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Dr. Claudia Mahler

Independent Expert on the enjoyment of all human rights by older persons

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**Re: Submission to the call for contributions on older persons deprived of liberty – 2022 HRC report**

Dear Dr. Mahler,

As researchers in ageing, public health and corrections from The University of New South Wales [Ageing Futures Institute](#), the [UNSW Australian Human Rights Institute](#), the [Centre of Excellence in Population Ageing Research](#), School of Population health, and the [Justice Reform Initiative](#); we respectfully make this submission in response to the call for input on the thematic report on the human rights of older persons deprived of liberty.

The following submission details key human rights risks and violations within the Australian Criminal Justice system, namely the custodial system, due to a lack of age-appropriate supports to manage an ageing prisoner population within the various state jurisdictions. We have provided data on the proportional change and age share of the prisoner population between 2001 – 2017 based on information from the Australian Bureau of Statistics (ABS) featured in a recent publication by the lead author of this submission, and colleagues (see Ginnivan et al 2021).

Please find following eight pages of information regarding the human rights risks of older persons deprived of liberty within the context of the Australian Criminal Justice system and some recommendations based on our research.

Sincerely,

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Submission to the call for contributions on older persons deprived of liberty

– 2022 HRC report

### **Older persons in the Australian Criminal Justice System**

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The Australian prisoner population like many around the world are ageing faster than the general population. This is due to a number of factors including a shift in legislative frameworks especially mandatory sentencing and mandatory minimums in some jurisdictions and a growing proportion of older people being convicted of historical crimes with longer sentences (see Figure 1.).<sup>1</sup> While there are clearly documented challenges in achieving systems of imprisonment in which the human rights of incarcerated populations are upheld, there are specific concerns for ageing populations. These concerns relate to the interplay of a number of factors including inadequate access to appropriate supports and services within Correctional Settings; an institutional focus on security that frequently over-rides health considerations, and a built environment incompatible with the required supports to meet older prisoners' mobility and aged care needs.<sup>2</sup>

The over-representation of Indigenous Australians in prison constitutes its own human rights issue, as well as the lack of culturally-safe and Indigenous-led health services, but there are particular concerns for older Aboriginal and Torres Strait Islander peoples because of the risk of age-related health issues from as early as mid-life.<sup>2</sup>

There are particular challenges in responding to the phenomenon of 'premature ageing' of older prisoners. Geriatric symptoms present as early as 45 years of age in Aboriginal and Torres Strait Islander populations, and 50 in non-Indigenous populations. When premature, or accelerated ageing is taken into account, approximately 13% of the prisoner population is considered 'aged' from a health perspective (See Figure 2).<sup>1,2</sup> The overall female prisoner population has grown by 64% across a decade (2009-2019), with older female prisoners the fastest growing population of prisoners.<sup>1,3</sup>

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<sup>1</sup> GINNIVAN, N. A., CHOMIK, R., HWANG, Y. J., PIGGOTT, J., BUTLER, T. & WITHALL, A. 2021. The ageing prisoner population: demographic shifts in Australia and implications for the economic and social costs of health care. *Journal of International Journal of Prisoner Health*.

<sup>2</sup> BAIDAWI, S., TURNER, S., TROTTER, C., BROWNING, C., COLLIER, P., O'CONNOR, D. & SHEEHAN, R. 2011. Older prisoners-a challenge for Australian corrections. *Trends and issues in crime and criminal justice*, 1.

<sup>3</sup> TROTTER, C. & BAIDAWI, S. 2015. Older prisoners: Challenges for inmates and prison management. *Australian & New Zealand Journal of Criminology*, 48, 200-218.

### *Key human rights risks and violations*

Human rights risks and violations arise due to the lack of age-appropriate supports for older persons entering the prison system such as systematic health and cognitive screening, few frail and aged units, and a lack of environmental supports in cells and common areas, such as lower bunk beds, changes of bed linen when soiled due to incontinence, and a lack of grip rails and mobility aides such as walking frames.<sup>4</sup>

