22/53 (February 2013) [63].

30 Ibid.

2.4 Australia and OPCAT

Australia ratified OPCAT in December 2017. Effective implementation of OPCAT forms an important safeguard for persons in closed environments, alongside an effective legal framework and cultural change.[31]

Rights and obligations relating to the prohibition of torture and cruel, inhuman and degrading treatment or punishment are created under CAT. OPCAT establishes a system of international and domestic external and independent monitoring of places of detention in an effort to prevent violations of the rights contained in CAT. This system is designed to prevent violations of human rights occurring in the first place, and complements the obligations in CAT to provide effective remedies by way of reaction to actual violations of rights.

States parties to OPCAT have an obligation to establish a regular and independent monitoring system of all places of detention, known as a NPM. States Parties must also allow for visits by independent experts from the UN Subcommittee to places of detention. The SPT provides international monitoring of places of detention and provides advice to States parties on how to establish and operate NPMs.

The Office of the Commonwealth Ombudsman has been designated as the NPM for Commonwealth places of detention, and as the coordinator of NPMs established in other Australian jurisdictions. States and territories must nominate a body or bodies to carry out the NPM function in places of detention within their jurisdictions and are still to be nominated in most states and territories.

Upon ratifying OPCAT in December 2017, Australia declared that it would take three years to fully implement the NPM. The Federal Government also announced a focus, in the first instance, on monitoring of 'primary places of detention', including environments such as prisons, juvenile detention centres, police cells and immigration detention centres.

Under OPCAT, 'places of detention' are more broadly defined and include:

> '[A]ny place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence [⋯]'[32]

Deprivation of liberty is defined as:

> '[A]ny form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.'[33]

These definitions go beyond the limited number of environments announced by the Federal Government and may cover a number of additional settings, such as aged care homes, mental health care facilities and disability care homes.

Fully implemented, the OPCAT regime has the potential to play a meaningful preventive role against human rights abuses that may arise from the use of force and restraint in the closed environments covered in subsequent chapters.

2.5 Protecting human rights during the pandemic

In response to the COVID-19 pandemic, the UN OHCHR has published COVID-19 guidance for States parties on how to protect rights of persons in detention and institutions during the pandemic. This guidance underlines the heightened risk of COVID-19 faced by persons in closed environments. It calls on States parties to take specific measures to address the situation of these groups in their COVID-19 responses.

31 See Pillar II of the Strategic Framework, B Naylor, J Debeljak, A Mackay: Strategic Framework for Implementing Human Rights in Closed Environments (2015).

32 OPCAT Article 4(1).

33 Ibid Article 4(2).

Further, the guidance calls for States parties to 'urgently explore options for release and alternatives to detention' in order to mitigate against the risks of COVID-19 in closed environments for certain groups, for example those with underlying health conditions. It underlines the particularly serious situation for older persons and persons with disabilities living in institutions and recognises that limited access for family and community support exposes these groups to further risks of neglect and abuse, such as the use of force and restraint.

The UN guidance on COVID-19 in the context of detention and institutions will also be referred to in chapters 3 to 8 alongside the application of international obligations in the context of each of the closed environments considered in this report.

CHAPTER 3.

RESIDENTIAL AGED CARE

3.1 Background

> '[A] key benchmark of any society is how it treats and protects its older citizens, particularly those who may be vulnerable to abuse in whatever form it takes [···]'
>
> Attorney-General Christian Porter upon launching the National Plan to Respond to the Abuse of Older Australians, 19 March 2019.

A growing evidence base outlines the risks that restrictive practices, notably chemical restraint, pose to the health and well-being of older persons.[34] The ongoing Royal Commission into Aged Care Quality and Safety (the Royal Commission) is the result of increasing concerns over the treatment of older persons in residential and in-home aged care in Australia. In 2021, the Royal Commission is set to deliver its Final Report which will recommend measures to ensure that aged care services are safe and of high quality. This includes a review of restrictive practices, including physical and chemical restraint. The Royal Commission's Interim Report found that 'the use of restrictive practices in aged care has been inhumane, abusive and unjustified'.[35] Importantly, Royal Commission noted in its Interim Report that the existing regulation of restrictive practices is 'not at all robust' and called for urgent government action to address the frequent use of chemical restraint.[36]

The COVID-19 pandemic has compounded existing human rights concerns in the aged care sector, with fatal consequences. As of 20 August 2020, the Australian Department of Health reported a total of 285 COVID-19 deaths in government-subsidised aged care facilities.[37] The Royal Commission has, as a result, called for additional submissions and evidence on the impacts of COVID-19 on persons in aged care.[38]

The Royal Commission into Aged Care Quality and Safety

- The Royal Commission was established on 8 October 2018 and is headed by the Honourable Tony Pagone QC and Ms Lynelle Briggs AO

34 Summarised in Human Rights Watch: "Fading Away": How Aged Care Facilities in Australia Chemically Restraint Older People with Dementia (October 2019).

35 Royal Commission into Aged Care Quality and Safety: Interim Report (October 2019) 193.

36 Ibid 10, 209.

37 Australian Government Department of Health: COVID-19 cases in aged care services – residential care (20 August 2020).

38 Royal Commission into Aged Care Quality and Safety: Call for submissions on impact of COVID-19 on aged care services (28 April 2020).

- The Interim Report was delivered on 31 October 2019 and the Final Report is due to be completed by 26 February 2021
- The Terms of Reference expressly direct the Royal Commission to have regard to 'all aspects' of the quality and safety of aged care, including measures 'to reduce or eliminate the use of restrictive practices'
- In April 2020, the Royal Commission called for submissions on the impact of COVID-19 on the aged care sector and the persons directly affected. This may include, for example, consideration of the impact of isolation

The Royal Commission follows previous investigations that have highlighted failings of the regulation of aged care facilities. Several such failings relate to the use of force through restrictive practices.

2017 Australian Law Reform Commission | Elder Abuse – A National Legal Response (Report 131) | May 2017
The Australian Law Reform Commission recommended that aged care legislation regulate the use of restrictive practices and contain a number of safeguards. Such safeguards include, for example, limiting restraint to a measure of last resort and to the extent necessary and proportionate to the risk of harm.

Office of the Public Advocate (Qld) | Legal frameworks for the use of restrictive practices in residential aged care: An analysis of Australian and international jurisdictions | June 2017
While acknowledging the importance of regulating restrictive practices, the Queensland Office of the Public Advocate noted that 'regulation alone will not result in reduced or eliminated use of restrictive practices in aged care settings. Issues relating to the current culture, staffing and operation of services in the sector must also be addressed'.

Ms Kate Carnell AO and Professor Ron Paterson ONZM | Review of National Aged Care Quality Regulatory Processes | October 2017
The authors recommended a significant reduction of the use of restrictive practices in the context of aged care. They also underlined that the elimination of restrictive practices is a goal that both governments and service providers should aim for.

2018 Four Corners | Episode: Who Cares? | September 2018
The Australian Broadcasting Corporation's investigative program Four Corners revealed widespread neglect and abuse in aged care facilities across Australia. Such abuse included excessive use of force and physical restraint, as well as the use of chemical restraint without consent on persons with dementia.

2019 Human Rights Watch | 'Fading Away': How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia | October 2019
In a recent report, Human Rights Watch recommended the prohibition of the use chemical restraint in aged care. The report highlighted the frequent use of chemical restraint on persons with dementia to control their behaviour.

The findings of these investigations have resulted in a commitment to change. For example, in 2019 the Prime Minister promised AUD $537 million to address the issues identified in the Royal Commission's Interim Report, including the prevalence of chemical restraint. Nevertheless, the legal framework remains out of step with Australia's international human rights obligations. Further, the COVID-19 pandemic has since had significant adverse impact on all aspects of society, notably the aged care sector and the economy. There is a debate before the Royal Commission as to whether the Federal Government did enough to prepare for the pandemic in the aged care sector.[39]

39 Daniel Hurst, The Guardian: Time is of the essence when Covid enters aged care but the government response has been sluggish (18 August 2020).

3.2 International human rights standards

The use of force and restraint in aged care facilities, often referred to as restrictive practices, conflict with numerous rights of older persons protected under international law. There is presently no dedicated treaty to the protection of the rights of older persons. Given the intersection between ageing and disability, rights under the UN Convention on the Rights of Persons with Disabilities (CRPD) may be relevant. Many persons in aged care homes may fall within the definition of a person with disability as someone with:

> '[L]ong-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'[40]

Yet, as the UN Special Rapporteur on the Rights of Persons with Disabilities has reported, the human rights-based approach to disability is often overlooked in movements for older persons' rights.[41] Alongside efforts to strengthen protection under existing instruments, there are growing calls for a standalone UN Convention on the protection of rights of older persons.[42]

Further, specific concerns have been expressed in respect of older person's rights in the context of the COVID-19 pandemic. Upon publishing a specific UN Policy Brief on the Impact of COVID-19 on Older Persons[43], the UN Secretary-General, António Guterres, underlined the need to ensure that the dignity and rights of older persons are respected in responses to COVID-19.[44]

Torture and other cruel, inhuman or degrading treatment or punishment

The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) has repeatedly called on Australia to take steps to eliminate restrictive practices in various settings, including aged care.[45] It has done so in the context of Article 15 of the CRPD, which prohibits the use of torture and other cruel, inhuman or degrading treatment or punishment.[46] Researchers have cited Australia's ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in the context of calls for improved monitoring of aged care facilities.[47] While not 'primary places' of detention as defined by the Federal Government (discussed in chapter 2), aged care facilities are closed environments in need of oversight and monitoring.

Exploitation, violence and abuse

In the National Action Plan to Respond to the Abuse of Older Australians, the Federal Government recognises that '[i]nappropriate use of drugs or physical restraints' are examples of physical abuse.[48] Under Article 16 of the CRPD, States parties must take all appropriate measures to protect against all forms of exploitation, violence and abuse.

The UN Special Rapporteur on the Rights of Persons with Disabilities recently stressed that elder abuse is a critical issue in long-term care settings, particularly the prevalence of chemical restraint.[49] Further, in the COVID-19 Policy Brief on the rights of older persons noted above, the UN has noted that persons in the aged care sector, as well as their families and carers, face a heightened risk of abuse and neglect during the pandemic.[50]

40 CRPD Article 1.

41 UN Special Rapporteur on the Rights of Persons with Disabilities: Report A/74/186 (October 2019) [6].

42 See e.g. Strengthening Older People's Rights: Towards a UN Convention (2019).

43 United Nations: Policy Brief: The Impact of COVID-19 on older persons (May 2020).

44 Ibid.

45 CRPD Committee: Concluding Observations on Australia (October 2019) [30].

46 Other instruments that contain this prohibition include International Covenant on Civil and Political Rights (1966) (ICCPR) Article 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT).

47 See, e.g. Laura Grenfell: Aged care, detention and OPCAT (2019).

48 Council of Attorneys-General: National Action Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023, 3.

49 UN Special Rapporteur on the Rights of Persons with Disabilities: Report A/74/186 (October 2019) [37].

50 United Nations: Policy Brief: The Impact of COVID-19 on older persons (May 2020).

Deprivation of dignity, autonomy, integrity, legal capacity and informed consent

The use of restraint on older persons without their free and informed consent undermines various other rights protected under international law. This includes the rights to personal autonomy and dignity (Article 3(a) CRPD), physical and mental integrity (Article 17 CRPD), and the enjoyment of legal capacity on an equal basis (Article 12 CRPD).[51] Further, the right to the enjoyment of the highest attainable standard of health (Article 25(d) CRPD) requires States parties to ensure that care is provided on the basis of free and informed consent.

Liberty and security of person

The UN Human Rights Committee has clarified that liberty means 'freedom from confinement of the body' and that security of person involves 'freedom from injury to the body and the mind, or bodily and mental integrity'.[52] This right therefore relates to a number of the other rights discussed above, such as the prohibition on torture and other forms of ill-treatment and the right to physical and mental integrity.

A person in aged care may be deprived of their liberty or experience a violation of their security of person in connection with restrictive practices. This may include, particularly during the pandemic, isolation, as well as the use of restraint to confine a person to a chair or a bed.

Life and health

The risks to the rights to life and health posed by COVID-19 on persons in aged care add to the rights impacts discussed above that flow from the use of restrictive practices.

As the UN Human Rights Committee has clarified, the right to life imposes not only negative obligations on States to respect life, but also involve positive obligations to ensure the right to life.[53] It includes a duty on part of States parties to take steps to address 'general conditions' that may amount to 'direct threats to life' or which prevent individuals to enjoy a life with dignity.[54] The right to health encompasses State obligations to act in a way that is 'reasonably calculated to realize the enjoyment' of the right.[55] COVID-19 is a notable example of such a threat to life and to health.

3.3 Regulation in Australia

Until recently, restrictive practices in aged care facilities were not expressly regulated.[56] To safeguard all persons in aged care homes, the Federal Government created the new Aged Care Quality and Safety Commission (ACQSC).

The Aged Care Quality and Safety Commission

- The role of the ACQSC is to protect and enhance the wellbeing, safety and quality of life of persons receiving aged care services
- Since 2019, the ACQSC may carry out unannounced visits to aged care facilities. Between April and June 2019, behavioural management, medication management and clinical care were three of the five most frequently 'not met outcomes' in audits[57]

51 See also ICCPR, Articles 16, 26.

52 UN Human Rights Committee: General Comment No. 35 (2014) [3].

53 UN Human Rights Committee, General Comment No 36 (2018) [21].

54 Ibid [26].

55 See International Commission of Jurists: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (22 - 26 January 1997) [7].

56 With the exception of privately funded residential care homes in Victoria under the Supported Residential Services (Private Proprietors) Act 2010 (Vic).

57 ACQSC: Residential care sector performance (April – June 2019).

- Members of the public may lodge complaints with the ACQSC concerning the treatment of persons in aged care facilities. The most frequent area of complaint between April and June 2019 was medication management

The ACQSC produced new Aged Care Quality Standards that came into effect on 1 July 2019. This document contains 8 key compliance standards that apply to organisations that provide Commonwealth subsidised aged care services.[58] Standard 8(3)(e) notes the need for a clinical governance framework on 'minimising the use of restraint'.

> "Safe and quality care and services require a clinical governance framework to 'minim[ise] the use of restraint"
>
> – Aged Care Quality Standard 8(3)(e)

The Standards are accompanied by the amended Quality of Care Principles 2014.[59] The Principles govern care services and have prompted considerable debate. The Parliamentary Joint Committee on Human Rights (PJCHR) resolved to conduct an inquiry into the first set of amendments in July 2019.[60] These amendments received widespread criticism for failing to comply with human rights obligations.[61] The reforms necessary divided the PJCHR to such extent that Labour and Greens Committee Members published in a dissenting report appended to the Inquiry Report. While both reports agreed on the need for reforms in the regulation of the use of restraint, the dissenting report called for the instrument to be disallowed 'and consultation with relevant stakeholders should take place urgently to work towards a human rights based regulatory framework to protect vulnerable older Australians in aged care'.[62]

New amendments to the Principles were passed in November 2019.[63] These amendments are limited in scope. They note that physical and chemical restraints must be a last resort, and add notes in respect of chemical restraint to clarify that informed consent for the prescription of medication is provided for under code of professional practice and in state and territory law (in instances of substitute decision-making). The new amendments also add a review process to examine the effectiveness of the Principles by 31 December 2020.[64]

Key concerns

This section outlines key concerns arising from the Table annexed to this chapter. It analyses the legal frameworks on the use of force in aged care against a set of indicators. To the extent possible, these indicators are derived from international standards. It is important to note that the indicators should be regarded as minimum requirements. Much like the use of restrictive practices in disability care, international standards require the reduction and elimination of such practices in aged care.

Our review of legislation that regulates the use of force and restraint in aged care demonstrates a number of areas where the legal frameworks fall short of international standards. Of particular concern are the following:

Limited scope

While the focus in this chapter has been on residential aged care facilities, we note that many elderly persons receive care in their homes by carers and/or relatives. The current regulation of restraint is limited to 'residential care' and 'flexible care in the form of short-term restorative care provided in a residential care setting'.[65] As the Royal Commission observes in its Interim Report, '[r]estrictive practices 'are

58 ACQSC: Aged Care Quality Standards (2019).

59 Quality of Care Principles 2014 (Cth); Made under the Aged Care Act 1997 (Cth) s 96-1.

60 Parliamentary Joint Committee on Human Rights: Inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019.

61 See, for example, submissions to the 2019 inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019: Human Rights Watch; Public Advocate Queensland; and Public Advocates and Public Guardians – ACT, Qld, NSW, NT, SA, Tas, Vic.

62 Parliamentary Joint Committee on Human Rights: Inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019, 61.

63 Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019 (Cth).

64 Quality of Care Principles 2014 (Cth) Principle 15H(4).

65 Ibid Principle 15D.

commonly, but not exclusively, used in residential aged care...'.[66] For this reason, the regulation of restrictive practices is overly limited in scope.

Chemical restraint

As studies have shown, chemical restraint presents significant risks for older persons, even before the pandemic.[67] Instead of prohibiting chemical restraint, the Federal Government has expressly permitted the practice under the national framework. The national framework also fails to regulate chemical restraint to the same extent as other forms of restraint.[68] For example:

- While physical restraint may only be used to prevent injury to the person themselves or injury to others, the reasons for using chemical restraint are not so limited[69]; and
- Non-emergency physical restraint requires informed consent from the person residing in the aged care home or their representative.[70] However, such consent is not expressly required for the use of chemical restraint (the prescription of medication is regulated only under codes of professional practice).

Informed consent

The need for informed consent is only mentioned in respect of non-emergency physical restraint in the Quality of Care Principles.[71] For the use of emergency physical restraint, and any chemical restraint, only a representative of a person residing in an aged care home (not the person themselves) must be informed (and only if 'practicable').[72] As the Royal Commission points out in its Interim Report, the law on informed consent is complex and differs in the states and territories, resulting in the use of restraint without consent.[73] For example, the law on substitute decision-making in instances where a person residing in an aged care home is unable to consent also differs between the states and territories. Only codes of professional practice address informed consent for the prescription of medication.[74]

Reporting

An approved provider has the responsibility to ensure that staff members report the suspicion of a 'reportable assault' (including an unreasonable use of force).[75] This obligation is to report to the approved provider, their key personnel, another person authorised to receive reports of such suspected incidents, a police officer and the Quality and Safety Commissioner.[76] It does not necessarily extend to an external and independent body. Further, the provider must only document the details of the use in the person's care and services plan.[77]

Staff training

The legislative framework does not set out any minimum training or qualifications requirements for staff on the use of restrictive practices. The Royal Commission has been presented with 'overwhelming evidence' of a knowledge-gap in residential aged care about restrictive practices and alternatives to such measures.[78]

66 Royal Commission into Aged Care Quality and Safety: Interim Report (October 2019) p 194.

67 Summarised in the 2019 Human Rights Watch report on the use of chemical restraint.

68 The only exception appears to be the regulation of privately funded care homes in Victoria where state legislation does not differentiate between different types of restraint.

69 Quality of Care Principles 2014 (Cth) Principles 15F, 15G.

70 Ibid Principle 15F(1)(e).

71 Ibid.

72 Ibid Principles 15F(2)(b), 15G(1)(c).

73 Royal Commission into Aged Care Quality and Safety: Interim Report (October 2019) 208.

74 See Notes 1 and 2 to Quality of Care Principles 2014 (Cth) Principle 15G.

75 Aged Care Act 1997 (Cth) s 63-1AA(5).

76 Ibid.

77 Quality of Care Principles 2014 (Cth) Principles 15F(2)(c), 15G(1)(b).

78 Royal Commission into Aged Care Quality and Safety: Interim Report (October 2019) 205.

Complaints and oversight

While a person may complain about the treatment in an aged care facility to the ACQSC, or other entities, the Quality of Care Principles do not establish any comprehensive framework with a complaint's mechanism.

Liability

The Aged Care Commissioner may impose sanctions if a provider has failed to adhere to the Quality of Care Principles and the Aged Care Quality Standards.[79] Sanctions may include revoking or suspending the provider's approval to provide services. Other than this discretionary power, the legislative framework does not hold providers and staff liable for failure to minimise restrictive practices or applying such measures contrary to the Principles. Instead, one must look to other areas of law, such as torts and criminal law for potential causes of action. Liability and sanctions are dependent upon adequate reporting and oversight mechanisms, two of the concerns with the existing framework mentioned above.

Inconsistency with regulation in other sectors

Given the intersection between ageing and disability, it is surprising that the regulation of restrictive practices in aged care facilities differs significantly from the national framework for its regulation in disability care. The disability sector is undergoing significant reform under the National Disability Insurance Scheme (NDIS) and contains stricter regulation of restrictive practices (see chapter 4 of this Report). In fact, legislation governing disability care and mental health facilities often excludes aged care facilities from their application.[80]

Examples of how the regulation of disability care differ from aged care:

	Disability care (NDIS framework)	Aged care (Quality of Care Principles)
Scope of regulation		
Restrictive practices include physical, mechanical and chemical restraint and seclusion	✓	X (only physical and chemical restraint)
Safeguards		
Restrictive practices are only permitted as a last resort	✓	✓ (clarified in the most recent amendments)
Physical and chemical restraint are regulated to the same extent	✓	X (chemical restraint not regulated to the same extent)
Oversight mechanism		
Regulation includes an oversight body to provide leadership on restrictive practices	✓	✓
Sanctions		
Using restrictive practices contrary to specific disability/aged care legislation is an offence	✓	X

79 Aged Care Act 1997 (Cth) s 3-4; Quality and Safety Commission Act 2018 (Cth) pts 7A-7B).

80 Office of the Public Advocate (Qld): Legal frameworks for the use of restrictive practices in residential aged care: An analysis of Australian and international jurisdictions (June 2017) 5.

Added concerns during the pandemic

It is in the context of the above concerns that the COVID-19 pandemic has entered many aged care homes.

As noted above, as of 20 August 2020, the Federal Government reported 1,322 active cases of COVID-19 in government-subsidised aged care facilities across Australia, and 285 deaths.[81] The majority of these cases were recorded in Victoria.[82] At the time of writing this report, it is reported that the ACQSC is investigating an alleged use of sedatives on persons with COVID-19 residing at an aged care facility in Victoria as a way to prevent movement around the facility.[83]

Added risks of restrictive practices during the pandemic

The use of restrictive practices during the pandemic adds risks to life and health to the list of other rights concerns discussed in section 3.2 of this chapter. Dementia Support Australia (DSA) has advised against the use of chemical restraint on persons with dementia, particularly during the pandemic.[84] In doing so, it has noted that the use of chemical restraint, which could affect respiration, 'is likely to lead to an adverse outcome for that resident' in the context of COVID-19.[85] As noted above, despite these risks there have still been reports of alleged use of chemical restraint.

The DSA has also advised against the use of other forms of restraint, stating that '[t]he use of physical restraint is generally not recommended'.[86] It has further cautioned against mechanical restraint through the use of restraining devices, particularly against persons with respiratory difficulties.[87]

Alongside other forms of restrictive practices, isolation is a form of restraint. If isolation is considered necessary to prevent the spread of COVID-19, the DSA notes that the persons residing in aged care homes must be observed every 15 minutes to confirm that that they are well.[88] As discussed both above and below, existing problems in the aged care sector pose barriers to frequent monitoring as a safeguard to protect the rights of persons in isolation. The risks to the health of persons residing in aged care homes, and to staff, add to these existing barriers and compound the detrimental impacts on the rights of the person subjected to restraints during the pandemic.

In addition to the above, the DSA has outlined the impacts that COVID-19 restrictions may have on the behaviour of persons residing in aged care homes and has advised aged care facilities of steps to take to avoid triggering behaviour that may result in restraints. For example, where restrictions of family visits or limitation of activities are necessary (which in itself raises human rights issues), other measures may still be possible, such as increased access to fresh air.[89]

Parallels between concerns relating to restrictive practices and concerns highlighted by the pandemic

Understaffing and inadequate staff training have been underlined as long-standing problems in aged care homes which, if addressed, some report could have prevented the adverse impacts of COVID-19 outbreaks in aged care homes.[90] For example, understaffing raises concerns in respect of the use of restrictive practices where restraint may be treated as a measure of convenience or necessity by staff in order to manage a large number of persons residing in aged care facilities. Understaffing is particularly concerning during the pandemic when isolation of vulnerable persons would require frequent monitoring to safeguard the rights of the person in isolation as noted above. In addition, the lack of staff training was noted above as a key concern in respect of restrictive practices. Lack of staff training gives rise to the likelihood that inappropriate forms of restraint are used on vulnerable persons residing in aged care facilities during challenging periods, such as COVID-19 lockdowns.

81 Australian Government Department of Health: COVID-19 cases in aged care services – residential care (20 August 2020).

82 Ibid.

83 Calla Wahlquist, The Guardian: Australian experts warn against the use of sedatives to contain Covid spread in aged care (13 August 2020).

84 Natasha Egan, Australian Ageing Agenda: Restraints pose additional risk when COVID is present (9 April 2020).

85 Dementia Support Australia: Restrictive practices: understanding and managing behaviours in a time of pandemic (17 April 2020)

86 Ibid.

87 Ibid.

88 Ibid.

89 Ibid.

90 Naaman Zhou, The Guardian: Q+A: 'catastrophic' Covid-19 outbreaks in aged care could have been prevented, doctors say (4 August 2020).

Further, lack of oversight and reporting have also been noted as key concerns in the context of restrictive practices in aged care homes, concerns which have continued in the context of the COVID-19 response. For example, we note that it has been reported that it took days for COVID-19 cases at an aged care home in Victoria to be communicated to the Federal Government.[91] This lack of communication between care homes and different authorities is reminiscent of the lack of transparency and communication that surround aged care homes and which, along with the other concerns outlined above, have continued to put the lives, dignity and rights of persons in aged care at risk.

3.4 Conclusion

Australia has an obligation under international human rights law to protect persons in aged care from restrictive practices and the human rights violations which may accompany such practices. We agree with the Royal Commission's findings in their Interim Report that '[t]he prevalence of restrictive practices in residential aged care is unacceptable'.[92] Instead of seeking to eliminate the use of such practices in aged care facilities, recent legislative amendments do not prohibit such practices, and contain weaker regulation compared to the disability care sector. In addition, the scope of regulation is largely limited to residential care, leaving persons receiving private or in-home care particularly vulnerable to rights abuses. Of significant concern is the minimal regulation of the use of chemical restraint, the prevalence of which has been well documented, most recently in the Interim Report of the Aged Care Royal Commission.

The existing human rights concerns around restrictive practices in aged care have been compounded by COVID-19. The pandemic has highlighted the existing failures of the system and resulted in dangerous, life-threatening and even fatal consequences for persons in aged care.

