



JustSpeak

AMNESTY
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AOTEAROA NEW ZEALAND

**JOINT SUBMISSION TO THE UN COMMITTEE AGAINST
TORTURE**

77TH SESSION, 10-28 JULY 2023

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INTRODUCTION

This submission has been prepared by Amnesty International and JustSpeak ahead of Aotearoa New Zealand's 2023 review under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) in July 2023. This submission mainly covers the period 2017 to start of June 2023.

JustSpeak is an organisation for transformational justice in Aotearoa. Our vision is a society that gives everyone what they need while caring for each other and the planet. We dream of a world where everyone has a roof over their head, food on the table, and time to spend with loved ones. Where we've reimagined justice to be about health and not handcuffs and where we've closed the last prison - for good.

Amnesty International is a global movement of over 13 million people who protect human dignity and defend human rights. In Aotearoa New Zealand, there are over 40,000 members and we work on a wide range of human rights issues of both national and international significance. Amnesty International promotes and defends human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments.

Data from the Human Rights Measurement Initiative (HRMI)¹ indicates that since 2017 Aotearoa New Zealand's score on freedom from torture and ill-treatment appears to be largely worsening (in 2017 the score was 7.3 out of 10 but decreased to 6.5 in the latest data).² HRMI reported that when asked to provide more context about who was especially vulnerable to torture and ill-treatment by the government, incarcerated people were referenced, which this submission primarily focuses on.³

Along with the prison system, this submission covers concerns relating to children and young people, the detention of people seeking asylum in criminal justice facilities, diplomatic assurances and accountability and oversight of the New Zealand Defence Force.

PRISON SYSTEM

The current prison system has been characterised as being at crisis point. Human rights concerns are raised regularly across the prison system, and we are seeing a failure to meet some of the bare minimum human rights standards set out in the UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) in some prisons.

We are concerned that an environment could be created where a failure to meet human rights standards is normalised in at least parts of the prison system, making it harder to progress reform in line with international human rights law and standards. This is exacerbated by serious deficiencies in the oversight system such as lack of accurate and timely statistical data to ensure the standards are being consistently met.

¹ Human Rights Measurement Initiative, <https://humanrightsmmeasurement.org/>

² <https://rightstracker.org/country/NZL?tab=report-physint>

³ <https://rightstracker.org/country/NZL?tab=report-physint>

CONCERNS ACROSS THE PRISON SYSTEM - CALL FOR REFORM

*"Since 2018, while the overall actual numbers of Māori in prison have decreased, the disproportionality of Māori has continued to increase, in turn ensuring the disproportionate impact on whānau Māori, hapū, iwi and communities. Prisons are therefore continuing to fail Māori."*⁴

The two key documents He Whakaputanga o te Rangatiratanga o Niu Tirenī⁵ and Te Tiriti o Waitangi⁶ uphold the sovereignty of Māori (the indigenous people of Aotearoa New Zealand). The Government's failure to uphold He Whakaputanga o te Rangatiratanga o Niu Tirenī and Te Tiriti o Waitangi, the immeasurable violence and harm caused throughout Aotearoa New Zealand's colonial history, and the discriminatory practices and racism that still prevail today have created deep seated disadvantage and are all central to understanding issues in the criminal justice system.

The operation of the current system has caused immense harm and ongoing intergenerational trauma, especially for Māori communities.

While this section largely focuses on policies aimed at reducing harm, there is a need for broader transformational change to address the key structural challenges set out above. And central to this is ensuring reforms are grounded in He Whakaputanga o te Rangatiratanga o Niu Tirenī He Whakaputanga and Te Tiriti o Waitangi.⁷

Over the last four years, there has been a decrease in the prison population, dropping by 22% from 5,300 to 4,100.⁸ However, as noted in a report by Ināia Tonu Nei⁹ the "drop has been at a lower rate compared to non-Māori, resulting in Māori making up an even larger proportion of the prison population".¹⁰ The report notes that "Māori men are now more than six times more likely to be in prison than non-Māori men", and "Māori women are now almost 11 times more likely to be in prison than non-Māori women".¹¹

⁴ Ināia Tonu Nei, *Companion report to the Long-Term Insights Briefing: Justice Sector "Long Term Insights on imprisonment, 1960 to 2050"*, December 2022, p. 22, https://static1.squarespace.com/static/60d12cb5a665b46504ad8b32/t/63ffeb7e1bb2af2d8318d805/1677716359871/Ina%CC%84iaTonuNei_LTIBCompanionReport.pdf

⁵ The Declaration of Independence, signed by a number of Māori Chiefs, is an international declaration of sovereignty. By July 1839 by 52 Chiefs had signed it.

⁶ A treaty signed between the British Crown and over 500 Māori chiefs in 1840.

⁷ International human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples, affirms Indigenous Peoples' right to *tino rangatiratanga*, self-determination, dignity, equality and freedom from discrimination. Gray, N, Milfont. T & Athy. A. *Climate Change as a Catalyst for Advancing Indigenous Rights*. Mai Journal of Indigenous Scholarship Volume 11 Issue 2 Page 106 Nov 2022. Doi 10.20507/MAIJournal.2022.11.2.2 <https://www.journal.mai.ac.nz/10.20507/MAIJournal.2022.11.2.2>

⁸ Ināia Tonu Nei, *Companion report to the Long-Term Insights Briefing: Justice Sector "Long Term Insights on imprisonment, 1960 to 2050"*, December 2022, p. 8, https://static1.squarespace.com/static/60d12cb5a665b46504ad8b32/t/63ffeb7e1bb2af2d8318d805/1677716359871/Ina%CC%84iaTonuNei_LTIBCompanionReport.pdf

⁹ Ināia Tonu Nei, <https://www.inaiatonunei.nz/about>

¹⁰ Ināia Tonu Nei, *Companion report to the Long-Term Insights Briefing: Justice Sector "Long Term Insights on imprisonment, 1960 to 2050"*, December 2022, p. 8, https://static1.squarespace.com/static/60d12cb5a665b46504ad8b32/t/63ffeb7e1bb2af2d8318d805/1677716359871/Ina%CC%84iaTonuNei_LTIBCompanionReport.pdf

¹¹ Ināia Tonu Nei, *Companion report to the Long-Term Insights Briefing: Justice Sector "Long Term Insights on imprisonment, 1960 to 2050"*, December 2022, p. 9, https://static1.squarespace.com/static/60d12cb5a665b46504ad8b32/t/63ffeb7e1bb2af2d8318d805/1677716359871/Ina%CC%84iaTonuNei_LTIBCompanionReport.pdf

Ināia Tonu Nei is a critical source of Māori expertise and perspectives on the future of Aotearoa’s criminal justice system and what transformation looks like. Ināia Tonu Nei reports highlight the need to decolonise the justice system and for legislation and policy settings to reflect Te Ao Māori, Tikanga¹² Māori and Te Tiriti o Waitangi.

The sections below detail human rights concerns across the system, with a particular focus on minimum entitlements. Not all of the instances fall within the direct purview of the Convention, but are included to illustrate our concern about an environment being created where a failure to meet human rights standards could become normalised in at least parts of the prison system.

DENIAL OF ADEQUATE TIME OUT OF CELL FOR EXERCISE

The minimum entitlement of one hour out of cell for exercise is not always being met, and therefore we believe urgent investigation is required to ascertain whether the Convention is being breached.

Official Information Act (OIA) requests¹³ focused on two maximum security units at Auckland Prison showed that the minimum entitlement of physical exercise was denied to people over 1000 times each month from October 2022 to April 2023. These units hold people who are sentenced and people on remand. In January and March this year, the minimum entitlement to exercise was denied over 2000 times across these two units. These OIAs showed that the right was denied regularly over a seven-month period. A lawyer who spoke to Amnesty International about their experiences in the prison system described this practice as becoming “business as usual”.

We understand there have been issues with staffing shortages (exacerbated by COVID-19), but given the length of time of denial of this minimum entitlement we believe this would not justify the human rights restriction.

More generally, we are concerned about excessive time in cells, and over the years there have been multiple reports in the media on this issue. For example, in April 2023, NewsHub reported that people in Mt Eden Corrections Facility were being kept in their cells for up to 23-hours.¹⁴ In August 2022, Stuff reported that people in two units at Wellington’s Rimutaka Prison had been locked in their cells for more than 22 hours on two separate days the week prior.¹⁵ A lawyer was reported in the media in January this year stating that some people in Auckland Prison had been locked up for three days at a time and unlocked on the fourth day.¹⁶

We believe reports of excessive time in cells warrant investigation into whether the unjustified use of solitary confinement or prolonged solitary confinement is occurring.