Despite a Prison health directors national roundtable report that ranked ageing prisoners as their fourth key priority (2015)<sup>5</sup>, barriers to appropriate aged care supports for older prisoners persist, and include: 1) A lack of funding 2) A penal culture with an overriding focus on the *criminogenic* aspects of prison without balancing and integrating the necessary health and aged care requirements – this includes a potential overuse of security restraint when transporting older prisoners to hospital for specialty treatment (due to a blanket requirement for prisoners of certain [security classification](#) needing these measures despite their older and often frailer health status) 3) Inappropriate built environment 4) Less efficient communication system between Justice Health Network clinicians and Custodial staff to manage timely health care with gaps in policy between the partnering organisations regarding responsibility for an older prisoner if there is a fall or health emergency 5) Lack of training for custodial staff to be more educated about the needs of this vulnerable group of prisoners 6) A lack of screening and potential diversionary approaches and 7) A lack of risk management assessment tools to account for frailty in determining whether a prisoner is safe to release and 8) A lack pre-release protocols and of housing or facilities in the general community to receive older and cognitively compromised older prisoners (e.g. those with dementia), often delaying their release beyond the completion date of their sentence.<sup>6</sup>

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<sup>4</sup> INSPECTOR OF CUSTODIAL SERVICES 2015. *Old and inside: Managing offenders in custody*. Level 13, 10 Spring St. Sydney, NSW, 2000: NSW Justice, Inspector of Custodial Services.

<sup>5</sup> SIMPSON, P., GUTHERIE, J. & BUTLER, T. 2015. Prison health directors national roundtable outcomes - summary report. *Kirby Institute, UNSW Australia, Sydney*.

<sup>6</sup> HAGOS, A. K., WITHALL, A., GINNIVAN, N. A., SNOYMAN, P. & BUTLER, T. *International Journal of Prisoner Health*, 2021. Barriers and enablers to health and social services for older prisoners transitioning to community.

figures and data on the Australian prisoner population

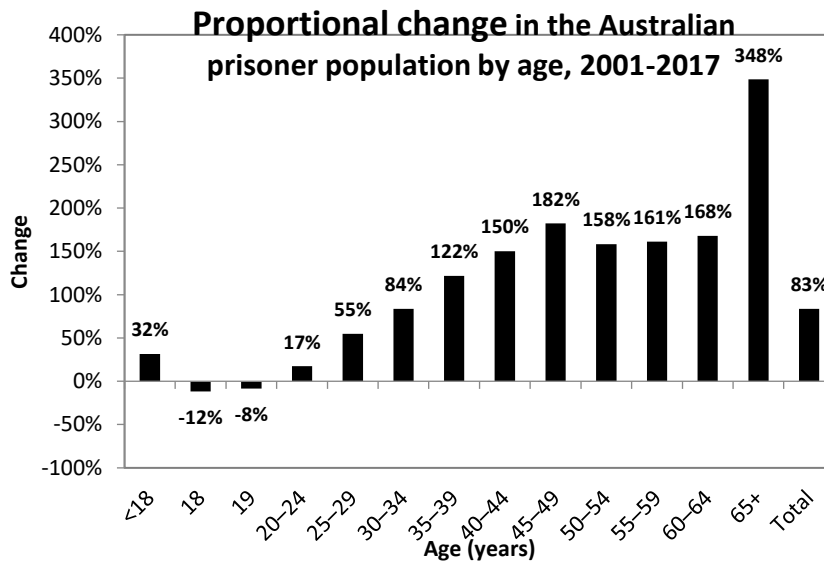


Figure 1. Proportional Change in the Australian Prisoner Population (2001-2017)<sup>7</sup>

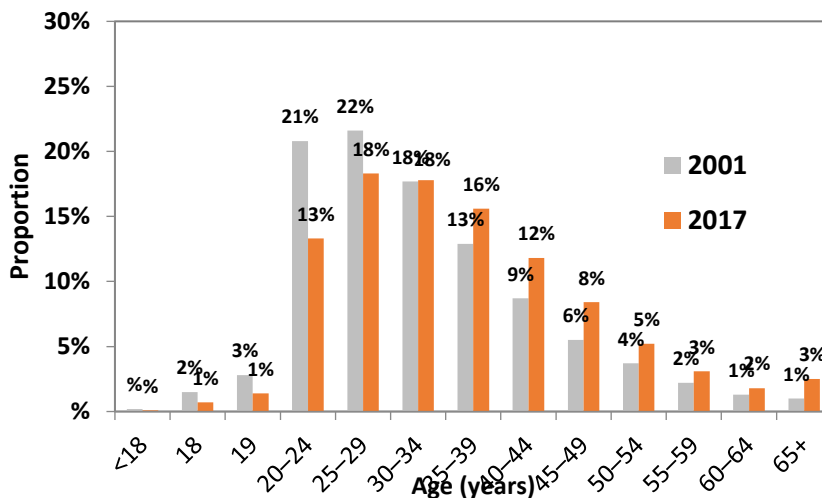


Figure 2. (left) Age share of the Australian Prisoner Population (2001 and 2017)<sup>8</sup>