Recommendations - Residential aged care

Based on our review of the existing legal frameworks on restrictive practices and relevant international human rights obligations, the Castan Centre recommends that the Australian governments:

- Ensure a human rights-based approach in response to COVID-19 which leaves no one behind and protects the rights of vulnerable persons, including persons in aged care.
- Amend the relevant legislation to take a human rights-based approach to aged care and effectively protect older persons from restrictive practices by prohibiting their use in aged care in line with recommendations by relevant UN Committees and Special Rapporteurs.
- Ensure that adequate preventive, reactive and accountability mechanisms accompany a prohibition, including:
  - Reporting obligations on part of providers of any instances of restraint
  - An external and independent complaints mechanism to report the use of force and restraint
  - Minimum training and qualification requirements for providers and workers on how to identify restrictive practices and on alternative practices to avoid the use of such measures to embed a human rights culture in the delivery of aged care services
  - Appropriate penalties for breach of the legislation to support the development of a culture of human rights compliance
- Make consistent preventive, reactive and accountability measures across comparable sectors (e.g. aged care, disability care and mental health sectors) to provide clarity to rights-holders and duty-bearers.
- Extend the scope of protection from restrictive practices beyond the institutional setting to recognise that force and restraint are also applied in the home.
- Fully and effectively implement OPCAT and its mandate in respect of all aged care facilities by the 2022 deadline.

91 Stephanie Dalzell and Jade Macmillan, ABC News: Federal Government wasn't notified of St Basil's aged care coronavirus outbreak for nearly a week (4 August 2020).

92 Royal Commission into Aged Care Quality and Safety: Interim Report (October 2019) 216.

Annex – Chapter 3 Residential Aged Care

INDICATORS	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Restraint is regulated by legislation, not only policy	PARTLY[I]	NO	NO	NO	NO	NO	NO	PARTLY[II]	NO
If regulated by legislation:									
Restraint is a measure of last resort and the least restrictive option	YES[III]							PARTLY[IV]	
Use is limited to preventing a person from causing injury to themselves or other persons	PARTLY[V]								
Informed consent must be obtained before use of restraint	PARTLY[VI]								
Every use of restraint must be reported	NO[VII]								
Chemical restraint is prohibited	NO[VIII]								
The law includes minimum requirements for staff training on restrictive practices	NO								
Administrators are required to escalate serious complaints to an independent, external body	PARTLY[IX]								
Use of restraint contrary to the law is a specific offence under legislation (in addition to general criminal law provisions)	PARTLY[X]								
Officials may be held civilly and/ or criminally liable under a specific provision dealing with use of restraint contrary to the law									
Independent visitor schemes:									
An independent visitor scheme is in place	YES[XI]		YES[XII]					PARTLY[XIII]	

I Quality of Care Principles 2014 (Cth) pt 4A created under the Aged Care Act 1997 (Cth). The Principles expressly state that the operation of state and territory laws in relation to restraint is not affected (Quality of Care Principles 2014 (Cth) pt 4A Principle 15E).

II The Supported Residential Services (Private Proprietors) Act 2010 (Vic) only regulates aged care facilities if they are privately funded.

III The latest amendments to the Principles clarify that both physical and chemical restraint must be used only as a last resort (Quality of Care Principles 2014 (Cth) pt 4A Principles 15F, 15G).

IV Only applicable to privately funded homes. A restriction of a resident's rights in privately funded homes must be the option which is the 'least restrictive of the resident's rights in the circumstances' (Supported Residential Services (Private Proprietors) Act 2010 (Vic) s 8).

V Physical restraint is only permitted if a person is posing a risk to themselves or any other person (Quality of Care Principles 2014 (Cth) pt 4A Principle 15F(1)(a)(i)). However, this does not appear to be required for the use of chemical restraint.

VI Informed consent from the consumer or the consumer's representative is required only for non-emergency use of physical restraint (Quality of Care Principles 2014 (Cth) 2014) pt 4A Principle 15F(1)(e)). It is not required in emergencies and not for any use of chemical restraint (where the consumer's representative only needs to be informed, and only so if practicable) (Quality of Care Principles 2014 (Cth) 2014) pt 4A Principle 15G(1)(c)).

VII The approved provider must only ensure that the details of the use of restraint is documented in the care and services plan of the consumer (Quality of Care Principles 2014 (Cth) pt 4A Principles 15F(2)(c), 15G(1)(b).

VIII Chemical restraint is expressly permitted. It is defined as: 'restraint that is, or that involves, the use of medication or a chemical substance for the purpose of influencing a person's behaviour, other than medication prescribed for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition.' (Quality of Care Principles 2014 (Cth) pt 1 Principle 4).

IX An approved provider has the responsibility to ensure that staff members report the suspicion of a 'reportable assault' (including an unreasonable use of force). However, the obligation to report is not necessarily to an independent external body but to one or more of the following: the approved provider, one of the provider's key personnel, another person authorised by the approved provider to receive reports of suspected reportable assault, a police officer, and the Quality and Safety Commissioner (Aged Care Act 1997 (Cth) pt 4.3 s 63-1AA(5)).

X Failure of an approved provider to meet its responsibilities for the quality of care of their services and the user rights of persons receiving their service may lead to sanctions (Aged Care Act 2014 (Cth) s 3-4; Aged Care Quality and Safety Commission Act 2018 (Cth) pt 7B).

XI See Aged Care Act 1997 (Cth) pt 5.6.

XII Ageing and Disability Commissioner Act 2019 No 7 (NSW) pt 4.

XIII Only for privately funded homes, Supported Residential Services (Private Proprietors) Act 2010 (Vic) pt 9.

CHAPTER 4.

DISABILITY CARE

4.1 Background

The ongoing Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) has provisionally defined 'violence and abuse' as covering restrictive practices (including physical and chemical restraint).[93] It reviews the use of all forms of such violence and abuse that have continued in disability care despite recent legislative amendments. In particular, the prevalence of chemical restraint and its risks for vulnerable persons has generated growing concerns in the disability sector (and in respect of aged care and mental health discussed in chapters 3 and 5 of this report). The Royal Commission also reviews all forms of neglect and exploitation of persons with disabilities. This is important as the impact of an omission to act (neglect) on a person with disabilities may be similar to the commission of physical or chemical restraint.

> 'I]n many cases such practices, when perpetrated against persons with disabilities, remain invisible or are being justified, and are not recognised as torture or other cruel, inhuman or degrading treatment or punishment.'
>
> The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on neglect, severe forms of restraint, seclusion and violence, A/63/175, 28 July 2008.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

- The Royal Commission was established on 4 April 2019 and is chaired by the Honourable Ronald Sackville AO QC
- The Interim Report is due to be completed by 30 October 2020 and the Final Report by 29 April 2022
- The Terms of Reference direct the Royal Commission to inquiry into 'all forms of violence against, and abuse, neglect and exploitation of, people with disability [⋯]'. As defined by the Royal Commission such violence and abuse include restrictive practices
- The Royal Commission issued a Statement of Concern on 26 March 2020 about the impacts of COVID-19 on persons with disabilities and underlined that the COVID-19 response is within the Terms of Reference.

The Royal Commission follows previous investigations, notably a report by the Senate Community Affairs References Committee, which covered the use of restrictive practices in the disability services sector in 2015. The Senate Committee recommended that the new National Disability Insurance Scheme (NDIS) quality and safeguarding framework ensure a 'zero-tolerance approach' to eliminate

93 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Issues Paper on Education and Learning (30 October 2019), Attachment A.

the use of restrictive practices.[94] This is in line with the 2014 National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector.[95] The Senate report also recommended that this approach be implemented at the state and territory levels.[96] Despite this position, the transformation towards a national framework under the NDIS did not prohibit the use of restrictive practices but seeks to regulate its use by, for example, limiting restrictive practices to prevention of self-harm or harm to others. The result is a patchwork of regulation at the national, state and territory levels, and continued use of restrictive practices.

In response to the pandemic, the Royal Commission has expressed strong concerns about the impact of COVID-19 on persons with disabilities.[97] Given the evidence of violence, abuse and neglect in such facilities already obtained by the Royal Commission, its concerns include the reduction in oversight of closed environments as a result of measures such as lockdowns.[98]

4.2 International human rights standards

The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) has repeatedly called on Australia to protect persons with disabilities from the use of force, including restrictive practices, and eliminate their use in all settings.[99] The use of force through different forms of restraint on persons receiving disability care and services conflicts with numerous rights protected under the UN Convention on the Rights of Persons with Disabilities (CRPD) and other international instruments.

In its guidance on COVID-19 and the rights of persons with disabilities, the UN Office of the High Commissioner for Human Rights (OHCHR) underlines the disproportionate impact the pandemic has on persons in closed environments, including social care institutions.[100] It also notes the heightened risk of COVID-19 for persons with disabilities due to factors such as underlying health determinants and the difficulty to comply with physical distancing.[101] Importantly, the OHCHR underlines the need to continue to respect the rights of persons in institutions during the pandemic.[102] This is particularly important as COVID-19 measures, such as limiting family contact as well as community visitors, 'may result in people with disabilities and older persons being further exposed to neglect and abuse'.[103]

Torture and other cruel, inhuman or degrading treatment or punishment

Calls by the UN for the elimination of restrictive practices are often made in the context of the prohibition on torture and other cruel, inhuman or degrading treatment or punishment (Article 15 CRPD).[104] For example, the UN Special Rapporteur on Torture in 2013 called for an 'absolute ban on all coercive and non-consensual measures, including restraint [⋯]' in respect of persons with psychological or intellectual disabilities.[105] Australia's ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in 2017 may provide another layer of protection from torture and other cruel, inhuman or degrading treatment or punishment by mandating regular visits by international and domestic external and independent bodies to 'places of detention' which may extend to certain disability care facilities.

94 Senate Community Affairs References Committee: Report on Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability (2015) recommendation 18.

95 National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (2014). This Framework was prepared for and endorsed by Disability Ministers of the Commonwealth, state and territory governments.

96 Ibid.

97 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Statement of Concern (March 2020) 1.

98 Ibid 4.

99 CRPD Committee: Concluding Observations on Australia (October 2019) [30].

100 United Nations: COVID-19 and the Rights of Persons with Disabilities: Guidance (April 2020).

101 Ibid.

102 Ibid.

103 United Nations: COVID-19 Guidance (2020).

104 Other instruments that contain this prohibition include International Covenant on Civil and Political Rights (1966) (ICCPR) Article 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

105 UN Special Rapporteur on torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report 22/53 (February 2013) [63]..

Exploitation, violence and abuse

Under Article 16 of the CRPD, States parties must take all appropriate measures to protect against all forms of exploitation, violence and abuse. As mentioned above, the Royal Commission has provisionally defined 'violence and abuse' to include restrictive practices. Active steps must be taken to protect against such practices as mandated by Article 16 CRPD.

Deprivation of dignity, autonomy, integrity, legal capacity and informed consent

The right to free and informed consent forms part of the right to the highest attainable standard of health (Article 25 CRPD).[106] The use of restrictive practices without consent undermines this right and deprives persons with disabilities of a range of other human rights. This includes the right to enjoy the exercise of legal capacity on an equal basis with others (Article 12 CRPD)[107], the rights to autonomy and dignity (Article 3(a) CRPD), and physical and mental integrity (Article 17 CRPD).

Liberty and security of person

The UN Human Rights Committee has clarified that liberty means 'freedom from confinement of the body' and that security of person involves 'freedom from injury to the body and the mind, or bodily and mental integrity'.[108] This right therefore relates to various other rights discussed above, such as the prohibition on torture and other forms of ill-treatment and the right to physical and mental integrity.

A person in disability care may be deprived of their liberty or experience a violation of their security of person in connection with restrictive practices. This may include, particularly during the pandemic, isolation as well as the use of restraint to confine a person to a chair or a bed.

Life and health

The risks to the rights to life and health posed by COVID-19 on persons in disability care add to the rights-impacts discussed above that flow from the use of restrictive practices.

As the UN Human Rights Committee has clarified, the right to life imposes not only negative obligations on States to respect life, but also positive obligations to ensure the right to life.[109] It includes a duty on part of States parties to take steps to address 'general conditions' that may amount to 'direct threats to life' or which prevent individuals to enjoy a life with dignity.[110] COVID-19 is a notable example of such a threat to life and to health.

4.3 Regulation in Australia

The regulation of disability services has undergone significant changes through the transition to a national system under the National Disability Insurance Scheme (NDIS). The NDIS was launched in 2013. In 2014, the Commonwealth, states and territories approved a national framework to reduce and eliminate the use of restrictive practices in disability services.[111] The NDIS has its own NDIS Quality and Safeguarding Framework, monitored by the NDIS Commission established in 2017. Under this policy framework, the NDIS Commission's Senior Practitioner is designated to oversee 'behaviour support', including restrictive practices. The NDIS Commissioner

106 Another instrument that protects this right include International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) Article 12.

107 See also ICCPR, Articles 16, 26.

108 United Nations Human Rights Committee: General Comment No. 35 (2014) [3].

109 UN Human Rights Committee, General Comment No 36 (2018) [21].

110 Ibid [26].

111 National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (2014) 1.

provides the Senior Practitioner with provider reports on the use of restrictive practices that have been submitted to the Commissioner. These reports are reviewed, and serious incidents are assessed by the Senior Practitioner.

Since its enactment, the NDIS Quality and Safeguarding Framework has been rolled-out to states and territories. While the independent NDIS Commission now operates in all jurisdictions, state and territory laws on restrictive practices may still apply if such provisions can operate concurrently with the national framework.[112]

The Framework has included the adoption of the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) (the Rules). These Rules apply to registered 'NDIS providers' that use restrictive practices in the course of providing support to a person with disability. The NDIS providers report to the NDIS Commissioner, who in turn provide reports to the Senior Practitioner as discussed above.

The Rules permit rather than prohibit restrictive practices, subject to certain safeguards. For example:

- Restrictive practices may only be used to prevent harm to the person with disability or to other persons;
- Registered providers must report to the NDIS Commissioner once a month on the use of restrictive practices;
- Chemical restraint is recognised as a restrictive practice which is regulated to the same extent as other restrictive practices; and
- Most jurisdictions have an independent visitor scheme in place to monitor compliance, alongside other independent oversight mechanisms. For example, the Australian Capital Territory has its own Senior Practitioner that oversees the use of restrictive practices under the relevant legislation.[113]

Key concerns

This section outlines key concerns arising from the Table annexed to this chapter. It analyses the legal frameworks in this area against a set of indicators derived from international standards on the rights of persons with disabilities. It is important to note that these indicators should be regarded as minimum requirements. As set out above, international standards require Australia to protect persons with disabilities from restrictive practices by reducing and eliminating their use.

Despite the national framework to reduce and eliminate restrictive practices adopted in 2014, the NDIS framework does not prohibit the use of restrictive practices but seeks to regulate its use. Our analysis of existing national, state and territory laws reveals inconsistencies in regulation of the use of restrictive practices and a distinct lack of safeguards with respect to such uses. Of particular concern are the following issues:

Inconsistencies and lack of clarity

Inconsistencies and lack of clarity in the regulation of restrictive practices exist between the NDIS framework and state and territory laws that remain in force alongside the NDIS framework. To illustrate, the below table outlines some of these inconsistences.

Examples of inconsistencies between the NDIS framework and state and territory laws

Required by the NDIS rules	Example of an inconsistent state and/or territory law
A restrictive practice must be a measure of last resort and the least restrictive measure	In the Australian Capital Territory measures must be the 'least restrictive way' of ensuring safety, which may not necessarily be the least restrictive option.[114]

112 National Disability Insurance Scheme Act 2013 (Cth) (NDIS Act) s 207.

113 Senior Practitioner Act 2018 (ACT) s 26.

114 Ibid ss 6(b), 9(2)(g)(ii).

The use of a restrictive practice contrary to the law is a specific offence	In Queensland, the law expressly states that it does not create a civil cause of action for the breach of a provision under the Act.[115] A claimant would have to resort to other causes of action, such as the tort of battery.
No good faith exemption exists for providers and officials applying restrictive practices contrary to the law	In the Northern Territory a good faith exemption from both civil and criminal liability exists.[116]

Additionally, we have observed internal inconsistencies within particular state and territory laws. For example, under the relevant law in Tasmania, restrictive practices must only be used to protect against 'serious harm' against the person with disability or other persons.[117] On the other hand, approval to use a restrictive practice may be obtained for 'the primary purpose of ensuring safety, health or wellbeing of the person or other persons'.[118] This, in effect, appears to broaden the scope of use for restrictive practices. At best this may cause confusion, and at worst, opens potential avenues for abuse.

Chemical restraint

Chemical restraint is expressly included in the definition of restrictive practices in all jurisdictions regulated by law. As a restrictive practice, it is permitted in accordance with certain criteria and safeguards despite the health risks of its use on vulnerable groups, such as older persons with dementia (a cognitive impairment).[119] Studies have indeed found the use of chemical restraint to be ineffective in addressing symptoms of persons with dementia.[120] Despite the various safeguards to protect against chemical restraint except as a measure of last resort, it continues to be widely used, suggesting the weakness in practice of such safeguards.

Informed consent and authorisation

The NDIS Rules do not expressly require informed consent for the use of regulated restrictive practices. As mentioned in chapter 2 of this report, the law on informed consent differ across jurisdictions and there is a lack of consistency and clarity regarding informed consent. The utility of informed consent as a safeguard is thereby undermined and compromised.

Reporting

Providers have limited legal requirements to report the use of restrictive practices. The NDIS Rules, for example, require only a monthly report to the NDIS Commission.[121] Most jurisdictions do not have any further reporting requirements. In jurisdictions that do include further reporting obligations, these tend to be limited. For example, in the Northern Territory, a provider must notify the CEO only of emergency use of a restrictive practice.[122] None of the jurisdictions require providers to escalate serious complaints to an external body. Monthly reports to the NDIS Commissioner under the NDIS framework are only shared with the Senior Practitioner who can review and follow-up on serious incidents as noted above.

Training and qualification requirements

No jurisdictions impose minimum training and qualification requirements workers in the area of restrictive practices. Such training may include, for example, identification of restrictive practices in the particular setting in order to reduce and eliminate its use in the particular context.

115 Disability Services Act 2006 (Qld) s 4.

116 Disability Services Act 1993 (NT) s 67.

117 Disability Services Act 2011 (Tas) s 36(2).

118 Ibid ss 38(4)(a) and 43(1)(a)).

119 See, for example, Human Rights Watch: "Fading Away" How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia (October 2019).

120 See studies cited by Human Rights Watch in the October 2019 report referenced above.

121 National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) r 14.

122 Disability Services Act 1993 (NT) s 42(2)(b).

Liability

There are significant inconsistencies concerning the liability of providers who breach legislation that regulates the use of restrictive practices. For example, the NDIS framework only imposes civil liability on providers who breach conditions of their registration.[123] Such conditions include, for example, that providers ensure that regulated restrictive practices are used as a last resort.[124] However, several state and territory laws either:

a. do not regulate restrictive practices under law; or

b. include civil and/or criminal exemptions from liability for acts and omissions taken in good faith and pursuit of functions under the relevant legislation.[125]

State and territory laws operate alongside the NDIS framework to the extent that they can do so concurrently with the NDIS obligations.[126] Any direct inconsistency between such laws and regulations should be resolved under the Commonwealth Constitution.

Recent amendments to the NDIS Act mandate that the Commissioner establish a worker screening database. The aim is to create a consistent system across all jurisdictions for the assessment of workers in disability services, and whether workers pose a risk to persons with disabilities.[127] This may improve accountability by preventing a person who has been found liable in one state or territory from obtaining employment as a worker under NDIS in another state and/or territory.

Added concerns during the pandemic

The pandemic has added another layer of concern to the disability care sector which exacerbates existing concerns.

As noted above, persons in closed institutions face a heightened risk of COVID-19 which add risks to life and health. This has been very clearly demonstrated in the aged care sector as discussed in detail in chapter 3 of this report. Similar concerns apply in other closed environments. For example, alongside other forms of restrictive practices, isolation is a form of restraint. If isolation is considered necessary to prevent the spread of COVID-19 in disability care, continued monitoring and oversight is crucial. However, as noted above, the existing legal framework fails to provide effective monitoring and reporting of the use of restrictive practices. During the pandemic, restrictions of access to closed environments in order to prevent the spread of the virus may further isolate and leave persons in institutions without monitoring and oversight.

4.4 Conclusion

Despite significant changes in the regulation of disability services, the existing national, state and territory frameworks fail to provide effective protection from restrictive practices for persons with disabilities. All jurisdictions currently allow the use of restrictive practices in disability care subject to certain safeguards. Our analysis identified various gaps in this regard. For example, the lack of minimum training and qualification requirements for providers and workers on the use of restrictive practices, and the lack of reporting requirements. Within existing safeguards, we identified inconsistencies both within and between state and territory laws and the NDIS Rules. Further, informed consent is not expressly required in the NDIS Rules and is regulated differently across the states

123 NDIS Act s 73J.

124 National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) r 21(3).

125 See e.g. Disability Services Act 1993 (NT) s 67; Disability Services Act 2011 (Tas) s 51.

126 NDIS Act s 207.

127 Ibid ch 6B.

and territories. Liability for the use of restrictive practices contrary to the law is either not an offence, or officials may be exempt from liability subject to certain criteria, in many jurisdictions.

Further, the pandemic has compounded existing concerns regarding the treatment of persons in closed environments, including disability care. This includes, for example, the ability to have monitoring and oversight of the treatment of persons in these environments.

Recommendations - Disability care

Based on our review of the existing legal frameworks on restrictive practices and relevant international human rights obligations, the Castan Centre recommends that the Australian governments:

- Ensure a human rights-based approach in response to COVID-19 which leaves no one behind and protects the rights of vulnerable persons, including persons in disability care.
- Amend the relevant legislation to take a human rights-based approach and effectively protect persons with disabilities from restrictive practices by prohibiting their use in line with the call for a zero-tolerance approach by the Senate Committee on Community Affairs and recommendations by relevant UN Committees and Special Rapporteurs.
- Ensure that adequate preventive, reactive and accountability mechanisms accompany a prohibition, including:
  - Reporting obligations on part of providers of any instances of restraint
  - An external and independent complaints mechanism to report the use of force and restraint
  - Minimum training and qualification requirements for providers and workers on how to identify restrictive practices and on alternative practices to avoid the use of such measures to embed a human rights culture in disability care services
  - Appropriate penalties for breach of the legislation to support the development of a culture of human rights compliance
- Make consistent preventive, reactive and accountability measures across comparable sectors (e.g. aged care, disability care and mental health sectors) to provide clarity to rights-holders and duty-bearers.
- Fully and effectively implement OPCAT and its mandate in respect of all disability care facilities by the 2022 deadline.

ANNEX – CHAPTER 4 DISABILITY CARE

INDICATORS	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Regulated by legislation, not only policy	YES[I]	YES[II]	PARTLY[III]	YES[IV]	YES[V]	PARTLY[VI]	YES[VII]	YES[VIII]	PARTLY[IX]
If regulated by legislation:									
Restraint is a measure of last resort and the least restrictive option	YES[X]	PARTLY[XI]	PARTLY[XII]	PARTLY[XIII]	PARTLY[XIV]	PARTLY[XV]	PARTLY[XVI]	PARTLY[XVII]	PARTLY[XVIII]
Use is limited to preventing a person from causing injury to themselves or other persons	YES	YES[XIX]	PARTLY[XX]	PARTLY[XXI]	YES	PARTLY[XXII]	PARTLY[XXIII]	PARTLY[XXIV]	PARTLY[XXV]
Informed consent must be obtained before use	NO	NO	NO	NO	NO[XXVI]	NO	NO	NO	NO
Every use of restraint must be reported	PARTLY[XXVII]	YES[XXVIII]	PARTLY[XXIX]	PARTLY[XXX]	PARTLY[XXXI]	PARTLY[XXXII]	PARTLY[XXXIII]	PARTLY[XXXIV]	PARTLY[XXXV]
Chemical restraint is prohibited	NO[XXXVI]	NO[XXXVII]	NO[XXXVIII]	NO[XXXIX]	NO[XL]	NO[XLI]	NO[XLII]	NO[XLIII]	NO[XLIV]
The law includes minimum requirements for staff training on restrictive practices	NO	NO	NO	NO	NO	NO	NO	NO[XLV]	NO
Administrators are required to escalate serious complaints to an independent, external body	NO	NO	NO	NO[XLVI]	NO	NO	NO	NO[XLVII]	NO[XLVIII]
Use contrary to the law is an offence under the legislation (in addition to general criminal law provisions)	PARTLY[XLIX]	YES[L]	PARTLY[LI]	YES[LII]	PARTLY[LIII]	PARTLY[LIV]	YES[LV]	YES[LVI]	PARTLY[LVII]
Officials may be held civilly or criminally liable for use contrary to the law and in good faith	PARTLY[LVIII]	PARTLY[LIX]	YES[LX]	PARTLY[LXI]	PARTLY[LXII]	YES[LXIII]	PARTLY[LXIV]	YES	PARTLY[LXV]
Independent visitor schemes:									
An independent visitor scheme is in place	NO	YES[LXVI]	YES[LXVII]	YES[LXVIII]	YES[LXIX]	PARTLY[LXX]	NO	YES[LXXI]	NO

I National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) (NDIS Rules)).

II Senior Practitioner Act 2018 (ACT). The NDIS Rules apply.

III No state legislation, only policy. The NDIS Rules apply.

IV Disability Services Act 1993 (NT) pt 4. The NDIS Rules apply.

V Disability Services Act 2006 (Qld) pt 6. The NDIS Rules apply.

VI No state legislation, only policy. The NDIS Rules apply.

VII Disability Services Act 2011 (Tas) pt 6. The NDIS Rules apply.

VIII Disability Act 2006 (Vic) pt 7. The NDIS Rules apply.

IX Most of the regulation of restrictive practices is done under a voluntary code of practice. The Disability Services Act 1993 (WA) contains only a few relevant provisions. The NDIS Rules apply.

X Behaviour support plans including regulated restrictive practices must only include such as a last resort after exploring other options and be the least restrictive (NDIS Rules r 21(3)(c), (d)).

XI A restrictive practice should only be used if it is the 'least restrictive way of ensuring the safety of the person or others…' (Senior Practitioner Act 2018 (ACT) ss 6(b), 9(2)(g)(ii)). The wording of this provision suggests that restrictive practices may be used in the least restrictive way yet not be the least restrictive option available. A positive behaviour support plan must only be approved if 'any restrictive practice included in the plan is…the least restrictive approach reasonably available' (Senior Practitioner Act 2018 (ACT) s 14(2)(b)). However, under the NDIS Rules, behaviour support plans including regulated restrictive practices must only include such as a last resort after exploring other options and be the least restrictive resort (NDIS Rules r 21(3)(c), (d)).

XII Under the NDIS Rules, behaviour support plans including regulated restrictive practices must only include such as a last resort after exploring other options and be the least restrictive resort (NDIS Rules r 21(3)(c), (d)).