¹² Correct procedure, custom, habit, lore, method, manner, rule, way, code, meaning, plan, practice, convention, protocol - the customary system of values and practices that have developed over time and are deeply embedded in the social context (Te Aka Māori Dictionary).

¹³ From Department of Corrections.

¹⁴ NewsHub, “Revealed: Shocking staff shortfalls see Mt Eden Prisoners face up to 23-hour lockdowns”, April 2023, <https://www.youtube.com/watch?v=j8EGsgvoH5c>

NewsHub, “Mt Eden Prison inmates face 22 to 23-hour lockdowns in cells, physical visits denied as Corrections struggles with staff crisis”, 6 April 2023, <https://www.newshub.co.nz/home/new-zealand/2023/04/mt-eden-prison-inmates-face-22-to-23-hour-lockdowns-in-cells-physical-visits-denied-as-corrections-struggles-with-staff-crisis.html>

Department of Corrections, Prison visit update, accessed 13 May 2023 “Face-to-face visits paused. Video calls available.”, https://www.corrections.govt.nz/our_work/in_prison/staying_connected_with_people_in_prison/visits/prison_visit_updates

¹⁵ Tom Hunt, “Prisoners locked in cells for 22 hours a day amid staff shortages”, 10 August 2022 <https://www.stuff.co.nz/dominion-post/news/wellington/129521591/prisoners-locked-in-cells-for-22-hours-a-day-amid-staff-shortages>

¹⁶ Catrin Owen, “Maximum security prisoners kept in cells for three days, breaching human rights”, 26 January 2023, <https://www.stuff.co.nz/national/crime/131059334/maximum-security-prisoners-kept-in-cells-for-three-days-breaching-human-rights>

ACCESS TO A LAWYER

Access to a legal adviser is a minimum entitlement under the Mandela Rules and an important safeguard against torture and other ill-treatment. We are aware of a number of concerns in this area and believe further investigation is warranted to ensure this entitlement is being upheld.

In October 2022, several criminal defence lawyers reported problems contacting their clients on remand in prison by phone or audio visual link (AVL), apparently due to staff shortages.¹⁷

The Office of the Inspectorate's report into Invercargill Prison May-June 2021, found: "[p]risoners we spoke with in the Remand Unit said it could be two to three days after they requested a call to their lawyer before unit staff facilitated a call."¹⁸

Along with access, confidentiality is also of concern. The Inspectorate's report on Christchurch Women's Prison stated: "Wāhine¹⁹ we spoke with in most units said they could not make legal telephone calls in private in their units. Legal calls were undertaken either in the staff office with a staff member present or just outside the office in the corridor (with the handset passed through the guard room window)."²⁰

RESTRICTIONS ON CONTACT WITH OUTSIDE WORLD

Under the Mandela Rules people in prison are entitled to maintain contact with loved ones through in-person visits and written correspondence.

As of 3 June 2023, in-person visits in multiple prisons across the country remain limited,²¹ and in Rimutaka Prison completely prohibited, meaning many people continue to not be able to see loved ones in-person. On 3 June, only seven out of 18 prisons had fully opened to visitors, and some people in prison have not been able to have visits since 2021. In an Official Information Act response regarding Units 12 and 13 at Auckland Prison, the Department of Corrections confirmed that the minimum entitlement to receiving private visitors had been denied to people held in these units since August 2021 on the ground that people's health or safety was threatened.²² Our understanding at the time of writing is that these units continue to be closed to in-person family visits.

Options like audio visual links or phone calls are helpful but should not be considered a long-term substitute. The government has an obligation to enable people in prison to build and maintain relationships with loved ones. This is particularly important given the extended period many have been apart from their loved ones.²³

¹⁷ Deena Coster, "Defence lawyers concerned about access issues with remand clients due to prison staff shortages", 10 October 2022, <https://www.stuff.co.nz/national/crime/130072689/defence-lawyers-concerned-about-access-issues-with-remand-clients-due-to-prison-staff-shortages>

¹⁸ Office of the Inspectorate, *Invercargill Prison Unannounced Inspection*, February 2022, p. 18, https://inspectorate.corrections.govt.nz/_data/assets/pdf_file/0009/45864/Invercargill_Prison_inspection_report_FINAL.PDF

¹⁹ Female (Te Aka Māori Dictionary).

²⁰ Office of the Inspectorate, *Christchurch Women's Prison Inspection*, October 2020, p. 20, https://inspectorate.corrections.govt.nz/reports/prison_inspection_reports/christchurch_womens_prison_inspection_report

²¹ For example, we understand in Auckland Prison face to face visitations are only allowed for some units.

²² From Department of Corrections.

²³ Mandela rules, Rule 43(3), rule 106. The UN Standard Minimum Rules for the Treatment of Prisoners states:

"The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order."

"Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both."

ACCESS TO HEALTHCARE

The provision of healthcare is an entitlement under several human rights instruments, including the Mandela Rules. We are concerned by reports of inadequate access to healthcare.

A report by Deputy Health and Disability Commissioner Kevin Allan relating to the care of a woman who died of cancer highlighted serious issues. The report concluded that there had been “a lack of appropriate assessment and physical examination, inconsistent documentation, and poor coordination of care. This is indicative of an environment that did not support its staff adequately to do what was required of them. Staff at the corrections facility individually and as a team failed to act on Ms A’s continued discomfort and escalating symptoms.”²⁴ The report concluded that Corrections had failed to ensure an appropriate standard of service which led to a breach of Right 4(1) of the Code.²⁵

The 2019 Office of the Inspectorate’s report of Rimutaka Prison found that the prison had made insufficient progress in improving the timeliness of access to health care.²⁶ A 2019 Office of the Inspectorate report into Manawatū Prison found nurses advised that the recall list for follow up health interventions was long due to the challenges of getting prisoners to the Health Unit.²⁷

In 2021, the Office of the Inspectorate’s report on Inter-prison Transfers highlighted concerns about the impact moving people between prisons can have on an individual’s health and well-being, including surgeries or specialist appointments.²⁸

RESTRAINT AND SEPARATION AND ISOLATION

Multiple reports, as detailed below, have raised concerns in these areas. In at least one instance, discussed directly below, there has been a finding of a breach of the Convention.

In 2017, the Office of the Ombudsman found that the use of the tie-down bed and/or waist restraints on five prisoners amounted to cruel, inhuman or degrading treatment or punishment, as set out in Article 16 of the Convention.²⁹ In 2019, the practice of tie-down beds was abolished, but our understanding is waist restraints can still be used.

A further Ombudsman’s report into Otago Corrections Facility found a breach of Rule 43 of the Mandela Rules that could constitute a breach of the Convention:

"Prisoners were being held in the Management Unit for more than 15 days, in my view in breach of Rule 43 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the 'Nelson Mandela Rules'). Prisoners in the Management Unit needed more meaningful activity and human contact."³⁰

²⁴ Deputy Health and Disability Commissioner, Healthcare provided to patient in prison, Case 16HDCo1703, Health & Disability Commissioner, March 2019, p. 2, <https://www.hdc.org.nz/decisions/search-decisions/2019/16hdc01703/>

²⁵ The Code of Health and Disability Services Consumers' Rights.