*Recommended measures for the management of older prisoners during the COVID-19 pandemic*

Corrective Services and prison health services have stated (for example in NSW) that they have

identified and are closely monitoring incarcerated person assessed at increased risk of COVID-19 infection (including those with a history of chronic illness). However, we could not locate or obtain detail on any specific measures undertaken concerning incarcerated older persons in the context of the COVID\_19 pandemic. A report by Butler, MacIntyre, Simpson and Levy (2020), highlighted nine factors that would mitigate infectious disease transmission including prisoner age (older prisoners), medical conditions, ventilation, cell allocation, duration of incarceration, prison health service access and increasing decarceration (increasing spatial separation). The Butler et al (2020) report cites the

<sup>7</sup> GINNIVAN N.A BUTLER T.G & WITHALL A.L 2018. The rising health, social and economic costs of Australia's ageing prisoner population. *Medical Journal of Australia*, 209 (10), 422-242

main prison centres receiving and processing prisoners as likely places for outbreak and high transmission of COVID-19, which has transpired in the state of New South Wales in 2021.<sup>8</sup> In addition, Corrective centres that have ‘rapid build’ dorm style accommodation (see photo below) would likely be a site with an increased transmission of COVID-19. Centres that house a large portion of older prisons do have dormitory style accommodation and therefore are not ideal should any of the older prisoners become infected. The high dependency care units are a part of a prison hospital in the State of New South Wales – Long Bay, and other States have their various arrangements with in-prison care, or transfers to secure wings within hospitals where there would also be also greater risk of transmission.<sup>9</sup> This provides further rationale to explore ways to depopulate prisons, thereby increasing spatial separation where possible through the consideration of early release of eligible ‘low-risk’ older prisoners, in particular women and Aboriginal and Torres Strait Islanders.

The Corrective Services Administrators’ Council published Standard Guidelines for Corrections on issues relevant to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (OPCAT) referring to equivalence of care and caring for prisoners with disabilities. However, to date, at the national level, Australia has fallen short of implementing an overarching framework to be able to monitor the development of National Preventative Mechanisms (NPMs).<sup>10 11</sup> At a jurisdictional level, the progress of OPCAT has been varied among the states and territories but overall slow despite having over four years to develop and implement NPMs by the UN deadline. In 2019, Western Australia was the first state to appoint its NPMs, however, there remains NPM resourcing issues and an absence of legislation to facilitate NPM related inspections. In 2021, South Australia amended legislation to establish an NPM and along with Tasmania has introduced an OPCAT Implementation Bill. The Northern Territory has published a draft OPCAT bill. While the Australian Capital Territory (ACT) announced three NPMS in early 2022, Queensland have made no announcements regarding OPCAT. Further, two of Australia’s

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<sup>8</sup> Simpson PL, Butler T, MacIntyre R, Levy M. (2021). Updated report on the impact of the COVID-19 virus on the New South Wales prisoner population (9 September 2021): Report to Legal Aid NSW. (Report accessed at: <https://www.publicdefenders.nsw.gov.au/Pages/c19resources.aspx#secF>)

<sup>9</sup> BUTLER, T., MACINTYRE, R, SIMPSON, P, LEVY, M, 2020. Report on COVID-19 and the impact on New South Wales Prisoners. <https://www.publicdefenders.nsw.gov.au/Documents/butler-et-al-report-on-covid-19-and-impact%20on-nsw-prisoners.pdf>, accessed 20/03/2022

<sup>10</sup> Australian Human Rights Commission, 2020, Implementing OPCAT in Australia, <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>

<sup>11</sup> CARUANA, S. & Weller, P. 2021. OPCAT: Australia is falling short of its international obligations RMIT University Australia. <https://www.rmit.edu.au/news/acumen/opcat#:~:text=Australia%20is%20once%20again%20falling,treated%20with%20dignity%20and%20respect>. (accessed 26/03/2022)

largest states - New South Wales and Victoria have made no OPCAT announcements and refuse to conduct consultations to progress the stand-off.<sup>12</sup>

In the context of prisons, considering the high transmissibility of new variants of COVID-19, likely poor airflow, absence of universal masking, inability of the detained individual to regulate their contacts, waning immunity for current vaccines, and likely ongoing vaccine/booster implementation issues associated with deployment delays, vaccine hesitancy, and potential greater epidemic severity for closed and congregate settings like prisons, we recommend prioritising a managed depopulation strategy to decrease spatial density within the prison estate. Any depopulation approach should prioritise older persons, Aboriginal and Torres Strait Islander people, and those with underlying health conditions. Such a strategy must ensure adequate health, social and economic supports are in place for older persons who are released.<sup>8</sup>