XIII A restrictive practice included in a behaviour support plan must 'show the use of the restrictive intervention is the option that is the least restrictive of the person as is possible in the circumstances' (Disability Services Act 1993 (NT) s 37(2)(c)). However, restraint may be used by a provider in an emergency if 'the least restrictive for the resident as is possible in the circumstances', suggesting it might not necessarily be the least restrictive option (Disability Services Act 1993 (NT) s 42(2)(a)). Under the NDIS Rules, behaviour support plans including regulated restrictive practices must only include such as a last resort after exploring other options and be the least restrictive resort (NDIS Rules r 21(3)(c), (d)).

XIV A restrictive practice may only be employed where its use 'is the least restrictive way of ensuring the safety of the adult or others' (Disability Services Act 2006 (Qld) s 142(2)(f)(ii)). The wording of this provision suggests that restrictive practices may be used in the least restrictive way yet not be the least restrictive option available. Under the NDIS Rules, behaviour support plans including regulated restrictive practices must only include such as a last resort after exploring other options and be the least restrictive resort (NDIS Rules r 21(3)(c), (d)).

XV Only regulated under policy. Under the NDIS Rules, behaviour support plans including regulated restrictive practices must only include such as a last resort after exploring other options and be the least restrictive resort (NDIS Rules r 21(3)(c), (d)).

XVI A planned restrictive intervention must be 'the least restrictive of the person's freedom of decision and action as is practicable in the circumstances' (Disability Services Act 2011 (Tas) ss 38(4)(b), 43(1)(b)). An unplanned restrictive practice must have been the 'least intrusive type of restrictive intervention' (Disability Services Act 2011 (Tas), s 36(2)(b)). These provisions do not suggest that restrictive intervention must necessarily have been a measure of last resort. Under the NDIS Rules, behaviour support plans including regulated restrictive practices must only include such as a last resort after exploring other options and be the least restrictive resort (NDIS Rules, r 21(3)(c), (d)).

XVII Regulated restrictive practices may only be used if it is 'the option which is the least restrictive of the person as is possible in the circumstances' (Disability Act 2006 (Vic), ss 5(4), 132ZR, 132ZX(2), 140(b), 147(2)(a)). The Act does not specify whether the use of restrictive practices other than those regulated must be the least restrictive option. Under the NDIS Rules, behaviour support plans including regulated restrictive practices must only include such as a last resort after exploring other options and be the least restrictive resort (NDIS Rules r 21(3)(c), (d)).

XVIII Only regulated under voluntary code of practice. Under the NDIS Rules, behaviour support plans including regulated restrictive practices must only include such as a last resort after exploring other options and be the least restrictive resort (NDIS Rules r 21(3)(c), (d)).

XIX A positive behaviour support plan will only be approved and registered if there is satisfaction that any restrictive practice included in the plan is necessary to prevent harm to the person or others (Senior Practitioner Act 2018 (ACT) ss 14(2)(b); 15(6)(b)). If restrictive practices are used outside a positive behaviour plan, it must only be used to 'avoid imminent harm to the person or others' (Senior Practitioner Act 2018 (ACT) s 10(b)). This accords with the NDIS rules for regulated restrictive practices in behaviour support plans (NDIS Rules r 21(3)(c)).

XX Only regulated under policy. Under the NDIS Rules, regulated restrictive practices must only be used to prevent self-harm and harm to others (NDIS Rules r 21(3)(c)).

XXI Restraint may also be used to: Prevent destruction of property where to do so 'could involve the risk of harm to themselves or any other person' (Disability Services Act 1993 (NT), s 41(2)(a)).

This is slightly broader than to prevent self-harm and harm to other persons, which is the permissible uses under the NDIS Rules regulated restrictive practices in behaviour support plans (NDIS Rules r 21(3)(c)).

XXII Only regulated under policy. Permissible uses under the NDIS Rules for regulated restrictive practices are limited to prevention of self-harm or harm to other persons (NDIS Rules r 21(3)(c)).

XXIII An unplanned restrictive practice can only be used to 'protect the person with disability, or another person from serious harm' (Disability Services Act 2011 (Tas), s 36(2)). However, approval may be obtained if the restrictive practice is used 'only for the primary purpose of ensuring the safety, health or wellbeing of the person or other persons' (emphasis added) (Disability Services Act 2011 (Tas), ss 38(4)(a), 43(1)(a)). This appears to suggest a broader scope. Permissible uses under the NDIS Rules for regulated restrictive practices are limited to prevention of self-harm or harm to other persons (NDIS Rules r 21(3)(c)).

XXIV Restraint may also be used to: Prevent destruction of property where to do so 'could involve the risk of harm to themselves or any other person' (Disability Act 2006 (Vic), ss 140(a)).

This is slightly broader than to prevent self-harm and harm to other persons, which is the permissible uses under the NDIS Rules regulated restrictive practices in behaviour support plans (NDIS Rules r 21(3)(c)).

XXV Only regulated under voluntary code of practice. Permissible uses under the NDIS Rules for regulated restrictive practices are limited to prevention of self-harm or harm to other persons (NDIS Rules r 21(3)(c)).

XXVI However, use of some restrictive practices may be authorised if, for example, such practices are consented to 'by a guardian or in some cases an informal decision-makers for the adult' (Disability Services Act 2006 (Qld) ss 143(2)(b)(ii), 166(c)(ii)(B)).

XXVII An NDIS provider of regulated restricted practices must report monthly to the NDIS Commissioner regarding such use (NDIS Rules r 14).

XXVIII A provider must notify the use of restrictive practices to the Senior Practitioner and the Senior Practitioner may make guidelines on reporting requirements (Senior Practitioner Act 2018 (ACT) ss 10A, 12(1)(e), 20(b)). An NDIS provider of regulated restricted practices must report monthly to the NDIS Commissioner regarding such use (NDIS Rules r 14).

XXIX Only regulated under policy. An NDIS provider of regulated restricted practices must report monthly to the NDIS Commissioner regarding such use (NDIS Rules r 14).

XXX Only with regard to emergency use of restraint must a provider immediately give notice to the CEO (Disability Services Act 1993 (NT) s 42(2)(b)). An NDIS provider of regulated restricted practices must report monthly to the NDIS Commissioner regarding such use (NDIS Rules r 14).

XXXI Use of a restrictive practice in relation to an adult with an intellectual or cognitive disability must be reported to the Chief Executive every calendar month (Disability Services Act 2006 (Qld) s 199; Disability Services Regulation 2017 (Qld) s 8). An NDIS provider of regulated restricted practices must report monthly to the NDIS Commissioner regarding such use (NDIS Rules r 14).

XXXII Only regulated under policy. An NDIS provider of regulated restricted practices must report monthly to the NDIS Commissioner regarding such use (NDIS Rules r 14).

XXXIII No reporting requirement under the state law but it is a defence against the use of unauthorised use of restrictive practice if, inter alia, the Senior Practitioner is notified of the use (Disability Services Act 2011 (Tas) 36(2)(c)). An NDIS provider of regulated restricted practices must report monthly to the NDIS Commissioner regarding such use (NDIS Rules r 14).

XXXIV Only in an emergency must a regulated restrictive practice be reported to the Authorised Program Officer be notified and report to the Senior Practitioner (Disability Act 2006 (Vic) s 147(2)(c)), 147(3)). In respect of 'other restrictive practices', the Senior Practitioner may require that a service provider reports on the use of such practices but is not mandatory (s 150(2)). An NDIS provider of regulated restricted practices must report monthly to the NDIS Commissioner regarding such use (NDIS Rules r 14).

XXXV Only regulated under voluntary code of practice. An NDIS provider of regulated restricted practices must report monthly to the NDIS Commissioner regarding such use (NDIS Rules r 14).

XXXVI Chemical restraint is included as a regulated restrictive practice, the use of which is permitted in accordance with the Rules (NDIS Rules r 6).

XXXVII Chemical restraint is included as a restrictive practice (Senior Practitioner Act 2018 (ACT) s 7(1)(b)(i)). Under the NDIS Rules, chemical restraint is also permitted (NDIS Rules r 6).

XXXVIII Only regulated under policy. Under the NDIS Rules, chemical restraint is permitted (NDIS Rules r 6).

XXXIX Chemical restraint is included as a restrictive practice (Disability Services Act 1993 (NT) ss 33-34). Under the NDIS Rules, chemical restraint is also permitted (NDIS Rules r 6).

XL Chemical restraint is included as a restrictive practice (Disability Services Act 2006 (Qld) ss 144-145). Under the NDIS Rules, chemical restraint is also permitted (NDIS Rules r 6).

XLI Only regulated under policy. Under the NDIS Rules, chemical restraint is also permitted (NDIS Rules r 6).

XLII Chemical restraint is included under the broad definition of 'restrictive intervention' (Disability Services Act 2011 (Tas) s 4). Under the NDIS Rules, chemical restraint is also permitted (NDIS Rules r 6).

XLIII Chemical restraint is included as a regulated restrictive practice (Disability Act 2006 (Vic) s 3). Under the NDIS Rules, chemical restraint is also permitted (NDIS Rules r 6).

XLIV Only regulated under voluntary code of practice. Under the NDIS Rules, chemical restraint is also permitted (NDIS Rules r 6).

XLV The Senior Practitioner may issue directions to disability service providers in relation to minimum qualifications and training of Authorised Program Officers (Disability Act 2006 (Vic) ss 132ZO, 135(6)).

XLVI No requirement on providers to escalate serious complaints. However, the residential facility manager to report at least every six months to the CEO and principal community visitor on the pattern of complaints made during the period of the report; and any changes made to prevent a recurrence of the activities that led to the complaint (Disability Services Act 1993 (NT) s 49(3)).

XLVII No requirement on providers to escalate serious complaints. However, service providers, unless exempt, must report annually to the Disability Services Commission including information on the number of complaints and outcomes (Disability Act 2006 (Vic) ss 105, 106B).

XLVIII No requirement on providers to escalate serious complaints. However, it does require providers to 'give to the Director a return concerning complaints received and action taken by the service provider during the year' (Disability Services Act 1993 (WA) s 48A(1)). If a complaint is made to a public provider and it has not been resolved in accordance with administrative instructions, the complaint is to be referred to the Director (Health and Disability Services (Complaints) Act 1995 (WA) s 23(1)).

XLIX The NDIS framework imposes liability on NDIS providers, not individual workers. An NDIS providers breaching the Rules may be liable to a civil penalty (250 penalty units) (NDIS Act s 73J).

L It is prohibited to use a restrictive practice contrary to what is permitted in a positive behaviour support plan. Maximum penalty is 50 penalty units, imprisonment for 6 months or both. Note: Part 8 which covers offences under the Act does not commence until 1 July 2020. (Senior Practitioner Act 2018 (ACT), ss 2(2), 46(1)). Under the NDIS rules, NDIS providers breaching the Rules may be liable to a civil penalty (250 penalty units) (NDIS Act s 73J).

LI Only regulated under policy. Under the NDIS rules, NDIS providers breaching the Rules may be liable to a civil penalty (250 penalty units) (NDIS Act s 73J).

LII It is an offence to use a restrictive intervention contrary to the Act on a resident of a residential facility (Maximum penalty 40 penalty units) (Disability Services Act 1993 (NT), s 41(1)). Under the NDIS rules, NDIS providers breaching the Rules may be liable to a civil penalty (250 penalty units) (NDIS Act s 73J).

LIII 'No provision of this Act creates a civil cause of action based on a contravention of the provision' (Disability Services Act 2006 (Qld) s 4). No mention of criminal offences for contravention of Part 6 of the Act. Under the NDIS rules, NDIS providers breaching the Rules may be liable to a civil penalty (250 penalty units) (NDIS Act s 73J).

LIV Only regulated under policy. Under the NDIS rules, NDIS providers breaching the Rules may be liable to a civil penalty (250 penalty units) (NDIS Act s 73J).

LV Unauthorised use of restrictive practices is an offence (Fine not exceeding 200 penalty units) (Disability Services Act 2011 (Tas) s 36). NDIS providers breaching the Rules may be liable to a civil penalty (250 penalty units) (NDIS Act s 73J).

LVI Using of a restrictive practice without an approval is an offence (240 penalty units) (Disability Act 2006 (Vic), s 134). Under the NDIS rules, NDIS providers breaching the Rules may be liable to a civil penalty (250 penalty units) (NDIS Act s 73J).

LVII 'A person who ill-treats or willfully neglects a person with disability while that person is under his or her care, supervision or authority commits an offence.' (Disability Services Act 1993 (WA) s 53).

LVIII The NDIS framework imposes liability on NDIS providers, not individual workers. An NDIS providers breaching the Rules may be liable to a civil penalty (250 penalty units) (NDIS Act s 73J).

LIX ''An official is not civilly liable for anything done or omitted to be done honestly and without recklessness (a) in the exercise of a function under this Act; or (b) in the reasonable belief that the act or omission was in the exercise of a function under this Act' (Senior Practitioner Act 2018 (ACT) s 51(1)) . Official means '(a) the senior practitioner or (b) any other person exercising a function under this Act' (Senior Practitioner Act 2018 (ACT) s 51(3)). There are no exemptions under the NDIS Rules.

LX Only regulated under policy. There are no exemptions under the NDIS Rules.

LXI 'A person is not civilly or criminally liable for an act done, or omitted to be done, by the person in good faith and exercising due diligence in the course of delivering treatment or other services to a resident of a residential facility for this Act.' (Disability Services Act 1993 (NT) s 67). There are no exemptions under the NDIS Rules.

LXII A service provider, or an individual acting for a service provider, have immunity from civil and criminal liability if they used a restrictive practice and acted honestly and without negligence (Disability Services Act 2006 (Qld) ss 189-190). There are no exemptions under the NDIS Rules.

LXIII Only regulated under policy. There are no exemptions under the NDIS Rules.

LXIV The Minister, Secretary, Senior Practitioner, any of their delegates, the Guardianship and Administration Board or any authorised officer, have immunity from any action in respect of an act done in good faith and in the performance, or purported performance, of a function imposed, or the exercise, or purported exercise, of a power conferred (Disability Services Act 2011 (Tas) s 51). Immunity does not extend to service providers. There are no exemptions under the NDIS Rules.

LXV While using restrictive practices as such is not an offence, no one is exempt from liability for acting in good faith if such practices amount to ill-treatment or willful neglect (Disability Services Act 1993 (WA) s 53). There are no exemptions under the NDIS Rules.

LXVI See Official Visitor Act 2012 (ACT); Disability Services Act 1991 (ACT) pt 3.

LXVII See Ageing and Disability Commissioner Act 2019 No 7 (NSW) pt 4.

LXVIII See Disability Services Act 1993 (NT) pt 6.

LXIX See Public Guardian Act 2014 (Qld) ch 3 pt 6, ch 4 pt 2.

LXX The Community Visitor Scheme (see Disability Services (Community Visitor Scheme) Regulations 2013) does not conduct visits to 'non-government disability accommodation service providers, Supported Residential Facility or Day Options programs' https://communityvisitorscheme.sa.gov.au/about-us.

LXXI See Disability Act 2006 (Vic) pt 3 div 6, pt 6, div 7.

CHAPTER 5.

MENTAL HEALTH FACILITIES

5.1 Background

The ongoing Royal Commission into Victoria's Mental Health System is adding to the wider debate about the quality of mental health services across Australia. This debate is also informed by the ongoing Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability across Australia, which includes disability that affects mental health (discussed in chapter 4 of this report).

While falling short of a national framework, the annual/biennial forum Toward Elimination of Restrictive Practices continues to highlight the need for safer mental health facilities and services. It provides a platform for the exchange of initiatives and best practice for the reduction and elimination of restrictive practices.

> 'The Human Rights Council··· [c]alls upon States to abandon all practices that fail to respect the rights, will and preferences of all persons, on an equal basis, and that lead to power imbalances, stigma and discrimination in mental health settings'
>
> Extract from Human Rights Council Resolution A/HRC/36/L.25, 26 September 2017.

The Royal Commission into Victoria's Mental Health System

- The Royal Commission was established on 22 February 2019 and is chaired by Ms Penny Armytage
- The Interim Report was delivered on 29 November 2019. The Final Report is due to be completed by 5 February 2021
- The Terms of Reference include consideration of how to deliver the best mental health outcomes, including through 'best practice treatment and care models that are safe and person-centred', as well as any other relevant considerations

Despite a commitment to the reduction and elimination of restrictive practices in the mental health services for more than a decade,[128]

128 Australian Health Ministers' Advisory Council and National Mental Health Working Group: National safety priorities in mental health: a national plan for reducing harm (2005).

such measures continue to be used in mental health facilities and services. Between July 2018 and the first four months of the Royal Commission, Victoria's Mental Health Complaints Commissioner received more complaints than ever previously recorded (a total of 1,976).[129] Of these complaints, 88 related to the use of restrictive interventions and most concerned whether the use had been necessary and in compliance with the relevant legislation.[130]

The Interim Report of the Royal Commission into Victoria's Mental Health System documented many negative experiences of restrictive practices by persons subjected to such measures, including feelings of disempowerment and dehumanisation.[131] In the course of this inquiry, various stakeholders (including the Castan Centre) have called for the elimination of restrictive practices and pointed to their limited regulation compared with the disability sector with its national framework to reduce and eliminate restrictive practices (discussed in the previous chapter).[132]

In light of the information in its Interim Report, the Victorian Royal Commission confirmed that these findings 'will be subject of further consideration [by the Commission] in 2020'.[133] These considerations are now taking place in the context of the COVID-19 pandemic which has added to the existing concerns with the system in Victoria, as well as across Australia more broadly.

5.2 International human rights standards

Restrictive practices on persons in mental health facilities and in receipt of mental health services, conflict with numerous rights under international law. Given the overlap between mental health and disability, this includes the rights under the UN Convention on the Rights of Persons with Disabilities (CRPD). In October 2017, the UN Human Rights Council passed a resolution that recognises the violence and abuse faced by persons with psychosocial disabilities and mental health conditions.[134]

As noted in chapter 4 of this report, the UN Office of the High Commissioner for Human Rights (OHCHR) has underlined the importance of continuing to respect the rights of persons in institutions during the pandemic, including mental health facilities.[135] This includes the rights considered below. These rights impacts are compounded by the pandemic which has a disproportionate impact on persons in closed environments, including persons in mental health facilities, due to factors such as underlying health determinants and difficulty to comply with physical distancing.[136] Limiting contact with families and community visitors, for example, further adds to the risk that persons in these environments may be exposed to neglect and abuse through violence and restrictive practices.

Torture and other cruel, inhuman or degrading treatment or punishment

The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has confirmed that restrictive practices (including restraint) are frequently applied in closed environments, including mental health institutions.[137] The Special Rapporteur also recognised that the use of restraints on persons with psychiatric and other conditions might constitute ill-treatment and torture.[138] The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) has called on Australia to eliminate such practices in the context of Article 15 of the CRPD, which prohibits the use of torture and other cruel, inhuman or degrading treatment or punishment.[139] The Federal Government has recognised closed facilities where persons are involuntarily deprived of liberty for mental health treatment or assessment as 'primary places' of detention for the purposes of monitoring under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).[140]

129 Mental Health Complaints Commissioner Victoria: Annual Report 2018-19.

130 Ibid.

131 Royal Commission into Victoria's Mental Health System: Interim Report (November 2019) 93.

132 See, e.g., submissions by: Castan Centre (2019) and Office of the Public Advocate (Vic) (2019).

133 Royal Commission into Victoria's Mental Health System: Interim Report (November 2019) 93.

134 UN Human Rights Council: Resolution 36/13 (October 2017).

135 United Nations: COVID-19 and the Rights of Persons with Disabilities: Guidance (April 2020).

136 Ibid.

137 UN Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report 22/53 (February 2013) [63].

138 Ibid.

139 Other instruments that contain this prohibition include International Covenant on Civil and Political Rights (1966) (ICCPR) Article 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT).

140 Cited by the Commonwealth Ombudsman: Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) Baseline assessment of Australia's OPCAT readiness (2019) 8.

Exploitation, violence and abuse

In addition to the prohibition on torture, the UN High Commissioner for Human Rights has noted that restrictive practices in mental health facilities often contravene the right to be free from exploitation, violence and abuse (Article 16 CRPD).[141] Indeed, violence and abuse may be underlying causes of mental health conditions in the first place. This right requires States parties to take positive steps to protect individuals against such treatment, rather than merely refraining from it. This includes the need to ensure appropriate monitoring of mental health facilities, including the identification, investigation and prosecution (where appropriate) of abuse.

Deprivation of dignity, autonomy, integrity, legal capacity and informed consent

The use of restrictive practices without consent undermines the fundamental right of free and informed consent, a central part of the right to the highest attainable standard of health (Article 25(d) CRPD).[142] The UN High Commissioner for Human Rights has reminded States parties to repeal all laws and policies that fail to ensure this right, including the use of restraint.[143] Restrictive practices also undermine other related rights, including every person's right to the respect for their autonomy and dignity (Article 3(a) CRPD), physical and mental integrity (Article 17 CRPD), equality before the law and the enjoyment of legal capacity on an equal basis with others (Article 12 CRPD).[144]

Liberty and security of person

The UN Human Rights Committee has clarified that liberty means 'freedom from confinement of the body' and that security of person involves 'freedom from injury to the body and the mind, or bodily and mental integrity'.[145] This right therefore relates to various other rights discussed above, such as the prohibition on torture and other forms of ill-treatment and the right to physical and mental integrity.

A person in a mental health facility may be deprived of their liberty or experience a violation of their security of person in connection with restrictive practices. This may include, particularly during the pandemic, isolation and seclusion practices, as well as the use of restraint to confine a person to a chair or a bed.

Life and health

The risks to the rights to life and health posed by COVID-19 on persons in mental health facilities add to the rights impacts discussed above that flow from the use of restrictive practices.

As the UN Human Rights Committee has clarified, the right to life imposes not only negative obligations on States to respect life, but also involve positive obligations to ensure the right to life.[146] It includes a duty on part of States parties to take steps to address 'general conditions' that may amount to 'direct threats to life' or which prevent individuals to enjoy a life with dignity.[147] COVID-19 is a notable example of such a threat to life and to health.

141 UN High Commissioner for Human Rights: Report 34/32 (January 2017) [31].

142 Another instrument that protects this right include International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) Article 12.

143 UN High Commissioner for Human Rights: Report 39/36 (July 2018) [46].

144 See also ICCPR, Articles 16, 26.

145 United Nations Human Rights Committee: General Comment No. 35 (2014) [3].

146 UN Human Rights Committee: General Comment No 36 (2018) [21].

147 Ibid [26].

5.3 Regulation in Australia

The use of restrictive practices in mental health facilities is not prohibited. Between 2017 and 2018, the Federal Government reported 16,917 instances of physical restraint and 796 instances of mechanical restraint in mental health services.[148] With the exception of New South Wales (where restrictive practices are regulated under policy), restrictive practices are regulated under specific mental health legislation at the state and territory level. Yet, each jurisdiction defines and regulates these practices differently.

The extent of regulation of restrictive practices under mental health legislation

Forms of restrictive practices regulated					
State/Territory	Seclusion	Chemical restraint	Physical restraint	Mechanical restraint	Other
ACT	Involuntary seclusion	'Forcible giving of medication'	Restraint (not defined)		Minimum confinement
NSW	X	Sedation to ensure safe transport	Restraint (not defined)		_
NT	Seclusion	X	X	Mechanical restraint	_
QLD	Seclusion	Not expressly defined	Physical restraint	Mechanical restraint	'Other practices'
SA	Seclusion	Chemical restraint	Physical restraint	Mechanical restraint	Confinement
TAS	Seclusion	Restraint (not defined)			_
VIC	Seclusion	Use of sedatives	Restraint (not defined)		_
WA	Seclusion	X	Bodily restraint	X	_

Outside the coverage of specific mental health legislation, the use of restrictive practices on persons with psychiatric and other conditions may be covered under the National Disability Insurance Scheme (NDIS) (discussed in chapter 4 of this report).

Key concerns

This section outlines concerns arising from the Table annexed to this chapter. It analyses the legal frameworks that regulate restrictive practices against a set of indicators. To the extent possible, these indicators are derived from international standards. It is important to note that the indicators should be regarded as minimum requirements. Much like the use of restrictive practices in disability care, international standards require the reduction and elimination of such practices in the mental health context.

Our review of legislation that regulates the use of restrictive practices under mental health legislation demonstrates several areas where the legal frameworks fall short of international standards. Of key concern are the following areas:

Scope of regulation

As illustrated in the table above, states and territories differ regarding the extent to which they regulate the use of restrictive practices.

148 Australian Institute of Health and Welfare: Mental health services In brief 2019, v.

This inconsistency is two-fold:

- The jurisdictions differ in respect of which forms of restrictive practices they regulate; and
- The jurisdictions use different definitions (or no definition) for different forms of restrictive practices.

The scope of regulation differs, therefore, depending on in which state and territory a person receives the services.

Chemical restraint

Existing regulation is particularly limited in respect of chemical restraint, and as discussed above, differs between jurisdictions. The use of medication to restrain a person is not prohibited in any state or territory except for Queensland, which makes it an offence to administer medication that is not clinically necessary for treatment.[149] In other jurisdictions, chemical restraint is either:

- Not regulated by law (NSW, NT, WA);
- Regulated in a specific circumstance (when taking a person to/from a mental health facility) (Vic);[150] or
- Regulated as a form of restraint (ACT, SA, Tas).[151]

Informed consent

While most jurisdictions have an authorisation system in place, informed consent from the person subjected to the restrictive practice does not form part of the authorisation process under the relevant mental health legislation. More broadly, the law on informed consent differs between states and territories, which means that it is not applied consistently (as noted in the Interim Report of the Royal Commission into Aged Care Quality and Safety discussed in chapter 3 of this report).

Permitted uses of restrictive practices

None of the jurisdictions prohibits the use of restrictive practices in mental health facilities. Instead, the use of such practices is permitted on different grounds depending on the state and territory. This include very broad uses. For example, in South Australia, restraint may be used to prevent nuisance.[152] The wide variety of grounds gives broad powers to use force and restraint and risks normalising its use, rather than reducing and eliminating such practices.

Reporting, complaints and data collection

While all states and territories have established an independent community visitor scheme to monitor mental health facilities, there is no national framework that requires reporting of every use of restrictive practices to an external body, and the collection of data on such practices. Only half of the jurisdictions require restrictive practices to be reported. With the exception of the Northern Territory[153] , there is no requirement under mental health legislation for staff and providers to escalate serious complaints.

Staff training

Most states and territories do not have any reference in their legislation to minimum staff training or qualifications in respect of restrictive practices. Such training, for example, may be in respect of the need to identify a restrictive practice in order to reduce and eliminate its use in a particular context.