²⁶ Office of Inspectorate, *Rimutaka Prison Unannounced Follow-up Inspection October 2019*, September 2020, p. 25, https://inspectorate.corrections.govt.nz/_data/assets/pdf_file/0004/41368/Rimutaka_Prison_inspection_report_FINAL.pdf

²⁷ Office of Inspectorate, *Manawatu Prison Unannounced Follow-up Inspection May 2019*, February 2020, p. 19, https://inspectorate.corrections.govt.nz/_data/assets/pdf_file/0009/39267/Manawatu_PRISON_follow-up_inspection_FINAL.pdf

²⁸ Office of Inspectorate, Thematic Report: Inter-Prison Transfers, The impact of moving prisoners in New Zealand, October 2021, p. 34, https://inspectorate.corrections.govt.nz/_data/assets/pdf_file/0003/44337/Inter-Prison_Transfers_report_-_FINAL.pdf

²⁹ Office of the Ombudsman, *OPCAT findings report, A question of restraint*, 1 March 2017, p. 42, <https://www.ombudsman.parliament.nz/sites/default/files/2019-03/A%20question%20of%20restraint%20March%202017.pdf>

³⁰ Office of the Ombudsman, *OPCAT Report, Report on an unannounced inspection of Otago Corrections Facility under the Crimes of Torture Act 1989*, August 2022, p.1,

A 2017 report published by the Human Rights Commission, *Thinking Outside the Box?*, raised concerns about the high use of seclusion and restraint in corrections and health facilities.³¹ The report found that Māori people in particular, as well as ethnic minority groups, were over-represented in seclusion and segregation units.³²

The follow up 2020 report was highly critical stating that: “[m]any of the issues identified in *Thinking Outside the Box?* including an overuse of seclusion and restraint; risk averse policies and practices; poor record keeping; impoverished regimes; poor material conditions; lack of individual autonomy; and over-reliance on staff good will and availability, remained a concern.³³ It also highlighted the significant increase of use of force recorded from 2016-2019.³⁴

The most recent report in 2021, similarly raised serious concerns.³⁵ This report found that in 2019 there were 101 times where women spent 15 days or longer in segregation stating: “[a]t Auckland Region Women’s Correctional Facility (‘ARWCF’), 78% and 75% of segregations in the Separates and Management Units respectively were of Māori women. As many as 93% of segregations lasting 15 days or longer in the Management Unit were of Māori or Pacific women.”³⁶

A 2023 report by the Office of the Inspectorate on separation and isolation in prisons examined solitary confinement, stating:

“Over this time [1 October 2020 to 30 September 2021] approximately 5,655 prisoners experienced a period during which they were unable to associate with other prisoners– 29% of the total number of individuals held in prison during that time. ... We found that many of these prisoners would likely have experienced solitary confinement, as that term is defined in the Mandela Rules, and some prisoners would have experienced this for a number of months or years.”³⁷

The report goes on to note limitations in the data and the impact it has had on the ability to ascertain whether prolonged solitary confinement has occurred:

“Because of the limitations of the data, we were unable to ascertain how many of these 5,655 prisoners were isolated for more than 15 days, the threshold at which solitary confinement – and it is likely that many of these prisoners would have experienced solitary confinement – becomes “prolonged solitary confinement” under the Mandela Rules.”³⁸

<https://www.ombudsman.parliament.nz/sites/default/files/2022-08/Report%20on%20an%20unannounced%20inspection%20of%20Otago%20Corrections%20Facility%20under%20the%20Crimes%20of%20Torture%20Act%201989.pdf>

³¹ Dr. Sharon Shalev. *Thinking Outside the Box – A Review of Restraint and Seclusion Practices in NZ* Report Commissioned by the NZ HR Commission 2017, p. 24, https://www.solitaryconfinement.org/files/ugd/f33fff_2fobdaod1f3e48c7a9694a1b445afd85.pdf. The author, Dr. Sharon Shalev, visited 17 prisons, police cells, mental health units and children’s care facilities in 2016.

³² Dr. Sharon Shalev. *Thinking Outside the Box – A Review of Restraint and Seclusion Practices in NZ* Report Commissioned by the NZ HR Commission 2017, p. 26, https://www.solitaryconfinement.org/files/ugd/f33fff_2fobdaod1f3e48c7a9694a1b445afd85.pdf

³³ Dr. Sharon Shalev. *Time for a paradigm Shift: A follow up review of Seclusion and Restraint Practices in New Zealand*. NZ Human Rights Commission, December 2020, p. 11. https://tikatangata.org.nz/cms/assets/Documents/Time_for_a_Paradigm_Shift_FINAL.pdf

³⁴ Dr. Sharon Shalev. *Time for a paradigm Shift: A follow up review of Seclusion and Restraint Practices in New Zealand*. NZ Human Rights Commission, December 2020, p. 23, https://tikatangata.org.nz/cms/assets/Documents/Time_for_a_Paradigm_Shift_FINAL.pdf

³⁵ Dr. Sharon Shalev, *First, do no harm, Segregation, restraint, and pepper spray use in women’s prisons in New Zealand*, NZ Human Rights Commission, 4 November 2021, <https://apo.org.au/sites/default/files/resource-files/2021-11/apo-nid314878.pdf>

³⁶ Dr. Sharon Shalev, *First, do no harm, Segregation, restraint, and pepper spray use in women’s prisons in New Zealand*, NZ Human Rights Commission, 4 November 2021, p. 10, <https://apo.org.au/sites/default/files/resource-files/2021-11/apo-nid314878.pdf>

³⁷ Office of the Inspectorate, *Separation and Isolation Thematic Report*, March 2023, p. 4.

³⁸ Office of the Inspectorate, *Separation and Isolation Thematic Report*, March 2023, p. 51.

We believe the issues raised in this report warrant urgent work by the Government to ensure human rights standards are being upheld, this must include work to improve recording and reporting of data, which is discussed further in this submission.

INTERVENTION AND SUPPORT UNITS

Several reports, such as those listed below, have raised concerns specifically about Intervention and Support Units (ISU).³⁹ The Department of Corrections website describes placement in ISU as involving: “*individuals at immediate risk of self-harm or suicidal behaviour (“active harm” or “significant risk”), or those with acute mental health needs, and thus awaiting transfer to hospital or forensic in-patient mental health care, are placed in the ISU*”.

In an unannounced inspection of Otago Prison undertaken in October 2020 but published in 2022, the Office of the Ombudsman raised concern about breaches of the Convention: “[p]risoners could be seen on closed-circuit television while using the toilet and in various stages of undress in all Intervention and Support Unit cells... This may be degrading treatment and a breach of article 16 of the Convention against Torture (CAT).”⁴⁰ Similar findings were made in reports into Auckland Prison and Waikeria Prison.⁴¹

The 2023 report by the Office of the Inspectorate on separation and isolation referred to in the section above directly concerns ISU: “[a]pproximately 5,655 individual prisoners were segregated, subject to cell confinement or placed in an Intervention and Support Unit (ISU) in the year to 30 September 2021. Many of those prisoners would likely have experienced solitary confinement as that term is defined in the Mandela Rules: more than 22 hours a day without “meaningful human interaction.”⁴²

As noted above, limitations in the data meant the Office of the Inspectorate could not ascertain whether prolonged solitary confinement had occurred.⁴³ However, we believe urgent work is required to ensure human rights standards are being upheld.

USE OF PEPPER SPRAY

We are concerned about the use of pepper spray in prisons and whether it is being deployed in a manner consistent with the Convention. We are particularly concerned about a procedure called Cell Buster extraction. The use of Cell Buster for extracting people from their cells was described in a 2020 District Court Case (discussed below) as involving: “*sliding a tube under the cell door and pumping an orange gas into the cell. They experienced an intense burning sensation which continued for some time after the event, and struggled to breathe...*”

³⁹https://www.corrections.govt.nz/resources/research/journal/volume_8_issue_1_june_2021/intervention_and_support_project#:~:text=Care%20Continuum%20Matrix-,Intervention%20and%20Support%20unit,are%20placed%20in%20the%20ISU

⁴⁰ Office of the Ombudsman, *OPCAT Report on an unannounced inspection of Otago Corrections Facility under the Crimes of Torture Act 1989*, August 2022, p. 1, <https://www.ombudsman.parliament.nz/sites/default/files/2022-08/Report%20on%20an%20unannounced%20inspection%20of%20Otago%20Corrections%20Facility%20under%20the%20Crimes%20of%20Torture%20Act%201989.pdf>

⁴¹ Office of the Ombudsman, *Final report on an unannounced inspection of Auckland Prison under the Crimes of Torture Act 1989*, December 2020, p. 15, <https://www.ombudsman.parliament.nz/sites/default/files/2021-11/Final%20report%20on%20an%20unannounced%20inspection%20of%20Auckland%20Prison%20under%20the%20Crimes%20of%20Torture%20Act%201989.pdf> and Ombudsman, *Final report on an unannounced inspection of Waikeria Prison under the Crimes of Torture Act 1989*, August 2020, p. 15, <https://www.ombudsman.parliament.nz/sites/default/files/2021-11/Final%20report%20on%20an%20unannounced%20inspection%20of%20Waikeria%20Prison%20under%20the%20Crimes%20of%20Torture%20Act%201989.pdf>

⁴² Office of the Inspectorate, *Separation and Isolation Thematic Report*, March 2023, p. 30.