(Photo credit: 7news.com)

**Photo: Rapid build dormitory style accommodation from New South Wales Prisons**

*Overview on the national and local legal frameworks*

In March 2020, The New South Wales Governor, made a new regulation under section 276 of the *Crimes (Administration of Sentences) Act 1999*, to be able to release inmates on parole because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic. However, this was only if the prisoner had not committed serious crimes or

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<sup>12</sup> Gregoire, P. 2022, Australia Fails on OPCAT Implementation to Detriment of those Inside, Sydney Criminal Lawyers, <https://www.sydneycriminallawyers.com.au/blog/australia-fails-on-opcat-implementation-to-detriment-of-those-inside/> accessed 28/03/2022

was serving a life sentence.<sup>13</sup> Due to the nature of many older prisoners' crimes, it is unlikely that they would be granted early parole. The Communicable Diseases Network Australia released several versions of the National Guidelines for COVID-19 Outbreaks in Correctional and Detention Facilities. The report mentions vulnerable populations who may be at higher risk of severe illness, however, there is no specific mention of ageing prisoners as a vulnerable group who could be eligible for release or be provided alternative accommodation.<sup>14</sup> The Justice Health and Forensic Mental Health Network in the State of New South Wales have a statement on their website about the management of aged and vulnerable prisoners being managed with a vaccination program and ensuring that any visitors and staff are regularly administered Rapid Antigen Test (RATs).<sup>15</sup> There are limitations when it comes to the Australian Human Rights laws and specific protections for older persons. The Australia Human Rights Commission supports a Human Rights Act for Australians that would include human rights to adequate housing, health and an adequate standard of living (commonly known as economic, social and cultural rights). However, these are currently only aspirational, and therefore unenforceable.<sup>16</sup> The Australian Capital Territory opened its first prison, the Alexander Maconochie Centre (AMC) in 2009. This custodial centre was named after a 19th Century reformer who was often referred to as the 'father of parole', the AMC is Australia's first 'human rights' prison, in one of only two Australian jurisdictions to be governed by a human rights framework. However, according to Bartels (2015), the AMC has failed to live up to its lofty human rights goals, with a recent Auditor General's report concluding that there was 'a very large gap between what was anticipated and what has occurred since its opening. Two key issues were overcrowding and the lack of meaningful activities for prisoners.'<sup>17</sup>

*Good practices on how to ensure that older persons deprived of their liberty can exercise their human rights*

In the context of the Criminal Justice System, there are limitations to how and when older persons can exercise their human rights. There are limited health care supports for this growing population within prisons, and local governments have been slow to mobilise on the issue of appropriate supports and

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<sup>13</sup> New South Wales Crimes (Administration of Sentences) Amendment (COVID-19) Regulation 2020 under the Crimes (Administration of Sentences) Act 1999, <https://www.publicdefenders.nsw.gov.au/Documents/crimes-administration-of-sentences-amendment-covid-19-regulation-2020.pdf>, accessed 20/03/2022

<sup>14</sup> CDNA National Guidelines for COVID-19 Outbreaks in Correctional and Detention Facilities, Version 4, 07 October, 2021, Australian Government, Department of Health, <https://www.health.gov.au/sites/default/files/documents/2021/10/cdna-national-guidelines-for-covid-19-outbreaks-in-correctional-and-detention-facilities.pdf>, accessed 20/03/2022

<sup>15</sup> Health, Justice health and forensic mental health network, COVID-19: <https://www.justicehealth.nsw.gov.au/novel-coronavirus>

<sup>16</sup> Australian Human Rights Commission, *Human rights and Older people*, [https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA\\_older.pdf](https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_older.pdf), accessed 20/03/2022

<sup>17</sup> BARTELS, L. 2015, ANU Centre for Social Research and Methods, The ACT prison: human rights rhetoric versus crowded and bored reality. <https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=3124773>



care *within* prisons as well as planning for their eventual release back into community. There are several best practices highlighted in a report on transitioning prisoners back into the community by a non-government specialized aged care organization in the State of Victoria, however, this relates mostly the re-integration back into community for specialised housing.<sup>18</sup> For older persons deprived of liberty in the Australian Correctional System, there are very few avenues with which to exercise their human rights on some of the issues mentioned in this submission. In fact, the issue of ‘Systemic and Institutional Elder Abuse in Australian Custodial Settings’ was highlighted in a personal submission to the Australian Law Reform Commission Inquiry into Elder Abuse by the former Chair of the Justice Health and Forensic Mental Health Network Board of New South Wales, Christopher Puplick, AM.<sup>19</sup> In his submission, Mr. Puplick highlights the Nelson Mandela Rules and the requirement for certain minimum standards in areas such as accommodation, personal hygiene, health services, contact with the outside world, and prisoners with specific mental health issues or disabilities receiving appropriate attention. He goes on to state “I can attest that in NSW these Rules are regularly subject to non-compliance.” (Pulick, 2019, pp2-3). He also cites the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and suggests that there needs to be more of a Commonwealth oversight role in the quality and care and treatment provided to Australian prisons. However, to date, no such oversight or adoption of a national framework has been implemented.