149 Mental Health Act 2016 (Qld) s 272.

150 Mental Health Act 2014 (Vic) s 350(1)(b).

151 Mental Health Act 2015 (ACT); Mental Health Act 2009 (SA) s 3; Mental Health Act 2013 (Tas) s 3.

152 Mental Health Act 2009 (SA) ss 34A(2), 56(1)(c).

153 Mental Health and Related Services Act 1998 (NT) ss 100(10), (11).

Liability

Article 16 of the CRPD requires States parties to adopt frameworks that ensure that exploitation, violence and abuse may be identified, investigated and prosecuted (where appropriate). While three jurisdictions make it an offence to apply restrictive practices contrary to the relevant legislation, others have enacted broader offences, such as wilful neglect and ill-treatment, or do not make it an explicit offence to apply restrictive practices contrary to the legislation. In New South Wales, no legislation regulates the use of restrictive practices. Instead, one must look to other areas of law, such as torts and criminal law for potential causes of action. In some jurisdictions, officials are exempt from liability if acting pursuant to their functions. For example, officials in Queensland are exempt from civil liability if an act or omission was made contrary to the mental health legislation, but without negligence or dishonesty.[154] In Western Australia, all persons are protected from liability in tort in the performance, or purported performance, of functions under the mental health legislation or in assisting another person in performing such functions.[155]

Inconsistency with regulation in other sectors

Regardless of the intersection, and often overlap, between disability and mental health, the regulation of restrictive practices under mental health legislation has not undergone the same transformation to a national framework as the disability sector under the National Disability Insurance Scheme (NDIS). This is so despite the inconsistency of regulation of restrictive practices between state and territory mental health legislation.

	Disability care (NDIS framework)	Mental health legislation
Scope of regulation		
Restrictive practices include physical, mechanical and chemical restraint and seclusion	✓	- Varies between states/ territories
Safeguards		
Restrictive practices are only permitted as a last resort	✓	- Varies between states/ territories
Physical and chemical restraint are regulated to the same extent	✓	X (chemical restraint not regulated to the same extent)
Oversight mechanism		
Regulation includes a national oversight body to monitor restrictive practices	✓	✓
Sanctions		
Using restraint contrary to the relevant legislation is an offence	✓	- Varies between states/ territories

Added concerns during the pandemic

The COVID-19 pandemic has added to existing concerns regarding the state of the mental health facilities and care across Australia and put additional pressure on an already weak system.

As noted above, persons in closed institutions face a heightened risk of COVID-19 which add risks to life and health. This has been

154 Mental Health Act 2016 (Qld) s 797.

155 Mental Health Act 2014 (WA) s 583(1).

clearly demonstrated in the aged care sector as discussed in detail in chapter 3 of this report. Similar concerns apply in other closed environments. For example, alongside other forms of restrictive practices, isolation is a form of restraint. If isolation is considered necessary to prevent the spread of COVID-19 in mental health facilities, continued monitoring and oversight is crucial. However, as noted above, the existing legal framework fails to provide effective monitoring and reporting of the use of restrictive practices. During the pandemic, restrictions to access to closed environments in order to prevent the spread of the virus may further isolate and leave persons in institutions without monitoring and oversight.

5.4 Conclusion

Under international law, Australia has an obligation to protect persons in mental health facilities from the use of restrictive practices. State and territory mental health legislation do not prohibit such practices and provide weaker protection from their use than the disability sector. Of significant concern is the varying levels of regulation between jurisdictions, including the lack of clear and uniform definitions of restrictive practices. The result is a patchwork of legal frameworks, which makes identifying and addressing restrictive practices difficult.

Further, the pandemic has compounded existing concerns regarding the treatment of persons in closed environments, including mental health facilities. This includes, for example, the ability to have monitoring and oversight of the treatment of persons in mental health facilities.

Recommendations - Mental health facilities

Based on our review of the existing legal frameworks on restrictive practices and relevant international human rights obligations, the Castan Centre recommends that the Australian governments:

- Ensure a human rights-based approach in response to COVID-19 which leaves no one behind and protects the rights of vulnerable persons, including persons in mental health facilities.
- Amend mental health legislation to take a human rights-based approach and effectively protect persons in mental health facilities from restrictive practices by prohibiting their use in line with recommendations by relevant UN Committees and Special Rapporteurs.
- Ensure that adequate preventive, reactive and accountability mechanisms accompany a prohibition, including:
  - Reporting obligations on part of providers of any instances of restraint
  - An external and independent complaints mechanism to report the use of force and restraint
  - Minimum training and qualification requirements for providers and workers on how to identify restrictive practices and on alternative practices to avoid the use of such measures and embed a human rights culture in mental health facilities
  - Appropriate penalties for breach of the legislation to support the development of a culture of human rights compliance
- Make consistent preventive, reactive and accountability measures across comparable sectors (e.g. aged care, disability care and mental health sectors) to provide clarity to rights-holders and duty-bearers.
- Fully and effectively implement OPCAT and its mandate in respect of all mental health facilities by the 2022 deadline.

ANNEX – CHAPTER 5 MENTAL HEALTH FACILITIES

INDICATORS	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Regulated under law, not only policy	YES[I]	PARTLY[II]	PARTLY[III]	YES[IV]	YES[V]	YES[VI]	YES[VII]	PARTLY[VIII]
If regulated by legislation:								
Restraint is a measure of last resort and the least restrictive option	NO[IX]	NO[X]	YES[XI]	YES[XII]	NO[XIII]	YES[XIV]	YES[XV]	YES[XVI]
Use is limited to preventing a person from causing injury to themselves or other persons	NO[XVII]	NO[XVIII]	NO[XIX]	NO[XX]	NO[XXI]	NO[XXII]	NO[XXIII]	NO[XXIV]
Informed consent must be obtained before use	NO	NO	NO[XXV]	NO[XXVI]	NO[XXVII]	NO[XXVIII]	NO[XXIX]	NO[XXX]
Every use of restraint must be reported	YES[XXXI]	NO	PARTLY[XXXII]	NO[XXXIII]	NO	PARTLY[XXXIV]	YES[XXXV]	YES[XXXVI]
Chemical restraint is prohibited	NO[XXXVII]	NO	NO	YES[XXXVIII]	NO	NO	NO[XXXIX]	NO
The law includes minimum requirements for staff training on restrictive practices	NO[XL]	NO	NO	NO	NO	NO	PARTLY[XLI]	PARTLY[XLII]
Administrators are required to escalate serious complaints to an independent, external body	NO	NO	YES[XLIII]	NO[XLIV]	NO	NO	NO	NO[XLV]
Use contrary to the law is an offence under the Act (in addition to general criminal law provisions)	NO	PARTLY[XLVI]	YES[XLVII]	YES[XLVIII]	PARTLY[XLIX]	PARTLY[L]	NO[LI]	YES[LII]
Officials may be held civilly and criminally liable for restraint applied contrary to the law and in good faith	YES	YES	NO[LIII]	PARTLY[LIV]	YES	NO[LV]	PARTLY[LVI]	PARTLY[LVII]
Independent visitor schemes:								
An independent visitor scheme is in place	YES[LVIII]	YES[LIX]	YES[LX]	YES[LXI]	YES[LXII]	YES[LXIII]	YES[LXIV]	YES[LXV]

I Mental Health Act 2015 (ACT)

Regulates:

- Restraint
- Minimum confinement
- Forcible giving of medication
- Involuntary seclusion

II Section 81 of the Mental Health Act 2007 (NSW) contains very limited regulation of the use of restraint, including chemical restraint, in the specific context of transporting a person to/from a mental health facility and other health facilities.

III Mental Health and Related Services Act 1998 (NT)

Only regulates:

- Mechanical restraint
- Seclusion

IV Mental Health Act 2016 (Qld)

Regulates:

- Mechanical restraint
- Seclusion
- Physical restraint
- 'Other practices'.

Note: Chemical restraint is implicitly prohibited as it is an offence to administer medicine, which is not clinically necessary.

V Mental Health Act 2009 (SA)

Regulates :

- Chemical restraint
- Mechanical restraint
- Physical restraint
- Seclusion
- Confinement

VI The Mental Health Act 2013 (Tas)

Regulates:

- Seclusion
- Restraint (forms not clarified)

VII Mental Health Act 2014 (Vic)

Regulates:

- Seclusion
- Restraint (forms not clarified)
- The use of sedatives, specifically in the context of 'bodily restraint and sedation...when taking [a] person'

VIII Mental Health Act 2014 (WA)

Only regulates:

- Seclusion
- Bodily restraint

IX Restraint must merely be 'necessary and reasonable' (Mental Health Act 2015 (ACT) ss 65(2)(b), 73(2)(b), 88(1)(b).

X An authorised person transporting a person to/from a mental health facility or other health facility 'may use reasonable force' and 'restraint the person in any way reasonably necessary'. A person may also be sedated by the authorised person for the purpose of transport if 'necessary' to enable safe transport. (Mental Health Act 2007 (NSW) ss 81(2), (3)).

XI Mechanical restraint must only be applied when: 'no other less restrictive method of control is applicable or appropriate' (Mental Health and Related Services Act 1998 (NT) ss 14 (c), 56(d), 61(3) and s62(3)).

XII Physical restraint, mechanical restraint and forcibly administering medication may only be applied when: 'no other reasonably practicable way' to protect from harm (Mental Health Act 2016 (Qld) ss 24(3), 249(1), 250(1), 258(1), 263(1), 270, 374(2), 375(2), (3)).

XIII Restrictive practices must be: 'a last resort for safety reasons'. However, other reasons are permissible, such as carrying out a treatment or ensuring compliance with the Act, suggesting that such reasons are not required to be a last resort (Mental Health Act 2009 (SA) ss 7(h), 32A(2)).

XIV Under Standing Orders made under the Mental Health Act 2013 (Tas), physical, mechanical and chemical restraint must only be made after less restrictive interventions have been tried without success, or considered but excluded as inappropriate/unsuitable (Direction 1 of the Chief Civil Psychiatrist Standing Order 10; Direction 1 of the Chief Civil Psychiatrist Standing Order 10A).

XV Restrictive interventions may only be used: 'after all reasonable and less restrictive options have been tried or considered and have been found to be unsuitable' (Mental Health Act 2014 (Vic) s 105). Bodily restraint and sedation may be used when taking the person to/from a mental health service or any other place only if 'all reasonable and less restrictive options have been tried or considered and have been found to be unsuitable' (Mental Health Act 2014 (Vic) ss 350(1)(a), (b)).

XVI Bodily restraint may only be used if: 'there is no less restrictive way of providing treatment or preventing the injury or damage.' (Mental Health Act 2014 (WA) ss 216(1)(b), 232(1)(b)).

XVII In addition, restraint may be used to 'ensure that the person remains in custody' under a psychiatric treatment order (Mental Health Act 2015 (ACT) ss 65(2)(b), 73(2)(b)).

XVIII No specific uses specified for force and restraint in the context of transport to/from a mental health facility or other health facility. For chemical restraint, limited to ensure safe transport. (Mental Health Act 2007 (NSW) ss 81(2), (3).

XIX Mechanical restraint may also be used to: (Mental Health and Related Services Act 1998 (NT), ss 61(3), 62(3)).

- Provide medical treatment
- Prevent the person from absconding from the facility
- Prevent the patient from persistently destroying property

XX Restraint may also be used to: (Mental Health Act 2016 (Qld) s 270).

- Prevent the patient from causing serious damage to property
- Provide treatment and care to the patient
- Prevent a patient detained from leaving the service

XXI Restraint and use of force may also be used to: (Mental Health Act 2009 (SA) ss 34A(2), 56(1)(c)).

- Give effect to an inpatient order
- Ensure compliance with the Mental Health Act
- Maintain order and security at the centre
- Prevent nuisance to others
- Prevent harm to property or the person otherwise requires medical examination

XXII Restraint may also be used to: (Mental Health Act 2013 (Tas) s 57(4)(b)-(d), 56(6).

- Facilitate a patient's treatment
- Effect the patient's safe transfer to another facility.
- To prevent damage to the facility, its operation or equipment (emergency)
- Break up a dispute or affray involving the patient (emergency)
- Ensure movement to or attendance at any place for a lawful purpose (emergency)

XXIII Bodily restraint may also be used to administer treatment or medical treatment to the person (Mental Health Act 2014 (Vic) s 113).

XXIV Restraint may also be used to: (Mental Health Act 2014 (WA) s 216(1)(a)).

- Prevent the patie nt 'persistently causing serious damage to property'

Restraint may also be used to: (Mental Health Act 2014 (WA) s 232(1)(a)).

- Provide the patient with treatment
- Prevent the patient from persistently causing serious damage to property

XXV The Act does not require a patient's consent for the use of mechanical restraint. However, it must be approved by an authorised psychiatric practitioner, or if in an emergency, by a senior registered nurse on duty (Mental Health and Related Services Act 1998 (NT), ss 61(4), (7) and s 62(4), (7))

XXVI The Act does not require a patient's consent for the use of mechanical restraint. However, mechanical restraint must be approved by the chief psychiatrist and authorised by an authorised doctor pursuant to a set procedure (Mental Health Act 2016 (Qld) ss 246(c)-(d), 247, 249,

250).

XXVII Authorised officers may restrain or 'otherwise use force' on a person who have or appear to have a mental illness (Mental Health Act 2009 (SA) s 56(3)(c)). However, authorisation under the Controlled Substances Act 1984 is required to administer a drug to retrain a person (Mental Health Act 2009 (SA) s 56(6)).

XXVIII The Act does not require a patient's consent for the use of restraint. However, an involuntary patient, who is not a forensic patient, may be subjected to restraint only if the restraint is authorised by the Chief Civil Psychiatrist, a medical practitioner or approved nurse (Mental Health Act 2013 (Tas) ss 56(1)(b), 57(1)(b)).

XXIX The Act does not require a patient's consent for the use of bodily restraint. However, the use must be authorised by 'an authorised psychiatrist' or if not available, 'a registered medical practitioner or the senior registered nurse on duty' (Mental Health Act 2014 (Vic) ss 111(1), 114(1)). 'Urgent use' of bodily restraint in the form of physical restraint is allowed through approval of a registered nurse (Mental Health Act 2014 (Vic) s 115(1).

XXX The Act does not require a patient's consent for the use of bodily restraint. However, the use must be authorised with an oral authorisation or a bodily restraint order (Mental Health Act 2014 (WA) ss 213-216, 229-232).

XXXI The chief psychiatrist, care coordinator and person in charge of the mental health facility must keep a record of the use of force (including reasons), tell the public advocate, and maintain a register (Mental Health Act 2015 (ACT) ss 65(5), 73(5)), 83(2), 88(5), 107(5), 114(5), 266(3)). A person taking a detainee or young detainee to a secure mental health facility must give the director-general a written statement about any use of force when or in relation to taking the person to the facility. The director-general must enter this on the person's record, keep a register of such practice and tell the public advocate in writing (Mental Health Act 2015 (ACT) ss 144A(5), (6)). The latter also applies to police officers, authorised paramedics, mental health officers and doctors involved in the apprehension of a person who absconds from a mental health facility if restrictive practices are used (Mental Health Act 2015 (ACT) ss 144D(5), (6)).

XXXII A record must be made by the person-in-charge of the facility of mechanical restraint and a copy placed on the patient's records. The principal community visitor must ensure that the record is inspected by the community visitor at a minimum every six months (Mental Health and Related Services Act 1998 (NT) ss 61(12)-(14), 62(12)-(14)).

XXXIII Under the Act, the chief psychiatrist must only report annually to the Minister on the administration of the Act, including the use of mechanical restraint (Mental Health Act 2016 (Qld) ss 301(f), 307(e)).

XXXIV Where a patient is subjected to restraint, the authorising person must make a record of the use and give a copy of the record to the patient, the Chief Civil Psychiatrist and the Tribunal and place a copy on the patient's record (Mental Health Act 2013 (Tas)) ss 58(2), 96(2)).

XXXV An authorised psychiatrist must give a written report to the chief psychiatrist on the use of any restrictive intervention (Mental Health Act 2014 (Vic) s 108(1)). An authorised psychiatrist, registered medical practitioner or the senior registered nurse on duty who uses such practice must notify an authorised psychiatrist as soon as practicable (Mental Health Act 2014 (Vic) ss 111(2), 114(2)).

XXXVI The person in charge of the facility must report the use of bodily restraint to the Chief Psychiatrist (and if the person is mentally impaired also to the Mentally Impaired Accused Review Board) (Mental Health Act 2014 (WA) ss 224 and 240). Additionally, certain incidents must also be reported, including the unreasonable use of force on a person by a staff member of a mental health service, to the person in charge of the mental health service or the Chief Psychiatrist (Mental Health Act 2014 (WA) s 254(1)(c)).

XXXVII 'While 'restraint' is not defined under the Mental Health Act 2015 (ACT), reference is made to forcible giving of medication which is permitted pursuant to the conditions in the Act.

XXXVIII While chemical restraint is not explicitly prohibited, 'medication' includes sedation of the patient and it is an offence to administer medication unless the medication is 'clinically necessary' for treatment (Mental Health Act 2016 (Qld) s 272).

XXXIX The use of sedatives is only regulated in the context of 'Bodily restraint and sedation...when taking [a] person 'to and from a designated mental health care service or other place' when a registered medical practitioner may administer sedation (or direct a registered nurse or ambulance paramedic to do so) if certain conditions are met (Mental Health Act 2014 (Vic) s 350(1)(b)).

XL A licence to operate a private psychiatric facility may include a condition as to the qualification of the staff (Mental Health Act 2015 (ACT) s 226(3)(b)).

XLI The chief psychiatrist has the mandate to develop appropriate guidance, standards (and ensuring compliance with same) and education for mental health service staff (Mental Health Act 2014 (Vic) s 121(1)(a)-(c)).

XLII Minimum standards are not included under the Act but the Chief Psychiatrist has power to produce standards on bodily restraint, including training requirements for all staff (Mental Health Act 2014 (WA) s 547).

XLIII A person-in-charge of an approved treatment facility must inform the CEO if, after an investigation of a complaint, they consider that a person may have committed a criminal offence, disciplinary breach or professional misconduct. The CEO must notify a police officer, take action under the Public Sector Employment and Management Act or notify the relevant professional body. (Mental Health and Related Services Act 1998 (NT) ss 100(10), (11)).

XLIV However, the chief psychiatrist must make a policy about the management of complaints in relation to patients' treatment and care (Mental Health Act 2016 (Qld) s 305(1)(c)).

XLV However, prescribed service providers must provide the Director with information about complaints each year and action taken in response to such complaints (Mental Health Act 2014 (WA) s 309).

XLVI While the use of restrictive practices is not an offence under the Act, it is an offence for an authorised medical officer or any other person employed at the facility to wilfully strike, wound, ill-treat or neglect a patient or person detained (maximum 50 penalty units or imprisonment for 6 months, or both) (Mental Health Act 2007 (NSW) s 69).

XLVII Applying mechanical restraint contrary to the Act is an offence (maximum penalty is 40 penalty units respectively) (Mental Health and Related Services Act 1998 (NT) ss 61(2), 62(1)).

XLVIII Physical restraint, mechanical restraint contrary to the Act (and the administration of medication which is not clinically necessary) are offences (maximum penalty - 200 penalty units) (Mental Health Act 2016 (Qld) ss 245, 255, 269, 272). The Act also includes an offence relating to ill-treatment of a patient, including to wilful abuse, neglect or exploitation (maximum penalty is 2 years imprisonment or 200 penalty units) (Mental Health Act 2016 (Qld) s 621).

XLIX While use of restrictive practices contrary to the Act is not an offence under the Act, wilful neglect or ill-treatment by a person having 'oversight, care or control of a patient' (maximum penalty of $25,000 or 2 years' imprisonment) (Mental Health Act 2009 (SA) s 49)).

L While use of restrictive practices contrary to the Act is not an offence under the Act, it is an offence to intentionally ill-treat a person knowing that the person has a mental illness, and is, in consequence of the mental illness, unable to take proper care of himself or herself (a fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years, or both) (Mental Health Act 2013 (Tas) s 214).

LI However the Commissioner may serve a compliance notice on a mental health service provider if it has failed to comply with an undertaking given in connection with a complaint under the act or if it has acted contrary to the Act or regulations. Failure to comply with the compliance notice is an offence under the Act (1,200 penalty units for a body corporate and otherwise 240 penalty units) (Mental Health Act 2014 (Vic) ss 243, 260, 262(1)).

LII Unauthorised bodily restraint is an offence under the Act (punishable with a fine of AUD 6,000) (Mental Health Act 2014 (WA) ss 213, 229). It is also an offence under the Act for staff members to ill-treat or wilfully neglect a person for whom the Chief Psychiatrist is responsible (a fine of AUD 24,000 and imprisonment for 2 years) (Mental Health Act 2014 (WA) s 253).

LIII Civil and criminal immunity for all persons acting in 'good faith' and 'with reasonable care' relying on authority under the act or documents given/made in accordance with the Act (Mental Health and Related Services Act 1998 (NT) s 164).

LIV Officials are exempt from civil liability for an act done, or omission made, honestly and without negligence under this Act. If an official is exempt from such liability, liability attaches to the State (Mental Health Act 2016 (Qld) s 797).

LV An official does not incur any personal liability for any act done or purported or omitted to be done in good faith in the discharge of their responsibilities, and no civil or criminal proceedings lie against any person for anything done in good faith and with reasonable care in reliance on any order or document apparently given or made under the Act. A liability that would otherwise attach to an official attaches to the employer of the official (Mental Health Act 2013 (Tas) s 218).

LVI The Commissioner and directors of the board are not personally liable for anything done or omitted to be done in good faith in the exercise of power or performance of a function under the Act. Any liability attaches in such case to the state or the Institute of Forensic Medical Health (Mental Health Act 2014 (Vic) ss 231, 337).

LVII All persons are protected from liability in tort when performing or purporting to perform functions under the Act in good faith or when assisting another person to do so. Liability lies in such instance with the State (Mental Health Act 2014 (WA) s 583(1)).

LVIII See Mental Health Act 2015 (ACT) pt 12.3. See also Official Visitor Act 2012 (ACT).

LIX Mental Health Act 2007 (NSW) ch 5 pt 3.

LX See Mental Health and Related Services Act 1998 (NT) pt 14.

LXI See Public Guardian Act 2014 (Qld).

LXII See Mental Health Act 2009 (SA) div 2.

LXIII See Mental Health Act 2013 (Tas) pt 2.

LXIV See Mental Health Act 2014 (Vic) pt 9.

LXV See Mental Health Act 2014 (WA) pt 20.

CHAPTER 6.

PRISONS

6.1 Background

A 2019 report by the UN High Commissioner for Human Rights noted that the use of force by prison officers and other officials is one of the main reasons for death and serious injury of persons deprived of liberty.[156] The same UN report cited a Castan Centre submission in which we highlighted several inquests into the death of prisoners in Australia in the context of force and restraint:

December 2015

- Indigenous man David Dungay died following physical and chemical restraint in his cell in Long Bay jail, New South Wales. The death occurred during the transfer from one cell to another where Dungay was pinned down and injected with a sedative. He stated 12 times that he was unable to breathe before he died. A coroner announced on 22 November 2019 that the relevant professional board should review the conduct of the nurse who administered the drug, but that the guards who physically restrained David would not face disciplinary action as their conduct was not found to be motivated by 'malicious intent'.[157]

> 'By depriving persons of their liberty, States assume the responsibility to protect the life and bodily integrity of such persons. States are thus obligated to prevent the ill-treatment of, and violence against, such persons and to ensure that the conditions of a dignified life are met.'
>
> The UN High Commissioner for Human Rights on 'Human rights in the administration of justice' A/HRC/42/20, 21 August 2019.

July 2016

- Hizir Ferman died after being tear-gassed and physically restrained face-down with a riot shield during removal from Middleton Prison to Barwon Prison in Victoria. On 5 July 2019, a coroner found that his death 'may have been prevented'. The force used was deemed by the coroner not to be 'the minimum necessary for the least amount of time'. Nursing staff were found not to have had sufficient training to respond following the incident.[158]

September 2016

- Indigenous man Wayne Fella Morrison died after being restrained by prison officers at Yatala Labour Prison, South Australia. This inquest is ongoing.[159]

156 UN High Commissioner for Human Rights: Report A/HRC/42/20 (August 2019) [5].

157 Coroners Court of New South Wales: Inquest into the death of David Dungay (November 2019).

158 Coroners Court of Victoria: Findings into death with inquest Hizir Ferman (July 2019).

159 Calla Wahlquist, The Guardian: SA prison guards seek coroner's removal from inquest into Indigenous death in custody (November 2019).

It is important to note the overrepresentation of Indigenous people in Australia's prisons, which means that the use of force and restraint disproportionately affect this group. This is a broader human rights issue which must be kept in mind in respect of any justice reforms.

It is also crucial to consider the use of force in the context of COVID-19 and its impacts on prisoners. Due to the heightened risk for prisoners of COVID-19 based on factors such as underlying health determinants and overcrowded conditions, the UN has called for the release of some groups of prisoners when possible. This includes, for example, older persons and persons with underlying health conditions.[160] Prisoners who remain in prisons are vulnerable both to COVID-19, as well as violence, neglect and abuse through the use of force and restraint, the latter which may involve isolation in response to the pandemic.

6.2 International human rights standards

The use of force and restraint in prisons engage many human rights and specific rules exist in respect of the treatment of persons deprived of liberty. The UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) were adopted in 2015. The Rules provide governments with guidance on how to protect human rights of persons deprived of liberty.

A closer look at the Mandela Rules:

- The Mandela Rules were adopted in 2015, modifying existing rules on the treatment of prisoners.
- The rules constitute minimum rules on the treatment of prisoners, including guidance on the use of force and restraint. For example:
  - Rule 47: 'Inherently degrading or painful' instruments of restraint (e.g. use of chains, irons) shall be prohibited. Other instruments of restraint shall be limited to 'precautions against escape during a transfer'; 'to prevent a prisoner from injuring himself or herself or others or from damaging property'
  - Rule 48: Restraint 'shall be the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of risks posed'
  - Rule 49: The prison administration shall 'seek access to, and provide training in the use of, control techniques that would obviate the need for the imposition of instruments of restraint or reduce their intrusiveness'
  - Rule 71: A prison director shall 'report, without delay, any custodial death, disappearance or serious injury to a judicial or other competent authority that is independent of the prison administration [⋯]'
  - Rule 82: Use of force by prison staff shall be limited to self-defence; cases of attempted escape; and active/passive physical resistance to an order based on law or regulations
  - Rule 83: Both an internal and an external system for regular inspection shall be in place to monitor prisons

In the 2019 report mentioned above, the UN High Commissioner for Human Rights noted that the use of force includes the use of restraint (chemical restraint, instruments of restraint and physical restraint positions).[161]

As underlined by the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the prolonged use of restraint may amount to torture or ill-treatment.[162] Such treatment or punishment is contrary to numerous international human rights instruments, for example the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[163] Further, Rule 43 of the Mandela Rules points out that in no instance may 'restrictions or disciplinary sanctions amount to

160 UNODC, WHO, UNAIDS, OHCHR: Joint statement on COVID-19 in prisons and other closed settings (May 2020).

161 UN High Commissioner for Human Rights: Report A/HRC/42/20 (August 2019) [9].

162 UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report 63/175 (July 2008) [55].

163 Other instruments include International Covenant on Civil and Political Rights (1966) (ICCPR) Article 7; Convention on the Rights of Persons with Disabilities (2006)

torture or other cruel, inhuman or degrading treatment or punishment'. The same Rule states that instruments of restraint may never be used as a punishment for disciplinary offences. Since Australia ratified the CAT Optional Protocol (OPCAT), each state and territory is required to set up a National Preventive Mechanism (NPM) with powers to visit, monitor and report on human rights in places of detention. The NPM and the UN Subcommittee on the Prevention of Torture (SPT) must be given access to all places of detention.