⁴³ Office of the Inspectorate, *Separation and Isolation Thematic Report*, March 2023, p. 51.

[one woman] described resisting the effects of the pepper spray for 20 or 30 minutes whilst covering her face and body with towels and putting her head into the toilet bowl for air".⁴⁴

Under international human rights law, any use of less-lethal weapons must comply with the following governing principles: legality, legitimate aim, necessity and proportionality.

The United Nations Office of the Commissioners for Human Rights stipulates that: "*Chemical irritants should not be used in closed environments without adequate ventilation or where there is no viable exit, owing to the risk of death or serious injury from asphyxiation.*"⁴⁵

We are concerned that the Cell Buster extraction procedure and other instances of use of chemical irritants in enclosed spaces is inconsistent with this stipulation and should therefore be banned.

Since 2017, pepper spray can be carried around in canisters and used spontaneously by trained staff.⁴⁶ In 2020 Radio NZ reported that in the 2016 financial year, there were six recorded uses of pepper spray, however in the 2019/20 financial year there were reportedly nearly 900 incidents of pepper spray being drawn, of which it was used about 300 times.⁴⁷

A 2020 report by the Office of the Ombudsman found that in one instance the use of pepper spray violated Article 16 of the Convention, and that staff did not accurately report the incident.⁴⁸

In the District Court Case referred to above, pepper spray was deployed against a woman alone in her cell, faced by six officers in full body armour, which the Judge found to be excessive use of force "*and some distance beyond what was reasonably necessary to extract her from her cell.*"⁴⁹

REMAND

We are deeply concerned by the fact that about 40% of the prison population are people on remand.⁵⁰ The average remand time in detention increased 42% from 55 days in 2015/16 to 78 days in 2021/22.⁵¹ Increases of people on remand have proven to have a disproportionate impact on Māori with the proportion of Māori women now making up 70% of the women's remand population.⁵² With people being held on remand for lengthy periods of time, we are concerned that access to and eligibility for programmes are limited, as these are generally reserved for sentenced prisoners.

⁴⁴ R v Bassett [2020] NZDC 24454, p. 8.

⁴⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Guidance on less-lethal weapons in law enforcement*, United Nations, Geneva. 2020, section 7.2.6-7.2.7, https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/LLW_Guidance.pdf

⁴⁶ Department of Corrections, Regulatory Impact Statement: Use of pepper spray in custodial settings, 2021, p. 9, https://www.corrections.govt.nz/_data/assets/pdf_file/0007/45097/RIS_Use_of_pepper_spray_in_custodial_setting.pdf

⁴⁷ Tom Kitchin, "Pepper spray use rises in prisons around the country, Corrections figures show", 7 September 2020 <https://www.rnz.co.nz/news/national/425389/pepper-spray-use-rises-in-prisons-around-the-country-corrections-figures-show>

⁴⁸ Office of the Ombudsman, OPCAT Report Final report on an unannounced inspection of Auckland Prison under the Crimes of Torture Act 1989, p. 10, December 2020, <https://www.ombudsman.parliament.nz/sites/default/files/2021-11/Final%20report%20on%20an%20unannounced%20inspection%20of%20Auckland%20Prison%20under%20the%20Crimes%20of%20Torture%20Act%201989.pdf>

⁴⁹ R v Bassett [2020] NZDC 24454, p. 26.

⁵⁰ Justice sector, *Long-Term Insights Briefing*, December 2022, D December 2022, p. 8, https://www.justice.govt.nz/assets/Documents/Publications/14.02.2023-LTIB_Report_extended_final_v5_Web.pdf

⁵¹ Justice Sector, *Long-Term Insights Briefing*, December 2022, p. 40, https://www.justice.govt.nz/assets/Documents/Publications/14.02.2023-LTIB_Report_extended_final_v5_Web.pdf

⁵² Justice sector, *Long Term Insights Briefing*, December 2022, p. 52, https://www.justice.govt.nz/assets/Documents/Publications/14.02.2023-LTIB_Report_extended_final_v5_Web.pdf

A major driver behind the high remand population appears to be the Bail Amendment Act 2013, which reversed the onus of proof in certain instances. This undermines the right to be presumed innocent until proven guilty set out in the Universal Declaration of Human Rights.⁵³

Further, access to suitable housing may impact remand. We understand that a particular challenge is that only certain types of accommodation are acceptable bail addresses, meaning that a person may end up in prison because they are not considered to have an appropriate address to bail. This is in the context of a broader national shortage of affordable housing where access to safe and affordable housing is a significant challenge for many.⁵⁴

in addition, the introduction and increased use of electronic monitoring on bail has a net widening effect. People are subject to conditions that, if breached, mean that they can be remanded in custody. Previously they may have received bail without these conditions.⁵⁵

REHABILITATION

We are concerned that access to rehabilitation programs in prison has been severely impacted by COVID-19 and staffing shortages.

An inspection by the Office of the Ombudsman into Auckland South Correctional Facility found that the rehabilitative programme provision at the prison is insufficient to meet the required demand stating: "... a large number of prisoners had yet to access programmes and the waiting lists for some were high."⁵⁶

The Office of the Inspectorate's report on Invercargill Prison in 2022 found that people sentenced "needed to transfer to other prisons to access offence-focused rehabilitation programmes. Remand prisoners had less access to education and could not take part in rehabilitation".⁵⁷

We understand that there is currently no drug treatment programs available to women in prison.⁵⁸

According to recent correspondence with the Department of Corrections, reduced capacity to deliver Alcohol and other Drug (AOD) placements for people in prison means it is likely that some people have not been able to access needed AOD treatment prior to Parole Board hearings.⁵⁹ We are concerned about the impact this has had on the ability to get parole.

⁵³ Universal Declaration of Human Rights GA Res 217, S-CLXXXIII (1948), art 11.

[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217\(III\).pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217(III).pdf)

⁵⁴ See <https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/social-housing/demand-for-housing.html>

⁵⁵ JustSpeak, *Bailing out the justice system: reopening the window of opportunity*, April 2017,

<https://www.justspeak.org.nz/ourwork/bailing-out-the-justice-system>

⁵⁶ Office of the Ombudsman, *Report on an announced inspection of Auckland South Corrections Facility under the Crimes of Torture Act 1989*, February 2019, p. 52, https://www.ombudsman.parliament.nz/sites/default/files/2019-03/Final_OPCAT_Prison_Report_-_ASCF_-_PDF_online_.pdf

⁵⁷ Office of the Inspectorate, *Invercargill Prison Unannounced Inspection*, February 2022, p. 3,

https://inspectorate.corrections.govt.nz/_data/assets/pdf_file/0009/45864/Invercargill_Prison_inspection_report_FINAL.PDF

⁵⁸ Correspondence with Department of Corrections dated 10 March 2023.

⁵⁹ Correspondence with Department of Corrections dated 10 March 2023.

OVERSIGHT, TRANSPARENCY AND ACCOUNTABILITY

In addition to formal bodies, civil society plays an important role in oversight, and in the last several years has played a key role bringing to light serious violations. However, deficiencies in recording and reporting has made this role difficult.

MONITORING, REPORTING AND RECORDING

Deficiencies in monitoring, recording and reporting in prisons is problematic, as has been acknowledged by the Office of the Inspectorate and Office of the Ombudsman.