So far, research on the best care options for older prisoners with dementia in prison highlights international examples including the Structured Living Program in Nevada, USA.<sup>20</sup> In addition, a ‘buddy-system’ of dementia care called the ‘Gold Coat’ program at the California Men’s colony has been evaluated and described as a best practice model of care.<sup>21</sup> In 2012, the New York times ran a feature on [Dementia Behind Bars](#), describing in detail the Gold Coats program, with a useful 8-minute short video documentary of the program.<sup>22</sup> In 2016, Withall, Ginnivan & Butler of the University of New South Wales, Sydney, partnered with Dementia Australia to apply for funding from the

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<sup>18</sup> WINTRINGHAM SPECIALISED AGED CARE 2013. "Silver Bullet" or confused greying fox? Best Practice Support Model for Older Prisoners.

<sup>19</sup> Puplick, C.J., 2019, 237. C Puplick, *Systemic and Institutional Elder Abuse in Australian Custodial Settings*, Australian Law Reform Commission Inquiry into Elder Abuse., [https://www.alrc.gov.au/wp-content/uploads/2019/08/237\\_c\\_puplick.doc](https://www.alrc.gov.au/wp-content/uploads/2019/08/237_c_puplick.doc)

<sup>20</sup> DU TOIT, S. H. J., WITHALL, A., O’LOUGHLIN, K., NINAUS, N., LOVARINI, M., SNOYMAN, P., BUTLER, T., FORSYTH, K. & SURR, C. A. 2019. Best care options for older prisoners with dementia: a scoping review. *International psychogeriatrics*, 31, 1081-1097.

<sup>21</sup> BERRY, S. 2016. *The Gold Coats: An Exceptional Standard of Care: a Collaborative Guide to Caring for the Cognitively Impaired Behind Bars*.

<sup>22</sup> Donaldson, N. Heisler, T., Kang, s., and Spangler, C. 2012 *Dementia Behind Bars*, The New York Times, <https://www.nytimes.com/video/health/100000001367225/dementia-behind-bars.html>



Department of Health to develop and pilot a ‘train-the-trainer’ program of dementia care modelled on the Gold Coats program, however, this grant application was unsuccessful.

In line with recommendations made by the NSW Inspector of Custodial Officer report on managing older persons in prison (2015)<sup>4</sup>, our UNSW research team, funded by the National Health and Medical Research Council (2020), are developing a culturally safe audio-delivered app to screen for health needs and cognitive impairment as older prisoners enter the prison system, which could be rolled out widely if shown to be valid. Cognitive screening for older persons entering the prison system is only one form of support. The built environment, multidisciplinary teams, and improved systems of communications about timely care and programs for older prisoners are required to support the human rights of older persons who are deprived of liberty. Age-appropriate supports during a prisoners’ sentence and pre-release/ post-release programs for continuity of care is yet to be realised for older persons deprived of their liberty in the context of the Australian criminal justice system.

### *Recommendations*

We respectfully request that the Independent Expert:

- Urge governments to follow the recommendations of the United Nations High Commissioner for Human Rights and other UN entities to release eligible or low-risk older and health-compromised prisoners, including women and Aboriginal and Torres Strait Islander prisoners in order to mitigate the risk of contracting COVID-19. Any release strategy must ensure adequate health, social and economic supports are in place for older persons upon release.
- Urge governments to ensure that prison facilities have the adequate staff training and resources to provide appropriate health and hygiene needs of older prisoners.
- Recommend that the various States develop guidelines that address the special needs of older prisoners, in particular those who may have cognitive impairment, and that these guidelines have some national oversight and a mechanism for monitoring.
- Recommend that older prisoners with declining health and mobility issues be provided with specialised exercise programs in prison.
- Recommend that prison administrators work with the various State governments to develop pre-release and post-release continuity of care/re-entry into the community programs upon release to provide targeted support to older prisoners, particularly women and Aboriginal and Torres Strait Islander prisoners.