UN instruments also protect the right to non-discrimination, for example under Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which is relevant in respect of prisons given the overrepresentation of Indigenous people in Australia's prisons as mentioned above.[164]

A disproportionate number of persons in the criminal system have cognitive disabilities.[165] As mentioned in previous chapters of this report, international human rights law, notably the Convention on the Rights of Persons with Disabilities (CRPD), requires that use of force and restraints be eliminated against persons with disabilities in all settings, including the justice sector.

In March 2020, the Inter-Agency Standing Committee of the UN OHCHR and the WHO issued an Interim Guidance on COVID-19 and persons deprived of liberty. It underlines the need for measures to combat overcrowding in prison, such as the release of vulnerable prisoners and those with upcoming release dates and sentences for minor offences.[166] A number of other calls to reduce overcrowding in prisons, and other places of detention, have been made by UN experts.[167] Such calls are also accompanied by emphasis on the continued protection of the health, safety and dignity of persons who remain in prisons and other places of detention.[168]

6.3 Regulation in Australia

The regulation of the use of force and restraint in Australian prisons is primarily found in state and territory legislation. While the Mandela Rules make a distinction between the use of force and restraint (including the grounds on which such measures are permissible), not all Australian jurisdictions make a distinction between force and restraint.

Regulation of the use of force versus restraint

ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Use of force includes the use of restraint/restraining equipment/approved restraint/restraining devices				Regulations do not mention the use of restraint	Use of force includes the use of restraint but the use of mechanical restraint is regulated separately.	Restraint is regulated separately from the use of force	

Key concerns

This section outlines key concerns arising from the Table annexed to this chapter. It analyses state and territory laws that regulate the use of force and restraint in prisons against a set of indicators. To the extent possible, these indicators are derived from the Mandela Rules. It is important to note that the indicators should be regarded as minimum requirements.

164 Other instruments include ICCPR Article 2(1); International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) Article 2(2); International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD); CRPD; Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW).

165 Bernadette McSherry: People with cognitive disability shouldn't be in prison because they're 'unfit to plead'. There are alternatives (2020).

166 Inter-Agency Standing Committee: Interim Guidance: COVID-19: Focus on persons deprived of their liberty (March 2020) 3.

167 See e.g. UNODC, WHO, UNAIDS, OHCHR: Joint statement on COVID-19 in prisons and other closed settings (May 2020).

168 Ibid.

Our review of legislation governing the use of force and restraint in prisons demonstrates a number of areas where existing frameworks fall short of international minimum standards.

Permitted uses of force and restraint

The grounds upon which force and restraint may be used in Australian prisons are broader than what is permitted under the Mandela Rules. For example, in the Australian Capital Territory, force may be used to prevent property damage in addition to self-defence and protection of other persons.[169] As mentioned above, the Mandela Rules make a distinction between the grounds on which force and restraint are permissible, whereas a number of Australian jurisdictions regulate force and restraint in the same way. Further, some jurisdictions have vague provisions that conceivably enable the use of force and restraint in almost any circumstance. In New South Wales, for example, force may be used to 'enable correctional officers to carry out their functions'.[170] Only in Tasmania does the legislation mandate that force be the least restrictive option available.[171] In other jurisdictions, last resort is determined by what the officer reasonably believes it to be, which may not necessarily be what is objectively the last resort.

Staff training

While some jurisdictions require that restraint and weapons are only used by prison officers who have training to use such measure, no legislation sets out the details of any minimum training requirements for the use of force and restraint.

Chemical restraint

Chemical restraint is either expressly permitted as a form of restraint in prisons[172] or the relevant legislation does not mention chemical restraint. It is not expressly prohibited in any jurisdiction.

Reporting, complaints and monitoring

Most jurisdictions have various scheme in place to monitor prisons. Several jurisdictions have, for example, Custodial Inspectorates (Western Australia, New South Wales, Australian Capital Territory and Tasmania).[173] These bodies carry out regular prison inspections. Each jurisdiction has an Ombudsman's Office which may (depending on the specific scope of its mandate) carry out functions such as undertaking inspections, conducting visits and receiving complaints.

Nevertheless, there are several gaps in respect of reporting, complaints and monitoring. For example, most jurisdictions lack mechanisms that require prison officers and administrators to escalate serious complaints made by prisoners concerning the use of force or restraint. Further, the legislation in many jurisdictions does not provide any express avenue for prisoners to complain to independent bodies. Broader avenues for complaint to independent bodies, such as an Ombudsman, exist outside of the official regulatory framework for prisons.[174]

Most of the jurisdictions do not require serious incidents, such as death and serious injury, to be reported by prison staff and administrators to an independent authority. No jurisdiction requires prison administrators to report to an independent authority a reasonable belief that an act of torture or cruel, inhuman or degrading treatment or punishment has been committed, as required under the Mandela Rules.

169 Corrections Management Act 2007 (ACT) s 138(1)).

170 Crimes (Administration of Sentences) Act 1999 (NSW) s 253L.

171 Corrections Act 1997 (Tas) s 34A(1)(a)).

172 See e.g. Corrections Management Act 2007 (ACT) s 140(4)).

173 See e.g. Inspector of Correctional Services Act 2017 (ACT) ss 7(1)(a)-(d), pt 3.

174 See e.g. Victorian Ombudsman: Prisons.

Liability

Uses of force and restraint contrary to the relevant legislation are not expressed as specific offences in any of the relevant laws. While officers may be liable under existing causes of action (such as assault and battery), most states and territories afford broad exemptions from civil and/or criminal liability under the relevant legislation.

Overview of provisions on exemption from liability

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Exemption	Any civil liability[175]	Any action, liability, claim or demand[176]	Any civil and criminal liability[177]	Any civil liability[178]	Any liability (the Commissioner only)[179]	No exemption provision	Any damage or injury caused by the use of force'[180]	Any action or claim in damages[181]
Conditions for exemption	Act or omission honestly/not reckless in the exercise of functions	Act or omission in good faith in the administration or execution of the Act or any other Act	Act or omissionin good faith in the exercise of power/ functions	Act or omission honestly and without negligence	Act or omission In good faithIn the exercise or purported exercise of powers/ functions	N/A	Use was in accordance with the Act	Action, order or authorisation Not malicious and with reasonable and probable cause Purports to be done for the purpose of carrying out the provisions of the Act

In the Northern Territory, the effect of the relevant provision is to exempt prison officers from both civil and criminal liability. This provides broad immunity from criminal prosecution for prison officers provided the exemption conditions are met. The provisions in Victoria, New South Wales and South Australia are less clear, and mention exemption from 'any action/liability/claim or demand' (NSW), that the Commissioner is 'not liable' (South Australia) and that prison officers are 'not liable' (Vic) without further specification. In Victoria, there is no requirement to have acted in good faith.

In the Australian Capital Territory, Queensland and Western Australia, prison officers are exempted from civil liability only (limited further to actions for damages in Western Australia), if they meet certain conditions, such as acting honestly and without negligence.

Although liability may still lie with the state and territory[182], exemption from liability for prison officers, particularly criminal liability, presents significant barriers to accountability.

Castan Centre academic Dr Stephen Gray has written in more detail about the issue of liability of prison officers and other officials. Read more about this issue here.

175 Corrections Management Act 2007 (ACT) s 223.

176 Crimes (Administration of Sentences) Act 1999 (NSW) s 263(1).

177 Correctional Services Act 2014 (NT) ss 199(1)-(2).

178 Corrective Services Act 2006 (Qld) s 349.

179 Correctional Services Act 1982 (SA) s 77M . In addition, section 74 of the Public Sector Act 2009 (SA) provides immunity from civil liability for acts and omissions "in the exercise or purported exercise of official powers or functions". This applies to all public officials, public sector employees and "persons to whom a function or power of a public sector agency, public sector employee or public official is delegated in accordance with an Act". Instead, liability attaches to the state.

180 Corrections Act 1986 (Vic) s 23(5)).

181 Prisons Act 1981 (WA) s 111.

182 See e.g. Corrective Services Act 2006 (Qld) s 349.

Inconsistency between jurisdictions

There is a lack of consistency in state and territory regulation of the use of force and restraint in prisons. As mentioned above, the use of force and restraint are defined and regulated differently in different states and territories. A harmonised approach where all jurisdictions adhere (at least) to international minimum standards would bring clarity to existing legal frameworks.

Added concerns during the pandemic

Prisoners are at heightened risk of COVID-19 for several reason, including for example, the difficulty to adhere to physical distancing in prisons and the likelihood of underlying health conditions. As noted above, the UN has called for the release of some prisoners, including those who are particularly vulnerable to COVID-19. These calls have been echoed by hundreds of Australian advocates through open letters to the Federal, State and Territory governments.

As prisoners remain in prison, so too do the concerns around the use of force and restraint noted in this chapter. The pandemic has a compounding effect on these existing concerns. For example, concerns about oversight and reporting are exacerbated by the pandemic through restrictions on prisons visits as part of the COVID-19 response.

6.4 Conclusion

The regulation of the use of force and restraint in Australian prisons falls short of international minimum standards set out in the Mandela Rules. The existing legislative provisions do not effectively regulate the use of force and restraint. Of significant concern is the lack of transparency due to weak reporting requirements of instances of force and restraint. Accountability is another key issue. Prison officers in almost all jurisdictions may be afforded immunity from civil and/or criminal liability for the use of force and restraint, provided certain conditions are met.

The pandemic compounds existing concerns highlighted in this chapter, such as lack of transparency and weak reporting requirements. Despite calls for release of some prisoners, including those particularly vulnerable to COVID-19, by national and international experts, prisoners remain in custody.

Recommendations - Prisons

Based on our review of the existing legal frameworks on the use of force and restraint and relevant international human rights obligations, the Castan Centre recommends that the Australian governments:

- Ensure a human rights-based approach in response to COVID-19 which leaves no one behind and protects the rights of vulnerable persons, including prisoners. This requires, for example, the immediate release of some prisoners, when safe, as recommended by the UN and national advocates.
- Harmonise and amend the relevant laws in all states and territories to, at least, meet international standards. This includes the requirements set out in the Mandela Rules, for example that the use of force or restraint is a measure of last resort.
- Make the use of force and restraint contrary to international standards an offence in all jurisdictions with appropriate penalties to support the development of a culture of human rights compliance.
- Repeal provisions in states and territories that afford immunity to prison officers from criminal liability (or which are unclear on the matter) to afford greater accountability for violations of human rights.
- Expressly prohibit chemical restraint in all jurisdictions.
- Mandate adequate staff training on the use of force and restraint by legislation.
- Fully and effectively implement OPCAT and its mandate in respect of Australian prisons by the 2022 deadline.

ANNEX – CHAPTER 6 PRISONS

INDICATORS	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Regulated by legislation, not only policy	YES[I]	YES[II]	YES[III]	YES[IV]	YES[V]	YES[VI]	YES[VII]	YES[VIII]
If regulated by legislation:								
Use is a measure of last resort[IX]	PARTLY[X]	NO	PARTLY[XI]	PARTLY[XII]	NO	YES[XIII]	NO	PARTLY[XIV]
Force is limited to self-defence, to prevent an attempted escape, or active/passive physical resistance to an order[XV]	NO[XVI]	NO[XVII]	NO[XVIII]	NO[XIX]	NO[XX]	NO[XXI]	NO[XXII]	NO[XXIII]
Restraint is limited to a precaution against escape during transfer, or to prevent prisoners from injuring themselves or others or damaging property[XXIV]	NO[XXV]	NO[XXVI]	NO[XXVII]	NO[XXVIII]	NO[XXIX]	NO[XXX]	NO[XXXI]	NO[XXXII]
Use must be the minimum necessary and reasonable	YES[XXXIII]	YES[XXXIV]	YES[XXXV]	YES[XXXVI]	YES[XXXVII]	YES[XXXVIII]	PARTLY[XXXIX]	PARTLY[XL]
Administrators must report to an independent authority any custodial death, disappearance, serious injury, or a reasonable belief that torture or other cruel, inhuman or degrading treatment or punishment has been committed[XLI]	PARTLY[XLII]	NO[XLIII]	PARTLY[XLIV]	NO[XLV]	NO[XLVI]	PARTLY[XLVII]	NO[XLVIII]	NO
Chemical restraint is prohibited	NO[XLIX]	NO[L]	NO[LI]	NO[LII]	NO	NO[LIII]	NO[LIV]	NO[LV]
The law includes minimum requirements for staff training on use of force and restrictive practices[LVI]	PARTLY[LVII]	NO	NO	PARTLY[LVIII]	NO	PARTLY[LIX]	NO	NO
Use contrary to the law is an offence under the Act (in addition to general criminal law provisions)	NO	NO	NO	NO	NO	NO	NO	NO
Officials may be held civilly or criminally liable for use of force and restrictive practices applied in good faith	PARTLY[LX]	NO[LXI]	NO[LXII]	PARTLY[LXIII]	PARTLY[LXIV]	YES[LXV]	NO[LXVI]	PARTLY[LXVII]
Independent visitor schemes:								
An independent visitor scheme is in place[LXVIII]	YES[LXIX]	YES[LXX]	YES[LXXI]	YES[LXXII]	NO[LXXIII]	YES[LXXIV]	YES[LXXV]	YES[LXXVI]

I Corrections Management Act 2007 (ACT)

II Crimes (Administration of Sentences) Act 1999 (NSW) and Crimes (Administration of Sentences) Regulation 2014 (NSW)

III Correctional Services Act 2014 (NT)

IV Corrective Services Act 2006 (Qld)

V Correctional Services Act 1982 (SA)

VI Corrections Act 1997 (Tas) and Corrections Regulations 2018 (Tas)

VII Corrections Act 1986 (Vic) and Corrections Regulations 2019 (Vic)

VIII Prisons Act 1981 (WA) and Prisons Regulations 1982 (WA)

IX Mandela Rules r 48.

X The director-general must ensure, as far as practicable, that the use of force is always a last resort (Corrections Management Act 2007 (ACT) s 137(1)(a)). A corrections officers may used force if the officer believes, on reasonable grounds, that the purpose in question may not be achieved in another way (Corrections Management Act 2007 (ACT) s 138(2)). On a restrictive reading, the use may not necessarily be the least restrictive option as it requires only a subjective belief (albeit on reasonable grounds) by the correction officer.

XI The Commissioner must ensure that to the extent practicable, force is used under the Act only as a last resort (Correctional Services Act 2014 (NT) s 140(1)(a)(i)). A correctional officer may used force if the officer reasonably believes that the purpose may not be achieved in another practicable way (Correctional Services Act 2014 (NT) s 138(2)(a)). On a restrictive reading, the use may not necessarily be the least restrictive option as it requires only a subjective belief (albeit their belief must be reasonable) by the correction officer.

XII A corrective services officer may use the force only if the officer reasonably believes the act or omission permitting the use of force cannot be stopped in another way. The use of force may involve the use of a restraining device (Corrective Services Act 2006 (Qld) ss 143(2)(a)), (4)(d)). On a restrictive reading of these provisions, the use may not necessarily be the least restrictive option, it only requires a subjective belief on part of the officer.

XIII The Director must ensure, as far as practicable, that the use of force in relation to the management of prisoners and detainees is always a last resort (Corrections Act 1997 (Tas) s 34A(1)(a)).

XIV While no such limitation exist for restraint, a chief executive officer may only use force, if 'no other reasonable means of control are available at the prison' (Prisons Act 1981 (WA) s 48(1)(b)).

XV Mandela Rules r 82(1).

XVI Force may also be used to: (Corrections Management Act 2007 (ACT) s 138(1))

- Prevent or stop the commission of an offence or disciplinary breach
- Prevent unlawful damage, destruction or interference with property
- For any other reason prescribed by regulation

XVII Force may also be used to: (Crimes (Administration of Sentences) Regulation 2014 (NSW) reg 131(4))

- Enable correctional officers to exercise their functions (Crimes (Administration of Sentences) Act 1999 (NSW) s 253L
- Search an inmate
- Seize dangerous or harmful articles
- Allow a medical practitioner to carry out medical treatment on an inmate
- Maintain discipline where an inmate is refusing to cooperate
- Achieve the control of inmates acting defiantly
- Prevent or quell a riot or other disturbance
- Deal with any other situation that has a degree of seriousness

XVIII Force may also be used to: (Correctional Services Act 2014 (NT) ss 47(3), 48(4), 50(5), 51(3), 52(3), 53(2), 92(4), 93(6), 137(3), 147(4), 150(3)):

- Maintain the security and good order of a custodial correctional facility and prisoners
- Restrain a person causing a disturbance
- Search a prisoner or assist a person searching a prisoner
- Assist a person taking a sample
- Use an approved identification system
- Assist a medical practitioner
- Search a vehicle
- Arrest a person committing an offence

XIX Force may be used to: (Corrective Services Act 2006 (Qld) s 143(1)(b)-(c))

- Restrain a prisoner who is committing, or attempting or preparing to commit, a breach of discipline

XX Force may also be used to: (Correctional Service Act 1982 (SA) ss 37(2), 86)

- Exercise powers or discharge duties under the Act
- Secure compliance with a search of a prisoner

XXI Force may also be used: (Corrections Act 1997 (Tas) s 34B(1)(h))

- For any other thing prescribed by the regulations

XXII Force may also be used to: (Corrections Act 1986 (Vic) s 23)

- Compel a prisoner to obey an order given by the prison officer or by an officer

XXIII Force, including deadly force, may also be used:

- When the Chief Executive Officer is of the opinion that a serious breach of the good order or security of a prison has occurred or is imminent; and no other reasonable means of control are available at the prison (Prisons Act 1981 (WA) s 48(1)).
- To ensure that their lawful orders are complied with (Prisons Act 1981 (WA) s 14(1)(d)).

XXIV Mandela Rules r 47.

XXV The use of force includes the use of restraints. The uses permitted for the use of force go beyond the grounds allowed under international standards (Corrections Management Act 2007 (ACT) ss 138(1), 140(1)).

XXVI The definition of 'force' under regulations 'includes the threat to use force and the carriage and use of restraining equipment' (Crimes (Administration of Sentences) Regulation 2014 (NSW) reg 3). The uses permitted for the use of force go beyond the grounds allowed under international standards (Crimes (Administration of Sentences) Regulation 2014 (NSW) reg 131(4)).

XXVII A correctional officer lawfully using force may use an approved restraint for that purpose (Correctional Services Act 2014 (NT) s 139(1)). The uses permitted for the use of force go beyond the grounds allowed under international standards (Correctional Services Act 2014 (NT) ss 47(3), 48(4), 50(5), 51(3), 52(3), 53(2), 92(4), 93(6), 137(3), 147(4), 150(3)).

XXVIII Use of force may involve the use of a restraining device (Corrective Services Act 2006 (Qld) s 143(4)). The uses permitted for the use of force go beyond the grounds allowed under international standards (Corrective Services Act 2006 (Qld) s 143(1)(b)-(c)).

XXIX While the Correctional Services Act 1982 (SA) and accompanying regulations deal with the use of force, they do not expressly deal with restraint. The uses permitted for the use of force go beyond the grounds allowed under international standards (Correctional Services Act 1982 (SA) s 86).

XXX The use of force includes the use of restraints and the uses permitted for the use of force go beyond the grounds allowed under international standards (Corrections Act 1997 (Tas) ss 34B(1)(h), 34D(1)).

The use of mechanical restraint which does not require force by correctional officers is possible for a range of purposes in addition those set out in international standards, including to: (Corrections Act 1997 (Tas) s 34I(2)(a), (c), (f))

- Prevent the commission of an offence or disciplinary breach
- Prevent access to an area where a prisoner is not permitted and for 'any other purpose prescribed by the regulations'

XXXI Restraint may also be used:

- For the security or good order of the prison (Corrections Regulations 2019 (Vic) reg 14(1)).

XXXII Restraint may also be used:

- On medical grounds (Prisons Act 1981 (WA) s 42).

XXXIII A corrections officer may only use force if it is 'no more than is necessary and reasonable in the circumstances' (Corrections Management Act 2007 (ACT) s 139(1)(c)).

XXXIV The use of force by a correctional officer must be 'reasonably necessary' (Crimes (Administration of Sentences) Act 1999 (NSW) s 253L).

XXXV Force in connection with various acts, such as searches and maintaining security and good order, must be 'reasonably necessary' (Correctional Services Act 2014 (NT) ss 51(3), 137(2)).

XXXVI Force by a corrective services officer must be 'reasonably necessary' (Corrective Services Act 2006 (Qld) ss 143(1), 146(1)).

XXXVII Force by an officer or employee of the Department or police officer employed in a correctional institution may only use force which is 'reasonably necessary in the circumstances' (Correctional Services Act 1982 (SA) s 86).

XXXVIII Force by a correctional officer must be 'necessary and reasonable' (Corrections Act 1997 (Tas) s 34B(1)).

XXXIX Under the law, a prison officer and other officers may only use reasonable force where necessary to, for example, compel a prisoner to obey and order (Corrections Act 1986 (Vic) ss 23(2), 55E(1)). Under the regulations, use of an instrument of restraint is allowed if necessary on the basis of certain permissible grounds, however, the reasonableness of such use is not mentioned. Any unnecessary use

of force when conducting a search must be avoided (Corrections Regulations 2019 (Vic) ss 14(1), 86(2)(b)).

XL Restraint may be used if necessary on the basis of certain permissible grounds, however, reasonableness of such use is not mentioned (Prisons Act 1981 (WA) s 42(1)). Use of force in certain instances, such as during a search, must be 'reasonably necessary' (Prisons Act 1981 (WA) s 49(8)).

XLI Mandela Rules r 71.

XLII The director-general must keep a record of any incident involving the use of force that causes injury or death to anyone and must give the record to the inspector of correctional services (Corrections Management Act 2007 (ACT) ss 142(1), (3)). However, the law does not impose any reporting obligations where there are reasonable grounds to believe that torture, cruel, inhuman or degrading treatment or punishment has been imposed.

XLIII While regulations require any correctional officer who uses force on an inmate to report it to the governor (Crimes (Administration of Sentences) Regulations 2014 (NSW) reg 133), there is no requirement that the governor escalate the report.

XLIV The General Manager must notify the Commissioner as soon as practicable after a prisoner becomes critically ill, injured, or dies and the Commissioner must take reasonable steps to notify the prisoner's next of kin, legal practitioner and any other person with decision making authority for the prisoner (Correctional Services Act 2014 (NT) s 91). There is however no requirement that an independent authority be notified.

XLV The law does not require the making and keeping of records of each use of force or restraint. Records must be kept of any incident of lethal force or involving the discharge of a weapon, and the Chief Executive must immediately advise the Minister of such an incident (Corrective Services Act 2006 (Qld) s 148). Except for an obligation to notify the death of a prisoner to the Coroner (Coroners Act 1993 (NT)) there is no requirement that an independent body be notified.

XLVI While law and regulations do not expressly require reporting of the use of force, the chief executive must provide an annual report to the Minister on the operation of the Correctional Services Act 1982 (SA) and the Minister must put a copy of the report before each House of Parliament (Correctional Services Act 1982 (SA) s 9).

XLVII The Director must keep a record of any incident involving the use of force that causes injury or death to anyone, and must give a copy of the record to the Coordinator of the Official Visitors Scheme for the purpose of informing the official visitors as soon as practicable after the incident (Corrections Act 1997 (Tas) ss 34F(1), (3)). It does not expressly provide for the need to report on a reasonable belief of torture, cruel, inhuman or degrading treatment or punishment.

XLVIII A prison officer using force to compel compliance with an order must report the fact to the Governor and if such use or order is by the Governor, the Governor must report this to the Secretary (Corrections Act 1986 (Vic) ss 23(3)-(4)). It does not include a requirement to report a reasonable belief of cruel, inhuman, degrading treatment or punishment or reporting to an independent entity.

XLIX Chemical restraint is allowed (Corrections Management Act 2007 (ACT) s 140(4)).

L Chemical restraint is allowed (Crimes (Administration of Sentences) Regulations 2014 (NSW) reg 132(1)).

LI Chemical restraint is allowed (Correctional Services Act 2014 (NT) s 93(1)).

LII Use of force may involve the use of a 'chemical agent' (Corrective Services Act 2006 (Qld) s 143(4)(b)).

LIII Restraint may involve the use of 'a chemical agent'. Regulations expressly permit chemical restraint (Corrections Act 1997 (Tas) s 34D(5)(e);

Corrections Regulations 2018 (Tas) reg 8(1)(b)).

LIV While chemical restraint is not included as an instrument of restraint (Corrections Regulations 2019 (Vic) reg 13(1)), it is not expressly prohibited.

LV Chemical restraint is allowed (Prisons Act 1981 (WA) s 42(2)).

LVI Mandela Rules rr 49, 75-76, 82(2).

LVII The director-general must ensure that restraints and weapons are only used by corrections officers trained to use them (Corrections Management Act 2007 (ACT) s 140(3)). However, the requirements of the training are not specified.

LVIII Under law, 'the chief executive must ensure that a corrective services officer authorised to use lethal force has been trained to use lethal force and other forms of force in a way that causes the least possible risk of injury to anyone other than the person against whom lethal force is directed.' (Corrective Services Act 2006 (Qld) s 144). The requirements of the training are not specified.

LIX The Director must ensure that restraints and weapons are only used by correctional officers trained to use them (Corrections Act 1997 (Tas) s 34D(3)). The requirements of the training are not specified.

LX A person exercising functions or responsible for the administration of the Act does not incur civil liability for an act or omission done honestly and without recklessness. Any civil liability that would normally attach to the person attaches instead to the Territory (Corrections Management Act 2007 (ACT) s 223)).

LXI An act or omission by various people exercising power under the Act (including corrections officers) are not subject to any action, liability, and claim or demand if the act or omission was done or omitted to be done in good faith in the administration or execution of the Act or any other Act (Crimes (Administration of Sentences) Act 1999 (NSW) s 263(1)).