A high-profile example of deficiencies when it comes to recording and reporting is a 2020 District Court case in which the court found that "[n]o records were kept regarding the supply of minimum entitlements".⁶⁰

Similarly, a special investigation by the Office of the Inspectorate reiterated this issue, finding that "[r]ecord-keeping was generally poor... and created a lack of transparency that at times hampered the Special Investigation."⁶¹ The report found "a systemic failure of oversight."⁶²

In the Office of the Ombudsman's September 2020 report on an unannounced follow up inspection of Whanganui Prison, it stated: "[a]part from physical disability alerts in IOMS, there was no system for recognising, reporting or supporting prisoners with disabilities. As such, 18 Staff were unable to identify prisoners on their unit with disabilities that were not visually obvious. I consider that more work is required in this area by the Department."⁶³

A recent 2023 report by the Office of the Inspectorate into separation and isolation in prisons again highlighted issues with reporting and recording:

"We were unable to obtain accurate and complete data for all prisoners who were unable to associate during our review period...The Department should be able to identify how many prisoners have been unable to mix, for any given period, and for how long. It is not otherwise possible to accurately identify the prevalence of isolation in New Zealand prisons, whether it is increasing or decreasing, and whether it is more likely for specific demographics".⁶⁴

Notably, in a 2020 internal memo to the Department of Corrections Chief Executive on a review of the entitlement of one hour per day of exercise, it was noted: "[t]he remaining gaps in the information collected are due to inconsistent documentation practice within units, across sites, and across the network. It is noted the recording of this data is a manual process and there is no current requirement to note individual specific unlock times (except for individuals on personalised management plans)".⁶⁵

⁶⁰ *R v Bassett* [2020] NZDC 24454, p. 14.

⁶¹ Office of the Inspectorate, *Special investigation, Report of investigation into the management of three wāhine at Auckland Region Women's Corrections Facility*, September 2021, p. 107,

https://inspectorate.corrections.govt.nz/reports/investigations/special_investigation_into_the_management_of_three_wahine_at_arwcf

⁶² Office of the Inspectorate, *Special investigation, Report of investigation into the management of three wāhine at Auckland Region Women's Corrections Facility*, September 2021, p. 7,

https://inspectorate.corrections.govt.nz/reports/investigations/special_investigation_into_the_management_of_three_wahine_at_arwcf

⁶³ Office of the Ombudsman, *Report on an announced follow up inspection of Whanganui Prison under the Crimes of Torture Act 1989*, June 2021, p. 15, <https://www.ombudsman.parliament.nz/resources/report-announced-follow-inspection-whanganui-prison-under-crimes-torture-act-1989>

⁶⁴ Office of the Inspectorate, *Separation and Isolation Thematic Report*, March 2023, p. 49.

⁶⁵ Internal memo to the Corrections Chief Executive, dated 8 May 2020. Received through the Official Information Act.

In a May 2020 briefing, the Department of Corrections accepted the recommendation to "*consider plans for developing an electronic system that would automate the capturing of this minimum entitlement*".⁶⁶ As of May 2023 (three years later), we understand that it has only been rolled out in one prison, and other prisons continue to use manual logbooks.

We understand from the Department of Corrections that national reporting on minimum entitlements has been introduced focusing on exercise outdoors, programmes and education and health. According to this information, reports are sent to the Office of the Ombudsman and Office of the Inspectorate; however, these reports are not currently being reported publicly.

Robust, nationally-consistent systems to record important information such as minimum entitlements and access to rehabilitation programmes, along with the provision of this information publicly, would be an important step forward in ensuring transparency and accountability.

COMPLAINTS SYSTEM

Numerous reports, including by the Office of the Ombudsman and Office of the Inspectorate, have highlighted failures and inadequacies of the prison complaints system, hindering the right to a remedy.

A 2021 District Court case concerning Auckland Women's Correctional Facility highlighted serious failures in the complaints system. The Judge stated: "[several complaints] were clearly not receipted or actioned, she was again deprived of the protection that should have been conferred upon her by the complaints regime prescribed by regulations. Critically, this left her largely without recourse in respect of her mistreatment."⁶⁷

Another example includes the 2022 Office of the Inspectorate report of Invercargill Prison, which documented people in the Remand Unit saying they did not receive a response to their complaint until they submitted more than one; and people in the South Unit said they were discouraged from making complaints by some staff.⁶⁸

We welcomed the independent review of the prison complaints system, with oversight from the Chief Inspector. We understand implementation is now underway.

RECOMMENDATIONS

We make the following recommendations to the Government:

- While work to reduce harm in the current criminal justice system is critical, broader transformation towards an approach that centres effective justice and accountability and properly recognises tino rangatiratanga⁶⁹ of Māori in accordance with Te Tiriti and He Whakaputanga is fundamental.
- Address the discriminatory impact the prison system has on Māori in a way that upholds Te Tiriti o Waitangi by adequately resourcing communities.
- When progressing reform, ensure meaningful engagement with people in prison and their families, people with lived experience, iwi, hapū, and relevant NGOs.
- Address the issues outlined in this submission, including:

⁶⁶ Correspondence received from the Department of Corrections, dated 9 September 2020.

⁶⁷ R v Bassett [2020] NZDC 24454, p. 30.

⁶⁸ Office of the Ombudsman, *Invercargill Prison Unannounced Inspection*, February 2022, p. 22, https://inspectorate.corrections.govt.nz/_data/assets/pdf_file/0009/45864/Invercargill_Prison_inspection_report_FINAL.PDF

⁶⁹ Self determination, sovereignty, autonomy, self-government, domination, rule, control, power (Te Aka Māori Dictionary).

- Enable in-person visits for all units across the prison system and prioritise reconnecting people in prison with their loved ones.
- Prohibit the use of Cell Buster extraction.
- Prohibit the use of pepper spray in confined spaces, in response to passive resistance, and against individuals who have been identified as high risk.
- Release publicly a comprehensive review into the use of pepper spray across the prison system, and ensure policy and practice is in line with human rights law.
- Stop the practice of remanding someone in prison where they are not considered to have an appropriate address to bail.
- Address concerns raised with the Bail Amendment Act 2013.
- Develop a nationally consistent system across all prisons to monitor, record and report on important information such as minimum entitlements, people who are unable to associate and separated from the prison population, and access to rehabilitation programmes. This information should be made publicly available at least every two months and released in a format easily accessible by members of the public.
- Consider appropriate accountability mechanisms, for example through KPI's.
- Complete implementation of the independent review of the complaints system in a timely manner.
- Review current practice on the separation of individuals from the prison population to ensure human rights are being upheld.
- Implement a system of ongoing evaluation and learning for continuous improvement, working with people who are using the system.

CHILDREN AND YOUNG PEOPLE

CARE AND PROTECTION RESIDENTIAL FACILITIES

Children and young people may be placed in the care of Oranga Tamariki (Ministry for Children) under a court order⁷⁰. If Oranga Tamariki cannot place them in a community, they may stay at a Care and Protection Residential Facility.

Reports have raised concerns about the safety and well-being of children and young people in some of these facilities (one of which has since closed) and we are concerned about a risk of ill-treatment.

A 2023 Salvation Army report found that while there has been a decline in the number of children coming into care, Māori children continue to make up more than two-thirds of children in care.⁷¹

The country's colonial history is central to understanding these disparities. In April 2021, the Waitangi Tribunal reported on the significant disparity between the number of Māori and non-Māori children being taken into state care.⁷² The Tribunal found: "*that persistent and significant disparity can, in part, be attributed to the effects of alienation and dispossession. However, it also reflects the Crown's failure to honour the guarantee to Māori of*

⁷⁰ For example in a case of ill-treatment.

⁷¹ The Salvation Army Social Policy & Parliamentary Unit, *State of the Nation 2023 report*, February 2023, p. 8, https://www.salvationarmy.org.nz/sites/default/files/uploads/2023/03/Mar/tsa_sotn_2023_download_v4.pdf

⁷² Waitangi Tribunal, *He Pāharakeke, he Rito Whakakīkinga Whāruarua, Oranga Tamariki Urgent Inquiry WAI 2915*, April 2021, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_171027305/He%20Paharakeke%20W.pdf

the right of cultural continuity embodied in the guarantee of tino rangatiratanga⁷³ over their kāinga⁷⁴. As such, the report finds that disparities are a direct consequence of the Crown's intrusion into the rangatira⁷⁵ of Māori over their kāinga.⁷⁶ The Tribunal recommended the establishment of a Māori Transitional Authority with the primary function of identifying changes necessary to eliminate the need for State care of tamariki⁷⁷ Māori.⁷⁸

For some time now concerns have been raised about Care and Protection Residences, including under statutory monitoring by the Office of the Children's Commissioner.

For example, a Care and Protection Facility in Christchurch was closed after footage was released showing what appeared to be excessive use of force against children residing there.⁷⁹ In a 2021 report by the Office of the Children's Commissioner into a residence, some children and young people reported that they did not always feel safe, and that staff used force inappropriately: "[m]ost of the children and young people we spoke to said they did not feel staff were adequately trained in the restraint process. We spoke with children and young people who described feeling 'manhandled' and who had observed staff members picking up' children or young people when using force".⁸⁰

In a 2021 interview on this report, the then Children's Commissioner commented to the media by stating that "[t]hese reports, along with the video of apparent assaults at a Christchurch residence, provide graphic evidence of the need for these outdated residences to close as soon as possible."⁸¹

In response to Oranga Tamariki placing young people in motels, the current Children's Commissioner recently stated⁸²:

"There has long been a need for smaller, specialised homes throughout Aotearoa that are equipped and resourced to meet challenging, complex behaviour with a therapeutic - not punitive - response."

We are concerned that some people working in these facilities have not been receiving adequate training or support in their role working with young people. A report of the Oranga Tamariki Ministerial Advisory Board (established in early 2021) noted:⁸³

"While we are convinced that the workforce in the residences is comprised of many individuals who are highly committed ... the range of skills, experience, and depth of specialisation on offer is not strong enough to provide the holistic, therapeutic care that tamariki⁸⁴ and rangatahi⁸⁵ with complex needs require in order to be safe and able to shift back into community care as soon as feasible. It is also not clear all residential

⁷³ Self determination, sovereignty, autonomy, self-government, domination, rule, control, power (Te Aka Māori Dictionary).

⁷⁴ Home, address, residence, village, settlement, habitation, habitat, dwelling (Te Aka Māori Dictionary).

⁷⁵ Chief, chieftain (Te Aka Māori Dictionary).

⁷⁶ <https://www.waitangitribunal.govt.nz/news/tribunal-releases-report-on-oranga-tamariki/>

⁷⁷ Children (Te Aka Māori Dictionary).

⁷⁸ Waitangi Tribunal, *He Pāharakeke, he Rito Whakakīkinga Whāruarua, Oranga Tamariki Urgent Inquiry* WAI 2915, April 2021, p. 186,

https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_171027305/He%20Paharakeke%20W.pdf

⁷⁹ Melanie Reid, Bonnie Sumner, "Whistleblower video shows assault on state care kids", 29 June 2021,

<https://www.newsroom.co.nz/alarm-at-physical-restraints-of-kids-in-care>

⁸⁰ Office of the Children's Commissioner. *Oranga Tamariki Residence Visit (OPCAT monitoring) Epuni Care and Protection residence*, March

2021, p. 9 and p. 11, <https://www.occ.org.nz/documents/284/Oranga-Tamariki-Residence-Visit-2020.pdf>

⁸¹ 1 News, "Details emerge of another inadequate Oranga Tamariki care residence", 2 July 2021,

<https://www.1news.co.nz/2021/07/01/details-emerge-of-another-inadequate-oranga-tamariki-care-residence/>

⁸² Office of the Children's Commissioner. "Motels can never be a home", 27 January 2023, <https://www.occ.org.nz/publications/media-releases/motels-can-never-be-a-home/>

⁸³ Oranga Tamariki Ministerial Advisory Board, *Review into provision of care in Oranga Tamariki residences: Report of the Ministerial Advisory Board*, August 2022, p. 5, <https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/Reviews-and-Inquiries/Ministerial-Advisory-Board/Ministerial-Advisory-Boards-Residences-Review.pdf>

⁸⁴ Children (Te Aka Māori Dictionary).

⁸⁵ Younger generation, youth (Te Aka Māori Dictionary).

staff are adequately aware of their specific obligations under the legislative and regulatory framework, or are supported to fulfil them.”

In 2021, Oranga Tamariki announced it would close all of its Care and Protection Residences; this announcement was also included in the Oranga Tamariki Future Direction Action Plan.⁸⁶

We are increasingly concerned that adequate progress has not occurred to close residences and transition to a different system better equipped to meet the needs of children and young people.

YOUTH JUSTICE FACILITIES

Youth Justice Facilities are for young people who have been arrested, remanded or sentenced requiring them to be held in custody. We are concerned about a risk of ill-treatment.

Māori children and young people are disproportionately impacted. In fact, the Waitangi Tribunal He Pāharakeke report found as at 31 December 2020 that Māori made up 75% of all children and young people in Youth Justice custody.⁸⁷

Over the years, there have been deeply concerning reports on a range of issues within Youth Justice Facilities.⁸⁸

A 2022 report by the Office of the Children’s Commissioner into a Youth Justice Facility raised serious concerns, including that “[s]taff are sometimes not deescalating behaviours which is leading to heightened units and admissions to the Secure Care unit”.⁸⁹ The report stated: “[s]taff were clear that the potential for harm to mokopuna⁹⁰ was high” and went on to say: “[a]t the time of our visit, the OCC⁹¹ were concerned for the safety of staff and mokopuna at the residence. With the staffing situation as it is, the OCC believe there is potential for serious harm to all parties.”⁹²

In a visit to another Youth Justice Facility last year, the Office of the Children’s Commissioner noted that the number of searches, use of restraint and secure care admissions was high, stating: “[w]e attribute this to emotional dysregulation, staff shortages, and inadequate staff training”.⁹³ The report also noted concern about unsafe medication dispensation practices stating: “there is an unacceptably high number of medication errors”.⁹⁴

⁸⁶ Oranga Tamariki, *Future Direction Action Plan*, September 2021, <https://www.orangatamariki.govt.nz/assets/Uploads/About-us/News/2021/MAB-report-action-plan-release/OT-Future-Direction-Action-Plan.pdf>

⁸⁷ Waitangi Tribunal, *He Pāharakeke, he Rito Whakakīkinga Whāruarua, Oranga Tamariki Urgent Inquiry WAI 2915*, April 2021, p. 48, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_171027305/He%20Paharakeke%20W.pdf

⁸⁸ See for example, Katie Doyle, “‘Horrible’ numbers of self-harm incidents in youth justice facilities”, September 2019 <https://www.rnz.co.nz/news/national/397928/horrifying-numbers-of-self-harm-incident-in-youth-justice-facilities> and Dr. Sharon Shalev. *Time for a paradigm Shift: A follow up review of Seclusion and Restraint Practices in New Zealand*. NZ Human Rights Commission, December 2020.

⁸⁹ Office of the Children’s Commissioner, *Korowai Manaaki OPCAT Monitoring Report*, November 2022, p. 5, <https://www.occ.org.nz/publications/reports/korowai-manaaki-opcat-monitoring-report/>

⁹⁰ This report describes mokopuna in the following way: “Drawing from the wisdom of Te Ao Māori, we have adopted the term mokopuna to describe all children and young people we advocate for, aged under 18 years of age in Aotearoa New Zealand”.

⁹¹ OCC stands for Office of the Children’s Commissioner.

⁹² Office of the Children’s Commissioner, *Korowai Manaaki OPCAT Monitoring Report*, November 2022, p. 6 and p. 9, <https://www.occ.org.nz/publications/reports/korowai-manaaki-opcat-monitoring-report/>

⁹³ Office of the Children’s Commissioner, *Te Maioha o Parekarangi OPCAT Monitoring Report*, November 2022, p. 9, https://www.occ.org.nz/documents/653/Te_Maioha_FINAL_Dec22.pdf

⁹⁴ Office of the Children’s Commissioner, *Te Maioha o Parekarangi OPCAT Monitoring Report*, November 2022, p. 5, https://www.occ.org.nz/documents/653/Te_Maioha_FINAL_Dec22.pdf

The Office of the Children’s Commissioner has spoken about how youth justice residences need to be overhauled and in a 2021 statement, the then Children’s Commissioner stated:

*“Segregating young people from the mainstream community and aggregating them together in large numbers is not a recipe for enduring rehabilitation. It simply increases the risk of violence, bullying and abuse”.*⁹⁵

Due to the small number of facilities and their geographical location, young people may be located some distance from home. Connection with family is critical for positive youth development. We are therefore concerned about the impact this separation has on young people, especially at such a critical time of brain development.

POLICE CELLS

We believe police cells are not an appropriate form of detention for children and young people and in some circumstances could constitute ill-treatment. The United Nations Convention on the Rights of the Child requires that those under 18 are only detained in exceptional circumstances, and they have the right to be held in an appropriate custodial environment.