LXII A person, including a correctional services officer, is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of their function. This does not affect the Territory's liability (Correctional Services Act 2014 (NT) ss 199(1)-(2)).

LXIII An official does not incur civil liability for an act done, or omission made, honestly and without negligence. Where this provision prevents a civil liability attaching to an official, the liability attaches instead to the state (Corrective Services Act 2006 (Qld) s 349).

LXIV No liability attaches to the Commissioner for any act/omission done in good faith in the exercise or purported exercise of functions and powers under this division (Correctional Services Act 1982 (SA) s 77M). In addition, s 74 of the Public Sector Act 2009 (SA) provides immunity from civil liability for acts and omissions "in the exercise or purported exercise of official powers or functions". This applies to all public officials, public sector employees and "persons to whom a function or power of a public sector agency, public sector employee or public official is delegated in accordance with an Act". Instead, liability attaches to the state.

LXV There is no provision in the relevant legislation expressly excluding prison staff from liability.

LXVI Under law, 'a prison officer is not liable for injury or damage caused by the use of force in accordance with the Act' (Corrections Act 1986 (Vic) s 23(5)).

LXVII Under the law, 'no action or claim for damages shall lie against any person for or on account of anything done, or ordered or authorised to be done, by him which purports to be done for the purpose of carrying out the provisions of this Act, unless it is proved that the act was done, or ordered or authorised to be done, maliciously and without reasonable and probable cause.' (Prisons Act 1981 (WA) s 111).

LXVIII Mandela Rules, rules 83-85.

LXIX See e.g. Official Visitor Act 2012 (ACT); Corrections Management Act 2007 (ACT) ch 7; Inspector of Correctional Services Act 2017 (ACT) ss 7(1)(a)-(d), pt 3. See also the work of the ACT Ombudsman (pursuant to Ombudsman Act 1989 (ACT)).

LXX See e.g. Crimes (Administration of Sentences) Act 1999 (NSW) s 228 and Crimes (Administration of Sentences) Regulation 2014 (NSW regs 165-167; Inspector of Custodial Services Act 2012 (NSW) ss 3(1)(a), div 2. See also work by the NSW Ombudsman (pursuant to Ombudsman Act 1974 (NSW)).

LXXI Correctional Services Act 2014 (NT) pt 2.3. See also the work of the NT Ombudsman (pursuant to Ombudsman Act 2009 (NT)).

LXXII See e.g. Corrective Services Act 2006 (Qld) pt 6. See also the work of the Qld Ombudsman (pursuant to Ombudsman Act 2001 (Qld)) and the Office of the Chief Inspector of Correctional Services.

LXXIII South Australia does not have an Official Visitor scheme in place. The Correctional Services Act 1982 (SA) does however mandate that prisons must be inspected on a regular basis by an inspector appointed by the Governor on the recommendation of the Minister, who is empowered to receive and investigate prisoner complaints (Correctional Services Act 1982 (SA) s 20). See also the work of the SA Ombudsman (pursuant to Ombudsman Act 1972 (SA)).

LXXIV See Corrections Act 1997 (Tas) s 10. The Inspector is also the Tas Ombudsman. See the work of the Tas Ombudsman (pursuant to Ombudsman Act 1978 (Tas)).

LXXV Corrections Act 1986 (Vic) s 35 and Corrections Regulations 2019 (Vic) reg 78. See also work by the Victorian Ombudsman (pursuant to Ombudsman Act 1973 (Vic)).

LXXVI Prisons Act 1981 (WA) s 57; Prisons Regulations 1982 (WA) pt X; and Inspector of Custodial Services Act 2003 (WA) pt 6. See also work by the WA Ombudsman (pursuant to Parliamentary Commissioner Act 1971 (WA)).

CHAPTER 7.

JUVENILE DETENTION

7.1 Background

The use of force and restraint in juvenile detention facilities is a matter of great public concern in Australia. It has also received international condemnation from the UN Office of the High Commissioner for Human Rights (OHCHR).[183] Of particular significance were the revelations of the treatment of juveniles at the Don Dale Youth Detention Centre in the Northern Territory, which resulted in national scrutiny of the system. These revelations were made in July 2016 by the Australian Broadcast Corporation's Four Corners (which more recently revealed abuse in aged care - see chapter 3 of this report).[184] The footage from Don Dale included images of children subjected to shackles, restraint chairs, teargas, physical assault, and so-called 'spit hoods', a restraining instrument to prevent detainees from biting and spitting on officers.[185] Shortly thereafter, the Federal Government announced the Royal Commission into the Protection and Detention of Children in the Northern Territory with terms of reference to investigate current practices in the Northern Territory juvenile justice system (and welfare services).

> 'The treatment these children have been subjected to could amount to a violation of the Convention on the Rights of the Child and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, to which Australia is a party.'
>
> Comments by a spokesperson for the UN Office of the High Commissioner for Human Rights in response to footage of the use of force at Don Dale Youth Detention Centre (NT), 29 July 2016.

The Royal Commission into the Protection and Detention of Children in the Northern Territory

- The Royal Commission was formed on 1 August 2016 and headed by the Honourable Margaret White AO and Mr Mick Gooda
- The terms of reference included the Northern Territory's juvenile detention system, including the documentation of instances of ill-treatment and the adequacy of existing regulations to prevent abuse
- The Final Report was delivered on 17 November 2017 and is available here
- The Royal Commission found that ill-treatment, including physical and verbal abuse, was prevalent in the Northern

183 UN News: UN rights office shocked by inhumane treatment of children in Australian detention centre (July 2016).

184 Four Corners: Episode Australia's Shame (July 2006).

185 Spit hoods have since been prohibited for use on children in all jurisdictions except South Australia (where a Bill to prohibit the use of spit hoods on children is pending at time of writing (as well as a Bill to prohibit its use on adults).

Territory juvenile justice system. The Royal Commission urged the Northern Territory Government, amongst other things to:

- Prohibit the use of spit hoods and CS gas and continue to prohibit the restraint chair;
- Prohibit the use of force and restraint to maintain 'good order' or to discipline a juvenile;
- Only permit the use of force as a matter of last resort and if proportionate in the circumstances;
- Only permit the use of force to protect the detainee or others from physical injury and only permit restraint in emergencies to protect from self-harm, harm to others and serious damage to property; and
- Only to permit persons with training and qualifications in physical intervention to use force.

The Royal Commission's findings demonstrated the failure of the regulation at the time to safeguard children in detention. The legislative amendments on the use of force and restraint in juvenile detention enacted in March 2019 have received criticism for failing to bring the legal framework in line with international standards and to address the recommendations of the Royal Commission.[186]

The use of force and restraint in juvenile detention is not limited to the Northern Territory. In response to the Four Corners broadcast, the UN OHCHR called on the Federal Government to extend its inquiry to the whole of Australia.[187] Inquiries have since taken place in other states and territories.[188] As mentioned in chapter 6 on the use of force in prisons, it is important to note the overrepresentation of Indigenous people in prison populations, including juvenile detention. The result is a disproportionate impact of the use of force and restraint on Indigenous people. This is a broader human rights issue which must be kept in mind in respect of any justice reforms.

It is also important to consider the use of force in the context of COVID-19 and its impacts on children in juvenile detention. Due to the heightened risk for children in juvenile detention of COVID-19 on the basis of factors such as underlying health determinants and overcrowded conditions in detention, the UN has called for the release of children in juvenile detention. Children who remain in detention are vulnerable both to COVID-19, as well as violence, neglect and abuse through the use of force and restraint. Restraint include isolation in response to the pandemic, as well as extended period of restricted contact with family members. At the time of writing this report, there are reports of 127 children in isolation in Brisbane Youth Detention Centre after a suspected case of COVID-19 of a staff member.[189]

7.2 International human rights standards

The use of force and restraint in juvenile detention facilities engages many human rights. Specific rules exist at the international level regarding the treatment of children deprived of their liberty. The UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) were adopted by the UN General Assembly in 1990 and provide minimum rules to protect children in juvenile detention. Rule 7 of the Havana Rules provides that States must, where appropriate, incorporate the Rules into national law and that States have an obligation to monitor their compliance and ensure compensation in cases of breach.

The Havana Rules on the protection of juveniles deprived of their liberty

- The Havana Rules were adopted in 1990 to establish minimum standards for the treatment of juveniles deprived of liberty
- A number of the Rules address the use of force and restraint. For example:
  - Rule 64: Force and instruments of restraint should only be used:
    - in exceptional cases;
    - if all other methods of control have been exhausted and failed;

186 See, for example, comments by the Criminal Lawyers Association NT here.

187 UN News: UN rights office shocked by inhumane treatment of children in Australian detention centre (July 2016).

188 See Australian Children's Commissioners and Guardians: Statement on Conditions Treatment in Youth Justice Detention (November 2017), Appendix 1, pp 24-26.

189 Brittney Kleyn, ABC News: Young inmates locked in cells as authorities brace for a potential coronavirus outbreak at the Brisbane Youth Detention Centre (21 August 2020).

- for the shortest amount of time possible;
- if they do not cause humiliation or degradation; and
- to prevent infliction of self-injury or injury to others or serious destruction of property.

- Rule 65: No personnel in juvenile detention facilities may carry and use weapons
- Rule 85: Personnel should receive training, including training on international standards on human rights and children's rights, that enables them to effectively carry out their functions
- Rule 87: Personnel must respect and protect the dignity and rights of all juveniles and not inflict, instigate, or tolerate any act of torture or other harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline. Personnel with reason to believe the Rules have been violated must report this to their superiors or organs with reviewing/remedial powers. They must also protect juveniles from abuse and exploitation

Another set of rules are the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). Rule 27 of the Beijing Rules confirm the applicability of the UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) to juveniles to the extent relevant to the treatment of juveniles deprived of liberty (discussed in more detail in chapter 6 of this report).

Different sets of international standards sometime differ in the scope of protection from the misuse of force and restraint. For example, the Mandela Rules state that prison staff may use force in cases of self-defence, attempted escape or active/passive physical resistance to an order.[190] Staff in juvenile detention centres may under the Havana Rules use force to prevent infliction of self-injury, injury to others or serious destruction of property.[191] The UN Committee on the Rights of the Child, elaborating on the meaning of the Convention on the Rights of the Child (CRC), has in its General Comment No. 24 stated that the use of force is only permissible for the prevention of imminent self-injury or injury to others, leaving out the prevention of property destruction.[192]

In addition to the Rules discussed above, the use of force and restraint in juvenile detention engages a number of human rights and international standards protected under international law. As noted above and in chapter 2 of this report, the UN Office of the High Commissioner for Human Rights noted that the use of restraining instruments and force at Don Dale 'could amount to a violation of the Convention on the Rights of the Child (CRC) and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)'.[193] Since Australia ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), the National Preventive Mechanism (NPM) for each state and territory and UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) must be given access to places of detention, including juvenile detention centres.

UN instruments also protect the right to non-discrimination, for example under Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which is relevant given the overrepresentation of Indigenous people in juvenile detention facilities mentioned above.[194]

A disproportionate number of persons in the criminal justice system have cognitive disabilities.[195] As mentioned in previous chapters of this report, international human rights law, notably the Convention on the Rights of Persons with Disabilities (CRPD), requires the use of force and restraints to be eliminated against persons with disabilities in all settings, including the justice sector.

In the context of the pandemic, the UN Children's Fund (UNICEF) and the Alliance for Child Protection in Humanitarian Action have issued a Technical Note on COVID-19 and children deprived of liberty. It calls on States to 'immediately release children who can safely return to their families and communities'.[196] For children remaining in juvenile detention facilities, the Technical Note emphasises that States must continue to protect their rights and safeguard them from 'violence, abuse and exploitation' which may be compounded

190 Mandela Rules rules 47 and 82.

191 Havana Rules rule 64.

192 Committee on the Rights of the Child: General Comment No. 24 (September 2019) [95f].

193 UN News: UN rights office shocked by inhumane treatment of children in Australian detention centre (July 2016).

194 Other provisions include ICCPR Article 2(1); International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) Article 2(2); International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD); CRPD; Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW).

195 Bernadette McSherry: People with cognitive disability shouldn't be in prison because they're 'unfit to plead'. There are alternatives (2020).

196 UNICEF, Alliance for Child Protection in Humanitarian Action: Technical Note: COVID-19 and Children Deprived of their Liberty (April 2020) 6.

by the pandemic or be a 'secondary consequence' thereto.[197] This requires, for example, allowing national and international monitoring of juvenile detention facilities. Further, it underlines that isolation in response to COVID-19, a form of restraint, must never be solitary and must only be made through a clinical decision for medical necessity.[198]

7.3 Regulation in Australia

The use of force and restraint in juvenile detention centres in Australia is regulated under state and territory legislation. It is similar in many ways to the legislation in the prison setting (discussed in chapter 6 of this report). For example, not all states and territories make a distinction between the use of force and restraint when regulating these practices in juvenile detention.

Key concerns

This section outlines some key concerns arising from the Table annexed to this chapter. It analyses the legal frameworks that regulate the use of force and restraint in juvenile detention against a set of indicators. To the extent possible, these indicators are derived from international standards in the context of juvenile justice. It is important to note that the indicators should be regarded as minimum requirements.

Our review of legislation governing the use of force and restraint in juvenile detention centres demonstrates areas where the legal frameworks fall short of international standards. Several areas are of particular concern:

Permitted uses of force and restraint

Only some jurisdictions require the use of force and restraint to be a measure of last resort, and even so, this safeguard is not required in emergency situations (in the Northern Territory) and may be limited to only certain types of restraint (in South Australia).[199]

In addition, no jurisdictions limit the use of force and restraint to situations necessary for the prevention of imminent self-injury or injury to others, as required by the Havana Rules. Further, all jurisdictions fail to impose a requirement that where force is used, it must only be to the minimum extent necessary, and objectively reasonably in the circumstances. For example, in Queensland, the use of force must be reasonable but is not limited to the minimum necessary.[200] In the Northern Territory, what is reasonable and necessary is left to the person applying the force and may not necessarily be what is objectively reasonable and necessary in the circumstances.[201]

Reporting, complaints and monitoring

Various schemes exist in all jurisdictions to monitor juvenile detention centres. Monitoring is, for example, carried out by Custodial Inspectorates, Children's Commissioners and the Office of the Ombudsman (with varying scope of functions when it comes to juvenile detention).[202]

However, there are several gaps in respect of reporting, complaints, and monitoring. For example, the majority of the jurisdictions do not require detention staff to report the use of force and restraint beyond the level of the facility. In fact, only one jurisdiction (the Northern Territory) presently requires staff to escalate serious complaints made in the context of the treatment in juvenile detention centres.[203]

197 Ibid 9.

198 Ibid 8.

199 See Youth Justice Act 2005 (NT) ss 10(1)(a), (2)); Youth Justice Administration Regulations 2016 (SA) reg 8(3)(a).

201 Youth Justice Act 2005 (NT) s 10(1)(b)(iii)).

202 See e.g. Children (Detention Centres) Act 1987 (NSW) s 8A and Children (Detention Centres) Regulation 2015 (NSW) regs 28-29; Inspector of Custodial Services Act 2012 (NSW) ss 3(1)(d), div 2. See also work by the NSW Ombudsman (pursuant to Ombudsman Act 1974 (NSW)).

203 Youth Justice Regulations 2006 (NT) regs 66(4), 66(5A).

Forms of restraint

While spit hoods are prohibited everywhere except in South Australia[204], chemical restraint is only (implicitly) prohibited in one jurisdiction.[205]

Staff training

In some jurisdictions, staff training on the use of force and restraint is not included in the legislation. Other jurisdictions limit the use of force and/or restraint to persons who have certain qualifications or training.[206] However, the content or requirements of such training is not specified in the legislation.

Liability

In all jurisdictions, excessive force may result in liability under general criminal law provisions. In New South Wales, the use of force (including instruments of restraint) for the purpose of punishment 'without reasonable excuse', is also a specific offence which carries a maximum of 10 penalty units, imprisonment not exceeding 12 months, or both.[207] Of significant concern is that in four jurisdictions, officials or persons administering force or restraint under the law may be exempt from liability.

Overview of provisions on exemption from liability

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Exemption	Any civil liability[208]	NO	Any civil and criminal liability[209]	NO	NO	NO	Any damage or injury caused by the use of force'[210]	Any action in tort[211]
Conditions for exemption	Conduct engaged in honestly and without recklessnessin the exercise of a function/ reasonable belief in the exercise of a function	N/A	Act or omissionin good faithin the exercise/ purported exercise of power/ functions	N/A	N/A	N/A	Force was reasonable and in accordance with the Act	Act or omission In good faith In the performance/ purported performance of functions under the Act

In the Australian Capital Territory and Western Australia, this is limited to civil liability (in the latter specifically limited to tort action).

In the Northern Territory, various actors are expressly exempt from civil and criminal liability, provided that the use of force was done 'in good faith' and 'in the exercise or purported exercise of a power, or the performance or purported performance of a function, under the Act.' This is a similar provision to the exemption provision in respect of the use of force in prisons.

The relevant provision in Victoria is less clear and states that an officer is 'not personally liable for injury or damage caused by the use of reasonable force in accordance with the Act'. This is also similar to the regulation of liability in the prison setting in Victoria.

204 At the time of writing, a Bill to prohibit the use of spit hoods on children is pending in South Australia (as well as a Bill to prohibit its use on adults).

205 Youth Justice Act 2005 (NT) ss 151AB, 153(2)(b).

206 See e.g. Youth Justice Administration Regulations 2016 (SA) reg 8(5)(b).

207 Children (Detention Centres) Act 1987 (NSW) ss 22(1)-(3).

208 Children and Young People Act 2008 (ACT) s 878.

209 Youth Justice Act 2005 (NT) s 215.

210 Children, Youth and Families Act 2005 (Vic) s 487A.

211 Young Offenders Act 1994 (WA) s 182.

The possibility of immunity for detention officers, particularly from criminal prosecution, prevents accountability in respect of use of force and restraint in the juvenile justice system.[212]

Inconsistencies

Inconsistencies exist between state and territory regulation of the use of force and restraint in juvenile detention. One example concerns the differences in the way in which force and restraint are defined.

Regulation of the use of force versus restraint

ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Use of force includes the use of restraints/instruments of restraint		Restraint is regulated separately from the use of force		Use of force includes restraint, except mechanical restraint which is regulated separately	Regulations do not mention the use of restraint		Restraint is regulated separately from the use of force

Only South Australia regulates mechanical restraint (and not other forms of restraint) separately from the use of force. While it requires mechanical restraint to be a measure of last resort, this is not required for the use of force more broadly, including other forms of restraint.[213]

Added concerns during the pandemic

As noted throughout this report, persons in closed environments, including children in juvenile detention, are at a heightened risk of COVID-19 for various reasons, such as difficulty to adhere to physical distancing and likelihood of underlying health conditions. The Technical Note on COVID-19 and children deprived of liberty discussed in Part 2 of this Chapter also underlines that children's vulnerability to violence, abuse and neglect may be both exacerbated by the pandemic or amount to a secondary consequence of the pandemic.

For example, concerns about oversight and reporting are compounded by the pandemic through restrictions on visits to juvenile detention facilities in order to contain the spread of the virus. As noted above, the Technical Note therefore calls on States to release children into the community when safe to do so. These calls have been echoed by hundreds of Australian advocates through open letters to the Federal, State and Territory governments.[214] Children who remain in detention and may be subject to isolation due to COVID-19 must be protected from violence, neglect and abuse.

In Victoria, extensive powers to allow for isolation of children in juvenile detention were introduced instead of release.[215] These are broad ranging powers raise a number of concerns from a human rights perspective, as the Castan Centre discussed in our submission to the Victorian Parliament Inquiry into the Victorian Government's COVID-19 response. Of concern is the lack of a reference to isolation as a measure of last resort. Further, the new provisions allow for the use of 'reasonable force' if necessary, to place a person in isolation.[216] Similarly, there appears to be no requirement for such force to be a last resort.

212 Castan Centre academic Dr Stephen Gray has written in more detail on the issue of liability of detention officers and other officers of the Crown, available here.

213 Youth Justice Administration Regulations 2016 (SA) reg 8(3)(a)).

214 See e.g. Open letter to Australian governments on COVID-19 and the criminal justice system.

215 Children, Youth and Families Act 2005 (Vic) pt 8.5A introduced through the COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic).

216 Ibid pt 8.5A s 600M(6).

7.4 Conclusion

Our research finds that the legal frameworks regulating the use of force and restraint in juvenile detention fall short of international minimum standards. The lack of safeguards and the broad uses for which force and restraint are permitted are problematic. The lack of transparency due to weak reporting requirements is also a concern. Accountability is limited in some jurisdictions where relevant officers may be exempt from criminal liability in certain instances. Chemical restraint is only (implicitly) prohibited in one of the jurisdictions.

As a result of the pandemic, children in juvenile detention facilities are even more vulnerable to neglect, violence and abuse, as well as at a heightened risk of COVID-19. Despite calls for release by international and national experts, children remain in juvenile detention facilities. We note with concern the temporary provisions in Victoria giving extensive isolation powers, as well as the power to use 'reasonable force' if necessary, to isolate children.

Recommendations - Juvenile detention

Based on our review of the existing legal frameworks on use of force and restraint and relevant international human rights obligations, the Castan Centre recommends that the Australian governments:

- Ensure a human rights-based approach in response to COVID-19 which leaves no one behind and protects the rights of vulnerable persons, including children in juvenile detention. This requires, for example, the immediate release of juvenile detainees, when safe, as recommended by the UN and national advocates.
- Harmonise and amend the relevant legislation in states and territories to, at least, meet international standards. This includes the CRC requirements elaborated in General Comment 24 and the Havana Rules, for example that the use of force or restraint be a measure of last resort.
- Make the use of force and restraint contrary to international standards an offence in all jurisdictions with appropriate penalties to support the development of a culture of human rights compliance.
- Repeal provisions in states and territories that afford immunity from criminal liability (or which are unclear on this matter) to afford greater accountability for violations of human rights.
- Expressly prohibit chemical restraint in all jurisdictions.
- Mandate adequate staff training on the use of force and restraint by legislation.
- Fully and effectively implement OPCAT and its mandate in respect of juvenile detention facilities by the 2022 deadline.

ANNEX – CHAPTER 7 JUVENILE DETENTION

INDICATORS	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Regulated by legislation, not only policy	PARTLY[I]	YES[II]	YES[III]	YES[IV]	YES[V]	YES[VI]	YES[VII]	YES[VIII]
If regulated by legislation:								
A measure of last resort	PARTLY[IX]	NO	PARTLY[X]	PARTLY[XI]	PARTLY[XII]	NO[XIII]	NO[XIV]	NO
Force is limited to instances where a child poses an imminent threat to themselves or others[XV]	NO[XVI]	NO[XVII]	NO[XVIII]	NO[XIX]	NO[XX]	NO[XXI]	NO[XXII]	YES[XXIII]
Restraint is limited to instances where a child poses an imminent threat to themselves or others[XXIV]	NO[XXV]	NO[XXVI]	NO[XXVII]	NO[XXVIII]	NO[XXIX]	NO[XXX]	NO[XXXI]	NO[XXXII]
Use must be the minimum necessary and reasonable[XXXIII]	YES[XXXIV]	YES[XXXV]	PARTLY[XXXVI]	PARTLY[XXXVII]	YES[XXXVIII]	YES[XXXIX]	YES[XL]	NO[XLI]
Use of force and restraint must be reported beyond the level of the facility[XLII]	PARTLY[XLIII]	NO[XLIV]	NO[XLV]	NO[XLVI]	NO[XLVII]	NO[XLVIII]	YES[XLIX]	NO[L]
Chemical restraint is prohibited[LI]	NO[LII]	NO[LIII]	YES[LIV]	PARTLY[LV]	NO[LVI]	NO[LVII]	NO[LVIII]	NO[LIX]
The law includes minimum requirements for staff training on use of force and restrictive practices[LX]	PARTLY[LXI]	NO	PARTLY[LXII]	PARTLY[LXIII]	PARTLY[LXIV]	NO	NO	PARTLY[LXV]
The law requires administrators to escalate serious complaints to an independent, external body	PARTLY[LXVI]	NO	YES[LXVII]	NO	NO	NO[LXVIII]	NO	NO
Use of force and restraint contrary to the law is an offence under the Act (in addition to general criminal law provisions)	NO[LXIX]	PARTLY[LXX]	NO	NO	NO	NO	NO	NO
Officials may be held civilly or criminally liable for use of force or restraint applied in good faith	PARTLY[LXXI]	YES	NO[LXXII]	YES	YES	YES	NO[LXXIII]	PARTLY[LXXIV]
Independent visitor schemes:								
An independent visitor scheme is in place[LXXV]	YES[LXXVI]	YES[LXXVII]	YES[LXXVIII]	YES[LXXIX]	YES[LXXX]	YES[LXXXI]	YES[LXXXII]	YES[LXXXIII]

I Children and Young People Act 2008 (ACT). Most of the regulation of the use of force and restraint is determined by the director-general who must make a policy or operating procedure in relation to the use of force (Children and Young People Act 2008 (ACT) s 223(7)). Such regulation has been made through the Children and Young People (Use of Force) Policy and Procedures 2018 (No.1) (which is classified as a notifiable instrument) ('Policy and Procedures 2018').

II Children (Detention Centres) Act 1987 No 57 (NSW) and Children (Detention Centres) Regulation 2015 (NSW)

III Youth Justice Act 2005 (NT) and Youth Justice Regulations 2006 (NT)

IV Youth Justice Regulation 2016 (Qld) under the Youth Justice Act 1992 (Qld)

V Youth Justice Administration Act 2016 (SA) and Youth Justice Administration Regulations 2016 (SA)

VI Youth Justice Act 1997 (Tas)

VII Children, Youth and Families Act 2005 (Vic)

VIII Young Offenders Act 1994 (WA) and Young Offenders Regulations 1995 (WA)

IX The director-general must ensure that the use of force is always a last resort. A detention officer may use force if they believe, on reasonable grounds, that the purpose for which the force is used cannot be achieved in another way (Children and Young People Act 2008 (ACT) ss 223(1)(a), 224(a); Policy and Procedures 2018 s 6.4). Even if the subjective belief of a detention officers is on reasonable grounds, this may not necessarily mean that, objectively, the purpose cannot be achieved in another way.

X Force may only be used if 'all other practicable measures to resolve the situation have been attempted and those measures have failed to resolve the situation'. However, this does not apply in emergency situations (Youth Justice Act 2005 (NT) ss 10(1)(a), (2)). Further, the use of restraint devices do not appear to have to be a last resort measure (Youth Justice Act 2005 (NT) s 155).

XI An authorised staff member may use restraints to restrain a child only if 'the staff member reasonably believes there is no other way to stop the child from engaging in the [proscribed] behaviour.' (Youth Justice Regulation 2016 (Qld) reg 19(1)(d)). Even if the subjective belief of a staff member is reasonable, this may not necessarily mean that, objectively, the purpose cannot be achieved in another way.