One of the options under s238(1)(e) of the Oranga Tamariki Act 1989 lists police cells as one of five hierarchical options available to the Youth Court when deciding where to remand young people pending their court hearing. In 2018, almost 200 young people were held in police cells for periods of more than 24 hours: in some cases, up to seven days.⁹⁶

The Government must ensure that there are community-based safe and secure alternatives to prison or police custody for young people on remand. We support the recommendations of the Office of the Children’s Commissioner included in their report to the UN Committee on the Rights of the Child 2022 that these options should be removed and repealed.⁹⁷

USE OF FORCE AND OTHER MEASURES

RESTRAINT

We are concerned that current training programs fail to adequately prevent the risk of torture and other ill treatment. Instead, the training should move away from reliance on restraints/seclusion towards de-escalation.

It is our understanding that there are two trainings offered to staff working in residential care facilities: Safe Tactical Approach and Response (STAR) is used in Youth Justice Facilities while Care and Protection Residences

⁹⁵ Office of the Children’s Commissioner, *Some stark injustices in our youth justice system need fixing – and here’s how*, October 2021, <https://www.occ.org.nz/publications/media-releases/some-stark-injustices-in-our-youth-justice-system-need-fixing-and-heres-how/>

⁹⁶ Office of the Children’s Commissioner, *The New Zealand Children’s Commissioner’s report to the United Nations Committee on the Rights of the Child*, August 2022, p. 71, https://www.occ.org.nz/documents/569/NZ_Childrens_Commissioners_Report_to_the_UN_Committee_on_the_Rights_of_the_Child_2_022.pdf

⁹⁷ Office of the Children’s Commissioner, *The New Zealand Children’s Commissioner’s report to the United Nations Committee on the Rights of the Child*, August 2022, p. 72, https://www.occ.org.nz/documents/569/NZ_Childrens_Commissioners_Report_to_the_UN_Committee_on_the_Rights_of_the_Child_2_022.pdf

use Management of Actual or Potential Aggression (MAPA). STAR focuses primarily on physical restraint whereas leading international programmes are increasingly focusing more on de-escalation.⁹⁸

There have been reports of concerning restraint practices, including those raised in the sections above on residential and youth justice facilities. A 2019 report by the Office of the Children's Commissioner reported experiences of young people: "[c]hildren and young people told us being restrained is hard, and sometimes people are injured. We heard about carpet burns, sprained wrists and bruises."⁹⁹

SPIT HOODS

Given the dangers of spit hoods, we believe they constitute ill-treatment and should be banned.

Between 2016 and 2020, figures released by Radio New Zealand (RNZ) showed police used spit hoods on 117 children and young people.¹⁰⁰ Police used the hoods 129 times in total, with seven young people placed in them more than once.¹⁰¹

Spit hoods have been known to cause serious harm or death. In August 2020, the Independent Police Complaints Authority found the Police had failed in their duty of care to a man who died after being in police custody.¹⁰² This case defined a spit hood as: "[a] covering for the head, with the top third made of mesh and the rest made of plasticised paper to prevent fluids escaping. The bottom third of the hood is shirred with elastic, to secure the hood around a person's neck without constraining it."¹⁰³ It found insufficient assessment and monitoring, and incorrect application of a spit hood - as the spit hood was incorrectly applied, they were not aware that the man was struggling to breathe.

STRIP SEARCHES

The practice of strip-searching children is inherently degrading and should be prohibited.

Between July 2020 and January 2021, Oranga Tamariki conducted 41 strip searches of young people in Youth Justice residences.¹⁰⁴ We support the calls from the Office of the Children's Commissioner to cease use of strip searches immediately and replace them with an alternative and less invasive option that respects privacy and maintains the young person's dignity.¹⁰⁵

⁹⁸ Oranga Tamariki Evidence Centre, *Physical restraint and de-escalation- Best international practice as applicable to secure youth justice residences*, March 2023, p. 27, <https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Research/Latest-research/YJ-residences-best-international-practice-evidence-reviews/Evidence-brief-physical-restraint-and-de-escalation.pdf>

⁹⁹ Office of the Children's Commissioner, *A Hard Place To Be Happy - Insights Report*, October 2019, p. 24, <https://www.occ.org.nz/documents/13/HardPlaceToBeHappy-FINAL.pdf>

¹⁰⁰ Katie Doyle, "Spit hoods used on 117 children, young people by police", September 2021, <https://www.rnz.co.nz/news/national/452078/spit-hoods-used-on-117-children-young-people-by-police>

¹⁰¹ Katie Doyle, "Spit hoods used on 117 children, young people by police", September 2021, <https://www.rnz.co.nz/news/national/452078/spit-hoods-used-on-117-children-young-people-by-police>

¹⁰² Independent Police Conduct Authority, *Police fail to fulfil duty of care to Alo Ngata after his arrest in Auckland in July 2018*, 27 August 2020, <https://www.ipca.govt.nz/site/publications-and-media/2020-media-releases/2020-aug-27-police-fail-to-fulfil-duty-care-auckland.aspx>

¹⁰³ Independent Police Conduct Authority, *Death of Alo Ngata following his arrest in Auckland*, 2020, p. 6.

¹⁰⁴ Office of the Children's Commissioner. *The New Zealand Children's Commissioner's report to the United Nations Committee on the Rights of the Child*, 22 August 2022, p. 28, https://www.occ.org.nz/documents/569/NZ_Childrens_Commissioners_Report_to_the_UN_Committee_on_the_Rights_of_the_Child_2022.pdf

¹⁰⁵ Office of the Children's Commissioner. *The New Zealand Children's Commissioner's report to the United Nations Committee on the Rights of the Child*, 22 August 2022, p. 28, https://www.occ.org.nz/documents/569/NZ_Childrens_Commissioners_Report_to_the_UN_Committee_on_the_Rights_of_the_Child_2022.pdf

PEPPER SPRAY

We believe the use of pepper spray on children and young people is in contravention to Article 37(a) of the Children's Convention and could constitute ill-treatment.

It may have serious health risks, between 2017 and 2021 it was reported that more than 480 children (17 years old and under) were pepper sprayed by the Police.¹⁰⁶

AGE OF CRIMINAL RESPONSIBILITY

The minimum age at which children can be held liable for criminal offending in Aotearoa New Zealand is currently 10 years old (for the most serious offences). The UN Committee on the Rights of the Child has called on countries to raise the age to at least 14 years old.

The Committee Against Torture also called on Australia to "[r]aise the minimum age of criminal responsibility, in accordance with international standards" in its 2022 review under the Convention.¹⁰⁷ Amnesty International considers that the age of criminal responsibility as currently set in Aotearoa New Zealand is inconsistent with international human rights law and standards, including the Convention, and is likely to cause significant harm to people under the age of 14.

ROYAL COMMISSION OF INQUIRY INTO ABUSE IN CARE

The Royal Commission is looking into the abuse of children, young people and adults in State and faith-based care between the years 1950-99.

While we welcome the Royal Commission, concerns have been raised about delays in producing the report.¹⁰⁸ The impact of the abuse suffered by survivors is clear from the interim reports.¹⁰⁹ Research by the Inquiry found one in three children and young people who had been in state residential care between 1950 and 1999 went on to serve a custodial sentence later in life.¹¹⁰

RECOMMENDATIONS

We make the following recommendations to the Government:

- Continue with the planned closure of Care and Protection Residences with urgency, and provide a timeline with steps explaining the process for community input.

¹⁰⁶ Katie Doyle, "More than 480 children and young people pepper sprayed by police", April 2022, <https://www.stuff.co.nz/pou-tiaki/300568395/more-than-480-children-and-young-people-pepper-sprayed-by-police>

¹⁰⁷ Committee Against Torture, Concluding observations on the sixth periodic report of Australia, adopted at its 1970th and 1971st meetings (22 and 23 November 2022) CAT/C/AUS/CO/6, Para. 38

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fAUS%2fCO%2f6&Lang=en

¹⁰⁸ For example see: Ripu Bhatia, *Royal Commission Abuse in Care inquiry's final report delayed*. April 2023, <https://www.stuff.co.nz/pou-tiaki/131748347/royal-commission-abuse-in-care-inquirys-final-report-delayed#:~:text=The%20final%20report%20of%20the,2023%20to%20March%2028%2C%202024.>

¹⁰⁹ See interim reports, including: Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions, *He Purapura Ora, he Māra Tipu. From Redress to Pūretumu Torowhānui*, December 2021, <https://www.abuseincare.org.nz/our-progress/reports/from-redress-to-puretumu/>

¹¹⁰ Synergia, *Care to Custody: Incarceration rates*, Royal Commission of Inquiry into Abuse in Care, August 2022, p. 4, <https://www.abuseincare.org.nz/assets/Uploads/Care-to-Custody-Incarceration-Rates-Research-Report.pdf>

- Reconsider the recommendations made in the Waitangi Tribunal report, including the establishment of a Māori Transitional Authority.
- Ensure that the arrest, detention or imprisonment of children, including in police cells, is used only in conformity with the law and only as a measure of last resort and for the shortest appropriate period of time.
- Ensure that there are adequate community-based safe and secure alternatives to prison or Police custody for young people on remand.
- Take steps to align with international human rights standards and best practice when required to use force on children.
- Prohibit the use of spit hoods, strip searches and pepper spray on children.
- Increase the age of criminal responsibility to at least 14.
- Commit to the intent of the Royal Commission’s rapid redress recommendation and set out a clear path forward for urgent redress for survivors.