XII Mechanical restraint may only be used as a last resort (Youth Justice Administration Regulations 2016 (SA) reg 8(3)(a)).

XIII The law does not expressly deal with use of restraint. While a use of physical force (which may include use of restraint) must be reasonable, there are no requirements that it must be of last resort (Youth Justice Act 1997 (Tas) s 132(b)).

XIV Restraint is not expressly dealt with by the Act. There is no requirement that the use of force, which might include restraint, be a last resort (Children, Youth and Families Act 2005 (Vic) s 487).

XV UN Committee on the Rights of the Child, General comment No. 24 (2019) [108].

XVI Force may also be used to: (Children and Young People Act 2008 (ACT) s 224(b)).

- Compel compliance with a direction given in relation to a young detainee by the director-general
- Prevent or stop the commission of an offence or behaviour breach
- Prevent unlawful damage, destruction or interference with property
- Defend the person or someone else
- Prevent a young detainee from escaping
- Under the notifiable instrument, force may also be used to: (Policy and Procedures 2018 s 6.5)
- Prevent escape from custody
- Prevent unlawful damage, destruction or interference with property
- Undertake a personal or area search
- Seize a prohibited thing or dangerous or harmful article or substance
- Prevent the loss, destruction or contamination of anything seized during search
- Enforce a segregation order
- Undertake a search
- Prevent or quell a riot or persistent serious disruption to safety and security
- Prevent or stop the commission of an offence

XVII Force may also be used to: (Children (Detention Centres) Regulation 2015 (NSW) reg 65).

- Prevent a detainee from inflicting serious damage to property
- Prevent escape
- Prevent a person from entering a detention centre by force
- Search a detainee in circumstances in which the detainee refuses to submit to being searched
- Seize any dangerous or harmful article or substance that is in the possession of a detainee
- Prevent or quell a riot or other disturbance

- Protect a dog being used to assist in the detection of prohibited goods in a detention centre from attack or harm
- Allow a medical practitioner to carry out medical treatment on a detainee
- Move a detainee who refuses to move from one location to another in accordance with an order of that officer

XVIII Force may also be used to: (Youth Justice Act 2005 (NT) s 154(1))

- Prevent the detainee from seriously damaging property
- Prevent the detainee from engaging in conduct that would seriously threaten to the security of the detention centre

XIX Force may also be used: (Youth Justice Regulation 2016 (Qld) regs 16(5), 24-26)

- To protect property in the centre
- To search the child detained

XX Force may also be used to: (Youth Justice Administration Act 2016 (SA) ss 30(2)(e), 33)

- Prevent the resident from causing significant damage to property
- Maintain order in the centre
- Preserve security in the centre
- Ensure compliance with a search

XXI Force may also be used: (Youth Justice Act 1997 (Tas) ss 132(b), 133(2), (4)).

- If necessary to prevent damage to property
- To protect the security of the centre
- Is otherwise authorised by or under the Act, any other Act or at common law
- To place the detainee in isolation

XXII Force may also be used if necessary to: (Children, Youth and Families Act 2005 (Vic) ss 487(b), 488(4), 488AC(3))

- Prevent the child from damaging property
- Protect the security of the centre
- Is otherwise authorised by or under the Act or any other Act or at common law,
- To carry out a search
- To place a child in seclusion

XXIII Reasonable use of force generally is not prescribed unless to prevent harm to the detainee themselves or another person (Young Offenders Regulations 1995 (WA) reg 72(1)).

XXIV United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) r 2(a).

XXV Restraint is considered a use of force (Children and Young People Act 2008 (ACT) s 226(1)) which allows for broader grounds of use than under international standards as listed in previous indicator on the use of force.

XXVI Force includes the use of instruments of restraint (Children (Detention Centres) Regulation 2015 (NSW) reg 62) and the grounds upon which force is permitted is broader than international standards as listed in the previous indicator on the use of force.

XXVII Restraint may also be used: (Youth Justice Act 2005 (NT) s 155(1))

- To prevent the detainee from seriously damaging property
- To prevent the detainee engaging in conduct which seriously threaten the security of the detention centre

XXVIII Restraint may also be used in cases where the staff member reasonably believes that the child is likely to: (Youth Justice Regulation 2016 (Qld) reg 19(1)(c))

- Attempt escape
- Seriously disrupt the order and security at the centre

XXIX Mechanical restraint may also be used to: (Youth Justice Administration Regulations 2016 (SA) reg 8(2)(b))

- Preserve the security of the centre
- Prevent the resident escaping custody
- Preserve community safety
- All other forms of restraints are regulated as use of force which is permitted on broader rounds than international standards as listed above under the use of force.

XXX Restraint is not dealt with expressly in the Youth Justice Act 1997 (Tas). To the extent that it constitutes use of force, it is permitted under broader grounds than international standards as listed above under the use of force.

XXXI Restraint is not dealt with expressly in the Children, Youth and Families Act 2005 (Vic). To the extent that it constitutes use of force, it is permitted under broader grounds than international standards as listed above under the use of force.

XXXII Restraint may also be used: (Young Offenders Act 1994 (WA) s 11D(1))

- On medical grounds
- To prevent escape during movement to or from a facility or detention centre
- During temporary absence from the facility or detention centre

XXXIII United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) r 82(1).

XXXIV A detention officer may use 'no more force than is necessary and reasonable in the circumstances' (Children and Young People Act 2008 (ACT) s 225(1)(c)). This includes the use of restraint ((Children and Young People Act 2008 (ACT) s 226(1)).

XXXV Children (Detention Centres) Regulation 2015 (NSW) reg 65(3)).

XXXVI The person using force may use no more force than they believe to be necessary and reasonable in the circumstances as perceived by them (Youth Justice Act 2005 (NT) s 10(1)(b)(iii)).

XXXVII A detention centre employee may use 'reasonable' force to protect a child, or another person or property from a child's misbehaviour (Youth Justice Regulation 2016 (Qld) regs 16(5), 24(4), 25(6), 26(8)). No similar restrictions apply to restraints in general but if approved restraints are used to restrain a child in the chief executive's custody, the chief executive must not use restraints for longer than is 'reasonably necessary in the circumstances' (Youth Justice Regulation 2016 (Qld) reg 19(2).

XXXVIII An employee of a training centre may only use such force as is 'reasonably necessary' (Youth Justice Administration Act 2016 (SA) s 33(1)).

XXXIX The use of force must be reasonable and necessary to achieve certain prescribed grounds under the law (Youth Justice Act 1997 (Tas) s 132(b)).

XL Physical force (which may include restraint which is not dealt with expressly under the Act) may be used if it is reasonable and necessary for a purpose set out under law (Children, Youth and Families Act 2005 (Vic) s 487(b).

XLI The use of restraint must be necessary but the Act does not mention reasonableness (Young Offenders Act 1994 (WA) s 11D). The use of force must be the minimum required to control the detainee's behaviour in the circumstances but the law does not mention necessity or reasonableness (Young Offenders Act 1994 (WA) s 11C(1)); Young Offenders Regulations 1995 (WA) reg 71(1)).

XLII United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the Havana Rules) r 64

XLIII Every use of force (which includes restraint) against a young person must be notified to the treating doctor or nurse; however, it is appears this is not beyond the level of the facility (Policy and Procedures 2018 s 6.15). The director-general must ensure that, as soon as practicable after the end of each month, a detention officer gives the director-general a report summarising the incidents (if any) during the month that involved the use of force in relation to a young detainee (Children and Young People Act 2008 (ACT) s 227). An ongoing register of these incidents is also to be kept by both the director-general and managers at each detention place, and must be made available for inspection to a Judge, Magistrate, Official Visitor, Commissioner exercising functions under the Human Rights Commission Act 2005, the Public Advocate, and the Ombudsman. The record must be inspected by the Public Advocate every 3 months (Children and Young People Act 2008 (ACT) ss 195(1)(b), (5)-(6)).

XLIV Reporting is not required beyond the facility – a report must be provided to the centre manager by each officer involved in the use of force as soon as practicable (Children (Detention Centres) Regulation 2015 (NSW) reg 66(1)).

XLV However, a register of the use of approved restraints must be kept, containing particulars of each use of approved restraints (Youth Justice Act 2005 (NT) s 158A).

XLVI While there must be a record made of every use of approved restraints (Youth Justice Regulation 2016 (Qld) reg 20), there is no explicit obligation to provide this report to anyone beyond the level of the facility.

XLVII If force is used against a resident of a training centre each employee of the centre involved must ensure that a written report is provided to the manager (Youth Justice Administration Act 2016 (SA) s 33(2)(a)). However, there is no requirement to report beyond the level of the facility.

XLVIII The Act does not expressly deal with restraint. The only requirement for a detention centre manager to keep a record of the use of force (presumably including use of restraint) is in relation to isolation but there is no obligation to provide this register to anyone (Youth Justice Act 1997 (Tas) s 133(6)).

XLIX Where an officer uses physical force or places a detainee in isolation, as soon as possible after taking the action, the officer must report the taking of the action to the officer in charge, who must report the taking of the action by the officer to the Secretary of the Department of Justice and Regulation (Children, Youth and Families Act 2005 (Vic) s 488AA).

L A written report of any incident involving the use of prescribed force or another similar physical restraint must be provided to the superintendent by the staff member involved (Young Offenders Regulations 1995 (WA) reg 72(5)), however reporting above the level of the superintendent is not required.

LI United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the Havana Rules) r 55.

LII The Children and Young People Act 2008 (ACT) and the Policy and Procedures 2018 do not expressly prohibit the use of chemical restraint and the use of medication to restrict movement or manage behaviour is not included in the definition of restraint. One provision under the Act mentions that the director-general may approve the use of a medicine other than prescription only medicine and may seek advice from a treating doctor before approving such use and ensure that the approval and reasons for the use are recorded in the

detainees register (Children and Young People Act 2008 (ACT) s 187(1)-(3)).

LIII Chemical restraint (dosing a person with medicine or any other substance) is only prohibited for the purpose of punishment (Children (Detention Centres) Act 1987 (NSW) s 22(1)(b)).

LIV The list of approved restraints is limited to: (a) handcuffs; (b) ankle cuffs; and (c) waist restraining belts (Youth Justice Act 2005 (NT) s 151AB). The use of a restraint that is not an approved restraint is prohibited in (Youth Justice Act 2005 (NT) s 153(2)(b)).

LV Chemical restraint is not expressly dealt with in regulation, although the chief executive must not use medication to discipline a child (Youth Justice Regulation 2016 (Qld) reg 16(4)(h)).

LVI The law expressly prohibits the use of mechanical restraint, isolation and separation except for certain circumstances (Youth Justice Administration Act 2016 (SA) s 29). The law and regulations are silent on the use of chemical restraint.

LVII The Youth Justice Act 1997 (Tas) does not expressly prohibit any forms of restraint.

LVIII The Children, Youth and Families Act 2005 (Vic) is silent on the issue of chemical restraint.

LIX Chemical restraint is expressly permitted if approved by a medical practitioner (Young Offender Act 1994 (WA) s 11D(2)).

LX United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) rr 75-76.

LXI The director-general must ensure that restraints are only used by detention officers trained to use them (Children and Young People Act 2008 (ACT) s 226(3)).

LXII A person using force must hold a current qualification in physical intervention techniques on youths (Youth Justice Act 2005 (NT) s 10(1)(b)(iv)). The law does not elaborate further on such training or mention the qualification in respect of restraints.

LXIII A staff member must successfully complete physical intervention training approved by the chief executive in order to be authorised to use 'approved restraints' and may only use 'reasonable force' if they have successfully completed such training (Youth Justice Regulation 2016 (Qld) regs 16(5)(a), 18(2)).

LXIV Mechanical restraint may only be used by an employee of the centre who has been trained in the use of such restraints, but the minimum requirements of such training are not detailed (Youth Justice Administration Regulations 2016 (SA) reg 8(5)(b)). No similar requirement for the use of force or other forms of restraint and seclusion.

LXV A person cannot use physical restraint when applying prescribed force unless 'that person has received instruction in the proper use of that hold'; however, the regulations do not specify the content of such instruction (Young Offenders Regulations 1995 (WA), reg 71(2)(a)).

LXVI If a complainant alleges that something that would constitute a criminal offence or significant breach of policy, procedure or legislation, staff must bring that matter to the attention of the Manager or Director of Child and Youth Protection Services Operations. These are not independent authorities (Children and Young People (Complaints Management) Policy and Procedures 2018 (No 1) (Notifiable Instrument NI2018-437 s 6.7). Certain incidents must be reported by staff to the Director immediately (Category 1 reportable incidents) and others within 5 days (Category 2 reportable incidents). Category 1 includes, for example, serious injury and death in custody. Category 2 includes, for example, assault (Children and Young People (Records and Reporting) Policy and Procedures 2018 (No.1) sch 1).

A mandated reporter under the Children and Young People Act 2008 (ACT) who is an adult and believes on reasonable grounds that a child or young person has experienced or is experiencing sexual abuse or non-accidental physical injury and reasons arise from information obtained during the course of, or because of, the person's work commits an offences if not reporting the incident as soon as practicable after forming the belief report it to the director-general (Children and Young People Act 2008 (ACT) s 356).

LXVII Any detainee complaint lodged with a member of staff must be forwarded to the Superintendent without delay (Youth Justice Regulations 2006 (NT) reg 66(4)). If the Superintendent believes the complaint is about a matter that could be the subject of a complaint under the Children's Commissioner Act, the Superintendent: (a) may refer the complaint to the Children's Commissioner; or (b) if the complaint is to be dealt with under these Regulations – must, as soon as practicable, give written notice about the complaint to the Children's Commissioner (Youth Justice Regulations 2006 (NT) reg 66(5A)).

LXVIII While the law establishes a procedure for detainee (or detainee's family) complaints, the Secretary is not obliged to take any particular course of action, simply provide written notice to the complainant with respect of the details of the complaint and how it will be dealt with (Youth Justice Act 1997 (Tas) ss 137, 138(1)).

LXIX The law does not make the use of force an offence; however, failure to report abuse by a mandated reporter believing on reasonable grounds that a child or young person has experienced non-accidental physical injury may be subject to civil or criminal penalty (50 penalty units, imprisonment for 6 months or both) (Children and Young People Act 2008 (ACT) s 356).

LXX The use of force (including restraint) for the purpose of punishment 'without reasonable excuse' is prohibited and a person who so punishes a detainee is guilty of an offence and liable to a penalty not exceeding 10 penalty units or imprisonment not exceeding 12 months, or both (Children (Detention Centres) Act 1987 (NSW) ss 22(1)-(3)).

LXXI An official, or anyone else engaging in functions under the Children and Young People Act 2008 (ACT) or in administration of the Act, is not civilly liable for conduct engaged in honestly and without recklessness in the exercise of a function under the Act, or in the reasonable belief that the conduct was in the exercise of a function under the Act. Any liability that would attach to an official attach instead to the Territory (Children and Young People Act 2008 (ACT) s 878). In respect of criminal liability, 'A youth worker, transfer escort and escort

officer may be criminally liable for any excessive use of force' (Policy and Procedures 2018 s 6.36). Note that no criminal offence is included under the Children and Young People Act 2008 (ACT) itself.

LXXII A current or former CEO, the Commissioner of Correctional Services, a superintendent of a detention centre, a community youth justice officer or a public sector employee performing functions under the Act) is not civilly or criminally liable for an act done or omitted to be done in good faith in the exercise or purported exercise of a power, or the performance or purported performance of a function, under the Act (Youth Justice Act 2005 (NT) s 215). This does not affect any liability the Territory would, apart from that subsection, have for the act or omission.

LXXIII An officer is not personally liable for injury or damage caused by the use of reasonable force in accordance with the Act. This does not affect the liability of the Crown or any other body or person (Children, Youth and Families Act 2005 (Vic) s 487A).

LXXIV Persons are exempt from an action in tort for anything they have done or omitted to do in good faith in the performance or purported performance of a function under the Act. This section does not relieve the Crown of any liability it might incur by virtue of persons performing functions under the Act (Young Offenders Act 1994 (WA) s 182).

LXXV UN Committee on the Rights of the Child, General Comment No. 24 (2019) [108]; United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the Havana Rules) r 72.

LXXVI See e.g. Children and Young People Act 2008 (ACT) pt 2.3 and Inspector of Correctional Services Act 2017 (ACT) ss 7(1)(e), pt 3. See also work by the ACT Ombudsman (pursuant to Ombudsman Act 1989 (ACT)).

LXXVII See e.g. Children (Detention Centres) Act 1987 (NSW) s 8A and Children (Detention Centres) Regulation 2015 (NSW) regs 28-29; Inspector of Custodial Services Act 2012 (NSW) ss 3(1)(d), div 2. See also work by the NSW Ombudsman (pursuant to Ombudsman Act 1974 (NSW)).

LXXVIII See Youth Justice Act 2005 (NT) pt 9.

LXXIX See e.g. Public Guardian Act 2014 (Qld); Youth Justice Act 1992 (Qld) s 263(4). See also work by the Qld Ombudsman (pursuant to Ombudsman Act 2001 (Qld)).

LXXX See e.g. Youth Justice Administration Act 2016 (SA) pt 3. See also work by the SA Ombudsman (pursuant to Ombudsman Act 1972 (SA)).

LXXXI See Youth Justice Act 1997 (Tas) s 135A). 'Prescribed officers' include the Commissioner for Children and Young People and the Custodial Inspector (Youth Justice Regulations 2009 (Tas) reg 6). The functions of these officers are set out in Commissioner for Children and Young People Act 2016 (Tas) s 8 and the Custodial Inspector Act 2016 (Tas) s 6. The Inspector is also the Tasmanian Ombudsman. See the work of the Tas Ombudsman (pursuant to Ombudsman Act 1978 (Tas)).

LXXXII The Commission for Children and Young People oversees an Independent Visitor programme. The Secretary can also appoint an authorised assessor to conduct independent review of facilities (Children, Youth and Families Act 2005 (Vic) s 63). See also work by the Victorian Ombudsman (pursuant to Ombudsman Act 1973 (Vic)).

LXXXIII See e.g. Inspector of Custodial Services Act 2003 (WA) pt 6. See also work by the WA Ombudsman (pursuant to Parliamentary Commissioner Act 1971 (WA)).

CHAPTER 8.

IMMIGRATION DETENTION

8.1 Background

> '…people who are deprived of their liberty have the right to be treated with humanity and with respect for their inherent dignity'
>
> Remarks by the President of the Australian Human Rights Commission, Emeritus Professor Rosalind Croucher AM, in the report 'Use of force in immigration detention', 23 October 2019.

Immigration detention is mandatory in Australia for anyone considered to be an 'unlawful non-citizen'.[217] The mandatory detention system means that persons are detained without an individualised risk assessment to determine the necessity of the detention. The detention population includes persons who arrive without a valid visa, as well as persons who have overstayed their visas and had their visas cancelled, including persons awaiting deportation after a prison sentence.[218] Many persons arriving without a valid visa do so as refugees or to seek asylum.[219] Immigration detention may be onshore, offshore (in one of the regional processing centres on Nauru and Papua New Guinea), or even at sea. The use of these facilities varies. For example, some centres are designed for extended processing, whilst other are merely for transit. The Federal Government has outsourced most of the management of immigration detention facilities in Australia (including the facility on Christmas island) to private security company Serco Pty Ltd (Serco).[220] In 2019, this service contract was extended until December 2021.[221] Off-shore processing centres in Papua New Guinea and Nauru have previously been handled by various Australian security entities.

There have been frequent reports of abuse and ill-treatment of offshore detainees.[222] In 2017, a UN expert noted an 'increased securitisation' of detention facilities more broadly, including an increased resort to violence by guards.[223] Excessive use of force and restraint in onshore immigration detention was recently highlighted by the Australian Human Rights Commission (AHRC). In a 2019 report sparked by the receipt of 14 separate detainee complaints, the AHRC found that the application of force in nine of the

217 Migration Act 1958 (Cth) s 189. Mandatory immigration detention is contrary to international standards, see for example, UN Special Rapporteur on the Human Rights of Migrants: Report A/HRC/35/25 (April 2017) [56].

218 Australian Department of Home Affairs: Immigration Detention Statistics Summary (31 March 2020).

219 See, e.g. statistics by the Australian Department of Home Affairs: 2018-19 Humanitarian Program Outcomes (July 2019).

220 Australian Border Force: Service providers (2020). Alongside Serco, International Health and Medical Services provides health related services.

221 Serco: Extension to Australian immigration services contract (September 2019).

222 See, e.g., The Guardian: Nauru Files (August 2016).

223 UN Special Rapporteur on the Human Rights of Migrants: Report A/HRC/35/25 (April 2017) [64].

complaints amounted to human rights violations. This included, for example, the use of handcuffs on a detainee with a wrist injury for over eight hours during transport to a different detention facility. In light of its findings, the AHRC asked the Federal Government to compensate the victims and made broader calls for reform to ensure more effective incident reporting and oversight in immigration detention.[224]

A closer look at the AHRC's recommendations to the Federal Government:

- Compensate six detainees and three detainee family units for the loss suffered from use of force that amounted to human rights violations
- Create a review process to guarantee that all uses of force in immigration detention are regularly evaluated in light of international human rights standards
- Document any pre-planned uses of force through video recordings
- Ensure that service manuals clarify that, for example:
  - There is a presumption against the use of restraint during transfers and escorts
  - The use of restraint is a last resort
  - An individualised risk assessment is conducted before applying restraint
  - Restraint should be applied for the shortest period necessary
  - Restraint should not be used on detainees under the age of 18
  - There is a presumption against the use of restraint on persons with severely limited mobility
  - A detention service provider must consult with a health service provider before using force
  - Force must not be used if a health service provider advises against it
  - A health service provider may direct the removal of restraints on health grounds
- Develop protocols for record-keeping, including for example requests by detention service providers and advice by medical professionals on whether force or restraints should be used

The Federal Government rejected the AHRC's findings of human rights violations but reported that it has made changes to its internal policies on the use of force in response to the report.[225] The use of force is largely governed by such internal policies, as well as through contractual obligations in the service contract between the Federal Government and Serco.

In August 2020, the Commonwealth Ombudsman published its July-December 2019 monitoring report of immigration detention facilities. The Ombudsman noted with concern:

> 'an increasing tendency for excessive an increasing tendency across the immigration detention network for force to be used to resolve conflict or non-compliant behaviour as the first rather than last choice, and can be exercised in a manner both inconsistent with the department's procedures and possibly without legal basis.'[226]

The AHRC and the Commonwealth Ombudsman reports follow other investigations. For example, The Guardian in 2019 published recordings by detainees that allege resort to excessive force in onshore detention facilities.

While this chapter specifically reviews the use of force and restraint in immigration detention, it is important to note the human rights issues that surround Australia's immigration detention system more broadly (e.g. allowing for mandatory and indefinite detention). These issues must be kept in mind in respect of any reforms to Australia's immigration detention regime.

It is also crucial to consider the use of force and restraint in the context of COVID-19 and its impacts on persons in immigration detention. Due to the heightened risk for persons deprived of liberty of COVID-19 on the basis of factors such as underlying health determinants and overcrowded conditions, the UN has called for efforts to release some groups deprived of liberty, including all

224 Australian Human Rights Commission: Use of force in immigration detention (23 October 2019) 16-22.

225 Ibid, pp 142-156.

226 Commonwealth Ombudsman: Monitoring Immigration Detention: Review of the Ombudsman's Activities in Overseeing Immigration Detention July – December 2019 (August 2020) 23.

children in immigration detention and vulnerable migrants.[227] Rather than releasing persons in immigration detention, the Federal Government has announced plans to reopen its detention facilities on Christmas Island.[228] Persons who remain in immigration detention are vulnerable to COVID-19, as well as to violence, neglect and abuse through the use of force and restraint, the latter which may involve isolation in response to the pandemic.

8.2 International human rights standards

The use of force and restraint in immigration detention engage many human rights. Specific rules and principles exist at the international level to protect the rights of persons deprived of liberty, including persons in immigration detention. For example, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) adopted in 2015 are the main source of rules for the treatment of persons in prisons and in detention more broadly.

The Mandela Rules and immigration detention

- The Mandela Rules were adopted in 2015 and modified an earlier version of the rules
- The rules constitute minimum rules, including guidance on the use of force and restraint. For example:
  - Rule 47: 'Inherently degrading or painful' instruments of restraint (e.g. use of chains, irons) shall be prohibited. Other instruments of restraint shall be limited to 'precautions against escape during a transfer'; 'to prevent a prisoner from injuring himself or herself or others or from damaging property'
  - Rule 48: Restraint 'shall be the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of risks posed'
  - Rule 49: The prison administration shall 'seek access to, and provide training in the use of, control techniques that would obviate the need for the imposition of instruments of restraint or reduce their intrusiveness'
  - Rule 71: A prison director shall 'report, without delay, any custodial death, disappearance or serious injury to a judicial or other competent authority that is independent of the prison administration [⋯]'
  - Rule 82: Use of force by prison staff shall be limited to self-defence; cases of attempted escape; and active/passive physical resistance to an order based on law or regulations
  - Rule 83: Both an internal and an external system for regular inspection shall be in place to monitor prisons

Similarly, the Body of Principles for the protection of all persons under any form of detention or imprisonment adopted by the UN General Assembly in 1988 provide standards for the treatment of immigration detainees. For example, Principle 1 states that every-one shall be 'treated in a humane way and with respect for their inherent dignity of the human person', reflecting Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR).

Principle 6 of the Body of Principles states that no person in detention may be subjected to torture, or other cruel, inhuman or degrading treatment or punishment, reflecting Article 7 of the ICCPR.[229] As noted in previous chapters of this report, various UN bodies have noted that the use of force to control behaviour of persons in closed environments may amount to torture or other cruel, inhuman or degrading treatment or punishment.[230] Since Australia ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), the National Preventive Mechanism (NPM) and UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) must be

227 UNODC, WHO, UNAIDS, OHCHR: Joint statement on COVID-19 in prisons and other closed settings (May 2020).

228 Hannah Ryan, The Guardian: 'Australian government to reopen Christmas Island detention centre during Covid-19 crisis' (5 August 2020).

229 The prohibition on torture and other cruel, inhuman or degrading treatment or punishment is also enshrined in other international instruments, for example Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Convention on the Rights of Persons with Disabilities (2006) (CRPD) Articles 15 and 16.

230 See e.g. UN News: UN rights office shocked by inhumane treatment of children in Australian detention centre (July 2016).

given access to places of detention, including immigration detention facilities. The NPM for the inspection of Commonwealth places of detention is the Commonwealth Ombudsman.