PEOPLE SEEKING ASYLUM AND REFUGE

Amnesty International considers detaining refugees and asylum seekers in prisons can in some circumstances constitute ill-treatment.

In 2021, Amnesty International published findings into the practice of imprisoning people seeking asylum in criminal justice facilities solely on immigration grounds, a practice contrary to international human rights standards.¹¹¹ Our findings demonstrated the deep and enduring harm of this policy. For example, one man spent over three years of his life in limbo in prison as his claim for asylum was processed.¹¹²

All those we interviewed reported being double bunked at some point with remand prisoners in prison and it was standard practice to be strip searched. Where refugees were detained with prisoners (convicted or on remand) prison authorities were often not aware of them being detained for immigration reasons, and the specific needs and trauma they had experienced to adequately address their needs without further harm. Language barriers for some meant they suffered in silence and couldn’t even ask for help.

When asked about the mental and physical impacts a social worker had seen on the people seeking asylum who had been detained in prison, she described how clients had told her that they came close to suicide in prison, that was the worst experience of their lives, and that it’s something they deal with to this day.¹¹³

Following this research, Immigration New Zealand commissioned an independent review into the processes and procedures relating to the detention of people seeking asylum. In May 2022 this review was released. It stated that the Immigration Act establishes a flawed framework and that how the system currently operates is

¹¹¹ “The detention of asylum seekers or other irregular migrants must not take place in facilities such as police stations, remand institutions, prisons and other facilities since these are designed for those within the realm of the criminal justice system. The mixing of migrants and other detainees who are held under the remit of the criminal justice system must not take place” Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 4, https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf

¹¹² Amnesty International, *Please take me to a safe place: The imprisonment of asylum seekers in Aotearoa New Zealand*, (Index: ASA 32/4113/2021), May 2021, p. 5, www.amnesty.org/en/documents/asa32/4113/2021/en/

¹¹³ Amnesty International, *Please take me to a safe place: The imprisonment of asylum seekers in Aotearoa New Zealand*, (Index: ASA 32/4113/2021), May 2021, p. 34, www.amnesty.org/en/documents/asa32/4113/2021/en/

“a recipe for arbitrary detention”.¹¹⁴ The review also stated that detention at criminal justice facilities should not occur.¹¹⁵

The Government accepted the recommendations in the report.¹¹⁶ However, since this time we are concerned that the Government has made statements indicating they will retain the option of detaining people seeking asylum in prisons.

In 2023, the Government introduced the Immigration (Mass Arrivals) Amendment Bill.¹¹⁷ The Bill expands how long a person arriving in a group (of 30 or more people) can be detained without a warrant. The Bill proposes extending this period of detention from 96 hours to 28 days. This raises concerns about arbitrary detention which amounts to cruel and degrading treatment.

RECOMMENDATION

The Government must prohibit the use of criminal justice facilities to detain people seeking asylum solely on immigration grounds, and ensure detention is only ever used as a last resort.

EXTRADITION AND RELIANCE ON DIPLOMATIC ASSURANCES

Where there is a real risk of torture or other deliberate ill-treatment in detention, diplomatic assurances should not be relied on as they are inherently unreliable and do not provide an effective safeguard.¹¹⁸

The UN Committee Against Torture has clearly stated that assurances are unreliable and ineffective to prevent torture. In its 2013 concluding observations on the United Kingdom reliance on diplomatic assurances, the Committee Against Torture called on the government to “ensure that no individual – including persons suspected of terrorism, who are expelled, returned, extradited or deported – is exposed to the danger of torture or other cruel, inhuman or degrading treatment or punishment.”¹¹⁹ It urged the State party to “refrain from seeking and relying on diplomatic assurances “where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture””.¹²⁰

¹¹⁴ Victoria Casey KC, *Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment - Restriction of Movement of Asylum Claimants*, 2022, p.12, <https://www.mbie.govt.nz/dmsdocument/20130-report-to-deputy-chief-executive-immigration-of-the-ministry-of-business-innovation-and-employment-restriction-of-movement-of-asylum-claimants>

¹¹⁵ Victoria Casey KC, *Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment - Restriction of Movement of Asylum Claimants*, 2022, p. 33, <https://www.mbie.govt.nz/dmsdocument/20130-report-to-deputy-chief-executive-immigration-of-the-ministry-of-business-innovation-and-employment-restriction-of-movement-of-asylum-claimants>

¹¹⁶ Ministry of Business, Innovation and Employment, *INZ accepts review recommendations relating to the detention of asylum claimants*, 3 May 2022, www.mbie.govt.nz/dmsdocument/20133-inz-accepts-review-recommendations-relating-to-the-detention-of-asylum-claimants

¹¹⁷ See https://www.parliament.nz/en/pb/sc/make-a-submission/document/53SCFD_SCF_E9936D6E-E4D2-4DB9-BD3C-08DB2F1A21D8/immigration-mass-arrivals-amendment-bill

¹¹⁸ Amnesty International, *Diplomatic Assurances against Torture – Inherently Wrong, Inherently Unreliable*, April 2017,

<https://www.amnesty.org/en/documents/ior40/6145/2017/en/>

Amnesty International, *Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ against Torture*, April 2010, <https://www.amnesty.org/en/documents/EUR01/012/2010/en/>

¹¹⁹ Committee Against Torture, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, adopted by the Committee at its fiftieth session (6-31 May 2013), June 2013, UN doc. CAT/C/GBR/CO/5, p. 7, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fCO%2f5&Lang=en

¹²⁰ Committee Against Torture, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, adopted by the Committee at its fiftieth session (6-31 May 2013), June 2013, UN doc. CAT/C/GBR/CO/5, p. 7, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fCO%2f5&Lang=en

We strongly oppose to allowing extradition to China in the case of Kyung Yup Kim. Mr Kim has made a complaint to the UN Human Rights Committee and been granted interim measures not to extradite him until the Committee has made its decision. We understand that the Government has agreed to accept the interim measures until 31 December 2023. China has a record of human rights abuses, including the use of torture and other ill-treatment against people in detention.

RECOMMENDATION

The Government should not rely on diplomatic assurances where there is a real risk of torture or other ill-treatment, as they are inherently unreliable and do not provide an effective safeguard against such abuse.

OVERSIGHT OF THE NEW ZEALAND DEFENCE FORCE

In July 2020, an inquiry into New Zealand Defence Force (NZDF) Afghanistan operations in 2010 found that the NZDF gave erroneous information to Ministers and the public about civilian casualties over a number of years. They also failed to follow up on credible allegations of torture of a prisoner they had delivered into Afghan detention.

A key recommendation from the Inquiry was to establish an Inspector-General of Defence to facilitate independent oversight of NZDF and enhance its democratic accountability.¹²¹ In November 2022, the Government introduced a Bill to give effect to this proposal, the Bill is currently before the Select Committee.¹²² While there is strong support for creating greater oversight of the NZDF, concerns have been raised, for example about transparency and proposed powers, including whether there is too broad a scope in some areas and the human rights implications.

¹²¹ Terence Arnold and Geoffrey Palmer, *Report of the Government Inquiry into Operation Burnham and related matters*, July 2020, Chapter

¹²² - Looking to the future. <https://operationburnham.inquiry.govt.nz/inquiry-report/chapter-12/>

¹²³ See <https://www.legislation.govt.nz/bill/government/2022/0178/latest/d4403581e2.html>