The UN has repeatedly confirmed that Australia's obligations under international law to respect and protect the human rights of persons in immigration detention extend to its offshore detention facilities.[231] In addition, the UN has emphasised that the act of outsourcing the maintenance of immigration detention to a private entity does not relieve Australia from its human rights obligations.[232]

In March 2020, the Inter-Agency Standing Committee of the OHCHR and the WHO issued an Interim Guidance on COVID-19 and persons deprived of liberty. It underlines the need for measures to combat overcrowding in closed environments, including release of some groups of detainees, including those with low risk profiles and with underlying health conditions.[233] The Interim Guidance also notes that the pandemic should be viewed as an opportunity to 'reduce the use of immigration detention generally and establish alternatives, and as a priority end immigration detention of children and vulnerable migrants.[234] Calls for release are accompanied by an emphasis on the need for continued protection of the health, safety and dignity of persons who do remain in detention.[235]

8.3 Regulation in Australia

As discussed above, Australia has international human rights obligation in respect of the treatment of detainees both onshore and offshore. However, domestic law only applies to detention facilities in the Australian territory. Unlike the regulation of prisons and juvenile justice facilities, the Commonwealth has exclusive powers over immigration matters under the Constitution. There are therefore no legal frameworks at the state and territory levels that specifically regulate the use of force in immigration detention.

The Migration Act 1958 (Cth) is the major piece of legislation in the field of immigration. Section 5 of the Act includes in the definition of detain, 'taking such action and using such force as are reasonably necessary to do so'. Yet, only a few provisions address the use of such force and these provisions are further limited to specific circumstances, such as searches and identification tests.[236] An attempt to introduce broad powers to use force in immigration detention failed to pass in 2015.[237] This included a controversial provision that would exempt detention personnel from 'any proceeding' if their exercise of power was done 'in good faith'. This resembles the provisions limiting liability for prison staff and juvenile detention officers discussed in chapters 6 and 7 of this report.[238]

Despite the 'securitisation' of immigration detention facilities noted in the introduction to this chapter, the use of force and restraint is largely governed by policy and contractual obligations between the Federal Government and Serco. Parts of the Immigration Detention Facilities and Detainee Services Contract ('the service contract') between the Federal Government and Serco were released by the then Department of Immigration and Border Protection pursuant to a Freedom of Information request. In February 2020, the Information Commissioner further ruled that the Serco Policy and Procedure Manual should be made available, following the refusal by the Department of Home Affairs in June 2017 to release the manual in response to a Freedom of Information request.[239]

Key concerns

This section outlines some key concerns arising from the Table annexed to this chapter. It analyses any existing legislative provisions on the use of force and the Serco service contract against a set of indicators.[240] To the extent possible, these indicators are derived from international standards on the treatment of persons in places of detention. It is important to note that the indicators should be

231 See e.g. Human Rights Committee: Concluding Observations on Australia (December 2017) [35].

232 Ibid.

233 Inter-Agency Standing Committee: Interim Guidance: COVID-19: Focus on persons deprived of their liberty (March 2020) 3.

234 Ibid.

235 Ibid.

236 See, e.g. Migration Act 1958 (Cth) s 261AE.

237 Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015.

238 Ibid, s 197BF.

239 Asylum Seeker Resource Centre and Department of Home Affairs (Freedom of information) [2020] AICmr 7.

240 Note: This Table only assesses the regulation of detention facilities managed by Serco.

regarded as minimum requirements.

Our review of the framework governing the use of force and restraint in immigration detention demonstrates several areas where Australia falls short of international minimum standards. Areas of particular concern include:

The lack of a statutory framework

As discussed in this chapter and illustrated in the annexed Table, the statutory framework on the use of force and restraint in immigration detention is extremely limited. This is serious concern as it maintains a lack of transparency and accountability for the use of force and restraint against persons in immigration detention.

While the Serco service contract has been made available following a Freedom of Information request, it contains limited safeguards and fails to adhere to minimum standards for the treatment of persons in detention required under international standards.

Permitted uses of force and restraint

While the service contract states that force must only be used as a last resort, permitted uses of such force and restraint may go beyond the specific uses permitted under international standards. For example, force may be used to 'resolve the situation in accordance with directions given by the Department'.[241] This is an overly broad power which may be subject to abuse. The existence of broad powers provides an avenue for use of force to be employed far beyond the limited used permitted under the Mandela Rules.

Specific uses of restraint are set out in the service contract only as it relates to 'Transport and Escort Services'. In addition to the standards for which such are permissible under the Mandela Rules, the list includes instances where 'the Department has otherwise approved' the use in an 'Escort Security Risk Assessment process'.[242] This may include many uses which are not permitted under international standards. With regards to the use of restraint more broadly in immigration detention, the service contract does not specify permitted uses, but notes that it must not be used 'in a manner which is likely to cause injury, serious discomfort or potential danger to the Detainee'.[243]

Staff training

While the service contract requires that force and restraint be only applied by trained staff, the nature of such training is not specified. The lack of definitions of force and forms of restraint may make the identification of force and restraint difficult for detention personnel.

Chemical restraint

The service contract defines 'control and restraint' as the use of 'accoutrements and procedures to control' and goes on to provide limited regulation of the use of restraint. It is not clear whether or not this includes chemical restraint. The Service Provider must implement a 'Security Services Plan' that should include details of 'restraint devices which will be utilised'[244], but this is not publicly available. No express prohibition on the use of chemical restraint is included in the service contract.

Reporting, complaints, and monitoring

After any use of force or restraint, Serco must inform the Department of Immigration and Border Protection of such use pursuant to an incident management reporting procedure.[245] The staff involved in the incident must provide an oral and written report after the use of force or restraint, Serco must then provide a detailed report to the Department and ensure that the person subjected to the force

241 Serco Facilities and Services Contract sch 2 s 4 cl 3.8(a)(i).

242 Ibid sch 2 s 5 cl 1.19(a)(iv).

243 Ibid sch 2 s 4 cl 3.9(a)(i).

244 Ibid sch 2 s 4 cl 1.3(a)(iii).

245 Ibid sch 2 s 4 cl 3.10(a)(i).

or restraint receives a medical examination.[246] Serco is also required to provide monthly reports of injuries, deaths or property damage arising in relation to their services, including actions taken to minimise these incidents.[247] Alongside these reporting requirements, various bodies, including the Australian Human Rights Commission and the Red Cross, conduct monitoring visits.[248]

Despite these reporting and monitoring frameworks, there have been recent reports of various allegations of excessive force in onshore detention centres.[249] While the new NPM as part of Australia's OPCAT implementation has established an independent monitoring scheme that complements other systems noted above, questions have also been raised as to whether all places of immigration detention will be covered, as not all of these places may be classified as 'primary' places of detention.[250]

Liability

Excessive force and restraint in immigration detention is not prohibited as a specific offence under statute. There is no provision exempting detention officers from liability. However, as noted above an attempt was made in 2015 to exempt officers from liability in the exercise of powers 'in good faith'.

Serco may be liable for breach of contract under the service contract. Its personnel may be liable for excessive force and restraint under other existing offences, such as assault and battery. However, it is important to note that immigration detention providers and personnel in offshore facilities stand outside the criminal jurisdiction of states and territories. This leaves a severe gap in liability for excessive force and restraint.

Added concerns during the pandemic

Immigration detainees are at a heightened risk of COVID-19 for several reasons, including their situation of confinement which makes physical distancing difficult and the likelihood of underlying health conditions. As noted above, the UN has called for efforts to reduce immigration detention and end such detention for vulnerable persons. However, immigration detainees remain in detention facilities and the Federal Government plans to reopen facilities on the Christmas Island.

As immigration detainees remain in custody, so too do the above-mentioned concerns on the use of force and restraint in immigration detention facilities. The pandemic has a compounding effect on these existing concerns. For example, concerns about oversight and reporting are exacerbated by the pandemic through restrictions on prisons visits as part of the COVID-19 response.

8.4 Conclusion

Our research finds that the frameworks that regulate the use of force and restraint in immigration detention fall short of international minimum standards set out in the Mandela Rules. Of significant concern is the lack of statutory regulation of the use of force and restraint in immigration detention. This in turn results in a lack of transparency and accountability. Any new statutory framework must itself adhere to international standards and not further limit the protection of persons in immigration detention. This is illustrated by the 2015 Bill that sought to introduce a number of provisions which were inconsistent with international standards.

The lack of regulation, transparency and accountability is exacerbated in the case of offshore detention facilities where it is not possible, for example, to bring an action for assault or battery under state and territory laws in response to excessive force and restraint. As noted above, the Federal Government plans to reopen facilities on the Christmas Island in response to the pandemic. The pandemic also compounds the existing concerns around the use of force and restraint highlighted in this Chapter, such as the lack of regulation, transparency and accountability.

Recommendations - Immigration detention

Based on our review of the existing frameworks on the use of force and restraint and relevant international human rights obligations, the Castan Centre recommends that the Australian governments:

- Ensure a human rights-based approach in response to COVID-19 which leaves no one behind and protects the rights of

246 Ibid sch 2 s 4 cl 3.10(a)(ii)-(iv).

247 Ibid pt 2, cl 4.1(d)(ii).

248 Australian Human Rights Commission: The Commission's Role; Australian Red Cross: Immigration Detention Monitoring.

249 Helen Davidson, The Guardian: Secret recordings allege excessive force by guards in Australia's detention centres (March 2019).

250 See Australia OPCAT Network: The Implementation of OPCAT in Australia: Submission by the Australia OPCAT Network to the SPT and WGAD (January 2020) p 50.

vulnerable persons, including persons detained in immigration detention. This requires, for example, efforts to reduce immigration detention and end of immigration detention as a priority for vulnerable persons as recommended by the UN.

- Enact a statutory framework in line with international standards set out in the Mandela Rules and best practice to regulate the use of use of force and restraint against persons in immigration detention.
- Make the use of force and restraint in immigration detention contrary to international standards an offence with appropriate penalties to support the development of a culture of human rights compliance.
- Expressly prohibit by law the use of chemical restraint.
- Mandate adequate staff training on the use of force and restraint by legislation.
- Fully and effectively implement OPCAT and its mandate in respect of all immigration detention facilities by the 2022 deadline.

ANNEX – CHAPTER 8 IMMIGRATION DETENTION

INDICATORS	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Regulated by legislation, not only policy	PARTLY[I]								
If regulated by legislation:									
Use is a measure of last resort[II]	PARTLY[III]								
Force is limited to self-defence, to prevent an attempted escape, or active/passive physical resistance to an order[IV]	NO[V]								
Restraint is limited to a precaution against escape during transfer, or to prevent detainees from injuring themselves or others or damaging property[VI]	PARTLY[VII]								
Use must be the minimum necessary and reasonable	PARTLY[VIII]								
Administrators must report to an independent authority any custodial death, disappearance, serious injury, or a reasonable belief that torture or other cruel, inhuman or degrading treatment or punishment has been committed[IX]	PARTLY[X]								
Chemical restraint is prohibited	NO								
Law includes minimum requirements for staff training on use of force and restrictive practices[XI]	NO[XII]								
Use contrary to the law is an offence under the Act (in addition to general criminal law provisions)	NO								
Officials may be held civilly or criminally liable for use of force and restrictive practices applied in good faith	NO								
Independent visitor schemes:									
An independent visitor scheme is in place[XIII]	YES[XIV]								

I The Migration Act 1958 (Cth) does not provide comprehensive regulation of the use of force and restraint in immigration detention. The Act merely states that detaining a person includes 'taking such action and using such force as are reasonably necessary to do so' (Migration Act 1958 (Cth) s 5). A few other provisions specify limitations on the use of force in respect of the performance of certain functions/powers, for example, the use of force during arrest or detention on an aircraft or during identification tests (Migration Act 1958 (Cth) ss 245F, 261AE). Further, provisions in the Act do not extend to Australia's regional processing centres.

Instead, the use of force in immigration detention is mostly governed by:

(a) Immigration Detention Facilities and Detainee Services Contract ('Facilities and Services Contract') between the Commonwealth Department of Immigration and Border Protection and Serco Pty Ltd (Serco); and

(b) The Detention Services Manual (not available at time of publication of this Report).

II Mandela Rules r 48.

III Regulated under service contract. Serco must ensure that 'force is not be used unless as a measure of last resort when all other methods have failed or have been assessed as inadequate' (Facilities and Services Contract sch 2 s 4 cl 3.8(a)(i)). 'Force' is not defined in the contract.

IV Mandela Rules r 82(1).

V Regulated under service contract. Force is permitted 'to resolve the situation in accordance with the directions given by the Department' (Facilities and Services Contract sch 2 s 4 cl 3.8(a)(i)) which may permit broader uses than what is allowed under international standards.

VI Mandela Rules r 47.

VII Regulated under service contract. Restraints may also be used if "the Department has otherwise approved the use of restraints as part of the Escort Security Assessment process' (Facilities and Services Contract s sch 2 s 4 cl 1.19(a)).

VIII Serco must ensure that force is only used at the 'reasonable level...necessary to resolve the situation in accordance with the directions given by the Department' (Facilities and Services Contract sch 2 s 4 cl 3.8(a)(i)). Further, Serco must ensure that restraint is 'not used in a manner which is likely to cause injury, serious discomfort or potential danger to a Detainee' (Facilities and Services Contract sch 2 s 4 cl 3.9(a)(i)).

IX Mandela Rules r 71; See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Principle 7.

X Regulated under service contract only. Service personnel must report any use of force as per an 'Incident management reporting requirements', as well as verbal and written reports to Management (Facilities and Services Contract sch 2 s 4 cl 1.19(c), 3.10(a)). Serco must also 'provide a national monthly report detailing any injury, illness, death or property damage arising in connection with the Services or the condition of the Facilities and action taken to prevent recurrence or minimise their impact' (Facilities and Services Contract sch 2 s 4 cl 4.1(d)(ii)). However, the service contract does not expressly require Serco personnel to report disappearance or reasonable belief that torture, or other cruel, inhuman or degrading treatment or punishment has been committed.

XI Mandela Rules rr 49, 75-76, 82(2).

XII However, Serco must ensure that 'Service Provider Personnel who use force are trained and accredited in the use of force in accordance with applicable law' (Facilities and Services Contract sch 2 s 4 cl 3.8(a)(iii)). Serco must also ensure that 'only Service Provider Personnel who use restraints are trained and accredited in the use of restraints in accordance with Law' (Facilities and Services Contract sch 2 s 4 cl 3.89(a)(iv)).

XIII Mandela Rules, rr 83-85.

XIV The Commonwealth Ombudsman is designated the NPM for Commonwealth places of detention (Ombudsman Regulations 2017 (Cth) pt 4 div 1). Visits are also conducted by other independent and external bodies, including the Australian Human Rights Commission and the Red Cross.

BIBLIOGRAPHY

UN human rights instruments

- Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Rights of Persons with Disabilities
- Convention on the Rights of the Child
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Optional Protocol to the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment
- UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988
- UN General Assembly: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005)
- UN Human Rights Council: Resolution 36/13 (October 2017)
- UN Human Rights Council: Resolution 36/L.25 (September 2017)
- UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (Havana Rules)
- UN Revised Standard Minimum Rules for the Treatment of Prisoners 2015 (Mandela Rules)
- UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules)

Other UN sources

- Committee on the Rights of the Child: General Comment No. 24 (September 2019)
- CRPD Committee: Concluding Observations on Australia (October 2019)
- Human Rights Committee: General Comment No. 21 (1992)
- Human Rights Committee: General Comment No. 31 (2004)
- Human Rights Committee: General Comment No 36 (2018)
- Human Rights Committee: Concluding Observations on Australia (December 2017)
- Inter-Agency Standing Committee: Interim Guidance: COVID-19: Focus on persons deprived of their liberty (March 2020)
- UNICEF, Alliance for Child Protection in Humanitarian Action: Technical Note: COVID-19 and Children Deprived of their Liberty (April 2020)
- United Nations: COVID-19 Guidance (2020)
- United Nations: COVID-19 and the Rights of Persons with Disabilities: Guidance (April 2020)

- United Nations: 'Nelson Mandela International Day 18 July'
- United Nations: Policy Brief: The Impact of COVID-19 on older persons (May 2020)
- UN High Commissioner for Human Rights: Report 34/32 (January 2017)
- UN High Commissioner for Human Rights: Report 39/36 (July 2018)
- UN High Commissioner for Human Rights: Report A/HRC/42/20 (August 2019)
- UN News: Press Briefing Notes on Gambia and Australia (July 2016)
- UN News: UN rights office shocked by inhumane treatment of children in Australian detention centre (July 2016)
- UN Special Rapporteur on the Human Rights of Migrants: Report A/HRC/35/25 (April 2017)
- UN Special Rapporteur on the Rights of Persons with Disabilities: Report A/74/186 (October 2019)
- UN Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report 22/53 (February 2013)
- UN Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report 63/175 (July 2008)
- UNODC, WHO, UNAIDS, OHCHR: Joint statement on COVID-19 in prisons and other closed settings (May 2020)

Domestic legislative instruments

- Aged Care Act 1997 (Cth)
- Ageing and Disability Commissioner Act 2019 No 7 (NSW)
- Charter of Human Rights and Responsibilities Act 2006 (Vic)
- Children (Detention Centres) Act 1987 No 57 (NSW)
- Children (Detention Centres) Regulation 2015 (NSW)
- Children and Young People Act 2008 (ACT)
- Children and Young People (Use of Force) Policy and Procedures 2018 (No.1)
- Children and Young People (Complaints Management) Policy and Procedures 2018 (No 1)
- Children and Young People (Records and Reporting) Policy and Procedures 2018 (No.1)
- Children, Youth and Families Act 2005 (Vic)
- Commissioner for Children and Young People Act 2016 (Tas)
- Correctional Services Act 1982 (SA)
- Correctional Services Act 2014 (NT)
- Corrections Act 1997 (Tas)
- Corrections Regulations 2018 (Tas)
- Corrections Act 1986 (Vic)
- Corrections Regulations 2019 (Vic)
- Corrections Management Act 2007 (ACT)
- Corrective Services Act 2006 (Qld)

- COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic)
- Crimes (Administration of Sentences) Act 1999 (NSW)
- Crimes (Administration of Sentences) Regulation 2014 (NSW)
- Disability Services Act 1993 (NT)
- Disability Services Act 1993 (WA)
- Disability Act 2006 (Vic)
- Disability Services Act 2006 (Qld)
- Disability Services Regulation 2017 (Qld)
- Disability Services Act 2011 (Tas)
- Human Rights Act 2004 (ACT)
- Human Rights Act 2019 (Qld)
- Human Rights Commission Act 2005 (ACT)
- Inspector of Correctional Services Act 2017 (ACT)
- Inspector of Custodial Services Act 2003 (WA)
- Inspector of Custodial Services Act 2012 (NSW)
- Mental Health and Related Services Act 1998 (NT)
- Mental Health Act 2007 (NSW)
- Mental Health Act 2009 (SA)
- Mental Health Act 2015 (ACT)
- Mental Health Act 2013 (Tas)
- Mental Health Act 2014 (Vic)
- Mental Health Act 2014 (WA)
- Mental Health Act 2016 (Qld)
- Migration Act 1958 (Cth)
- Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015
- National Disability Insurance Scheme Act 2013 (Cth)
- National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth)
- Official Visitor Act 2012 (ACT)
- Ombudsman Act 1972 (SA)
- Ombudsman Act 1973 (Vic)
- Ombudsman Act 1974 (NSW)

- Ombudsman Act 1978 (Tas)
- Ombudsman Act 1989 (ACT)
- Ombudsman Act 2001 (Qld)
- Ombudsman Act 2009 (NT)
- Ombudsman Regulations 2017 (Cth)
- Parliamentary Commissioner Act 1971 (WA)
- Prisons Act 1981 (WA)
- Prisons Regulations 1982 (WA)
- Public Guardian Act 2014 (Qld)
- Public Sector Act 2009 (SA)
- Senior Practitioner Act 2018 (ACT)
- Statutes Amendment (Spit Hoods) Bill 2020
- Statutes Amendment (Spit Hood Prohibition) Bill 2020
- Supported Residential Services (Private Proprietors) Act 2010 (Vic)
- Quality and Safety Commission Act 2018 (Cth)
- Quality of Care Principles 2014 (Cth)
- Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019 (Cth)
- Young Offenders Act 1994 (WA)
- Young Offenders Regulations 1995 (WA)
- Youth Justice Act 2005 (NT)
- Youth Justice Regulations 2006 (NT)
- Youth Justice Act 1992 (Qld)
- Youth Justice Regulation 2016 (Qld)
- Youth Justice Administration Act 2016 (SA)
- Youth Justice Administration Regulations 2016 (SA)
- Youth Justice Act 1997 (Tas)

Journal articles

- Bernadette McSherry: People with cognitive disability shouldn't be in prison because they're 'unfit to plead'. There are alternatives (2020)

- Bronwyn Naylor, Julie Debeljak, Anita Mackay: Strategic Framework for Implementing Human Rights in Closed Environments (2015)
- Laura Grenfell: Aged care, detention and OPCAT (2019)
- Stephen Gray: You Can't Charge Me, I'm a Cop: Should Police, Corrections Staff and Law Enforcement Officers be Immune from Criminal Liability for Actions carried out against Vulnerable People in the course of their Duties? (2018)

Other sources

- Aged Care Quality and Safety Commission: Aged Care Quality Standards (2019)
- Aged Care Quality and Safety Commission: Residential care sector performance (April – June 2019)
- Asylum Seeker Resource Centre and Department of Home Affairs (Freedom of information) [2020] AICmr 7
- Attorney-General, Mr Christian Porter: Speech launching the National Plan to Respond to the Abuse of Older Australians (March 2019)
- Australia OPCAT Network: The Implementation of OPCAT in Australia: Submission by the Australia OPCAT Network to the SPT and WGAD (January 2020)
- Australian Border Force: Service providers (2020)
- Australian Broadcasting Corporation: Four Corners - Episode: Who Cares? (September 2018)
- Australian Broadcasting Corporation: Four Corner - Episode Australia's Shame (July 2006)
- Australian Children's Commissioners and Guardians: Statement on Conditions Treatment in Youth Justice Detention (November 2017)
- Australian Department of Home Affairs: Immigration Detention Statistics Summary (31 March 2020)
- Australian Department of Home Affairs: 2018-19 Humanitarian Program Outcomes (July 2019)
- Australian Government Department of Health: COVID-19 cases in aged care services – residential care (20 August 2020)
- Australian Health Ministers' Advisory Council and National Mental Health Working Group: National safety priorities in mental health: a national plan for reducing harm (2005)
- Australian Human Rights Commission: The Commission's Role
- Australian Human Rights Commission: Use of force in immigration detention (23 October 2019)
- Australian Institute of Health and Welfare: Mental health services In brief 2019
- Australian Law Reform Commission: Elder Abuse – A National Legal Response (Report 131) (May 2017)
- Australian Red Cross: Immigration Detention Monitoring
- Brittney Kleyn, ABC News: Young inmates locked in cells as authorities brace for a potential coronavirus outbreak at the Brisbane Youth Detention Centre (21 August 2020)
- Calla Wahlquist, The Guardian: Australian experts warn against the use of sedatives to contain Covid spread in aged care (13 August 2020)
- Calla Wahlquist, The Guardian: SA prison guards seek coroner's removal from inquest into Indigenous death in custody (November 2019)
- Commonwealth Ombudsman: Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) Baseline assessment of Australia's OPCAT readiness (2019)
- Commonwealth Ombudsman: Monitoring Immigration Detention: Review of the Ombudsman's Activities in Overseeing Immigration Detention July – December 2019 (August 2020)
- Council of Attorneys-General: National Action Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023
- Coroners Court of New South Wales: Inquest into the death of David Dungay (November 2019)

- Coroners Court of Victoria: Findings into death with inquest Hizir Ferman (July 2019)
- Daniel Hurst, The Guardian: Time is of the essence when Covid enters aged care but the government response has been sluggish (18 August 2020)
- Dementia Support Australia: Restrictive practices: understanding and managing behaviours in a time of pandemic (17 April 2020)
- Department of Social Services: National Framework for Reducing and Eliminating the Use of Restrictive Practices in Disability Service Sector (2014)
- Hannah Ryan, The Guardian: 'Australian government to reopen Christmas Island detention centre during Covid-19 crisis' (5 August 2020)
- Helen Davidson, The Guardian: Secret recordings allege excessive force by guards in Australia's detention centres (25 March 2019)
- Human Rights Watch: "Fading Away": How Aged Care Facilities in Australia Chemically Restraint Older People with Dementia (October 2019)
- International Commission of Jurists: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (22 - 26 January 1997)
- Mental Health Complaints Commissioner Victoria: Annual Report 2018-19
- Minister for Foreign Affairs, Senator the Hon. Marise Payne: Human Rights Day Speech (2019)
- Ms Kate Carnell AO and Professor Ron Paterson ONZM: Review of National Aged Care Quality Regulatory Processes (October 2017)
- Naaman Zhou, The Guardian: Q+A: 'catastrophic' Covid-19 outbreaks in aged care could have been prevented, doctors say (4 August 2020)
- Natasha Egan, Australian Ageing Agenda: Restraints pose additional risk when COVID is present (9 April 2020)
- National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (2014)
- Open letter to Australian governments on COVID-19 and the criminal justice system
- Office of the Public Advocate (Qld): Legal frameworks for the use of restrictive practices in residential aged care: An analysis of Australian and international jurisdictions (June 2017)
- Parliamentary Joint Committee on Human Rights: Inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019
- Royal Commission into Aged Care Quality and Safety: Call for submissions on impact of COVID-19 on aged care services (28 April 2020)
- Royal Commission into Aged Care Quality and Safety: Interim Report (October 2019)
- Royal Commission into Aged Care Quality and Safety: Media Release ()
- Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Issues Paper on Education and Learning (30 October 2019)
- Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Statement of Concern (March 2020)
- Royal Commission into Victoria's Mental Health System: Interim Report (November 2019)
- Senate Community Affairs References Committee: Report on Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability (2015)
- Serco: Extension to Australian immigration services contract (September 2019)
- Serco Facilities and Services Contract
- Stephanie Dalzell and Jade Macmillan, ABC News: Federal Government wasn't notified of St Basil's aged care coronavirus outbreak for nearly a week (4 August 2020)
- Strengthening Older People's Rights: Towards a UN Convention (2019)
- Submissions to the 2019 inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019: Human Rights Watch
- Submissions to the 2019 inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019: Public Advocate Queensland
- Submissions to the 2019 inquiry into the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019: Public Advocates and Public Guardians – ACT, Qld, NSW, NT, SA, Tas, Vic

- Submission to Royal Commission into Victoria's Mental Health System: Castan Centre (2019)
- Submission to Royal Commission into Victoria's Mental Health System: Office of the Public Advocate (Vic) (2019)
- The Guardian: Nauru Files (August 2016)
- Toward Elimination of Restrictive Practices Forum
- Victorian Ombudsman: Prisons