

# Anti-Slavery Australia Submission on Contemporary Forms of Slavery as affecting Incarcerated People

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United Nations Human Rights Office of the High Commissioner

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## Table of Contents

<b>TABLE OF CONTENTS</b> .....	<b>1</b>
<b>ACKNOWLEDGMENTS</b> .....	<b>2</b>
<b>CONTRIBUTORS</b> .....	<b>2</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>3</b>
<b>ABOUT ANTI-SLAVERY AUSTRALIA</b> .....	<b>3</b>
<b>INTRODUCTION</b> .....	<b>4</b>
<b>AUSTRALIA'S LEGISLATIVE REGIME</b> .....	<b>5</b>
<b>RISKS OF MODERN SLAVERY IN AUSTRALIA'S PRISON LABOUR PROGRAMMES</b> .....	<b>7</b>
<b>AUSTRALIA'S NON-COMPLIANCE WITH INTERNATIONAL LAW</b> .....	<b>8</b>
<b>DISPROPORTIONATE EFFECT ON FIRST NATIONS PEOPLES AND PEOPLE LIVING WITH DISABILITIES</b> .....	<b>10</b>
<b>OUR RECOMMENDATIONS</b> .....	<b>12</b>

## Acknowledgments

This submission draws upon Anti-Slavery Australia's research and advocacy as well as our extensive experience in working with and providing legal advice and assistance to victims and survivors of modern slavery in Australia since 2003.

Anti-Slavery Australia acknowledges the traditional Owners of Country and the Holders of Knowledge for this place, the Gadigal people of the Eora Nation, upon whose lands and waters we work, and extend our respect to their Elders both past, present and emerging.

Anti-Slavery Australia expresses its sincere gratitude and respect for all survivors of modern slavery whose experiences have inspired and continue to drive our advocacy for survivors' rights to be protected and fulfilled.

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## Executive Summary

Anti-Slavery Australia is pleased to provide this submission to the UN Special Rapporteur on Contemporary Forms of Slavery (the Special Rapporteur) on current and formerly incarcerated people and contemporary forms of slavery.

This submission will address the key questions and types of input specified in the Special Rapporteur's call for input, including:

- A brief overview of labour programmes in Australia;
- Australia's legislative regime;
- Risks of modern slavery in Australia's prison labour programmes;
- Australia's non-compliance with international standards;
- The disproportionate impact on First Nations Peoples and people living with disabilities; and
- Our recommendations.

## About Anti-Slavery Australia

Anti-Slavery Australia is the only specialist legal, research and policy university centre in Australia working to end modern slavery. For 20 years, our team has been providing access to pro bono legal and migration services to people who have experienced or are at-risk of modern slavery; engaging in research and advocacy grounded in the firsthand experience of survivors; and delivering training on modern slavery to frontline service providers, government, community, law enforcement, business, students and educators.

## Introduction

Australia has had a long history of implementing labour programmes requiring people in prison to work.<sup>1</sup> ‘Correctional industries’ are a significant part of Australia’s prison systems and are justified on the basis that they serve an important function in prisoner rehabilitation – to prepare the inmate with work experience where they will acquire the skills which would allow them to obtain employment.<sup>2</sup> While the extent to which people in prison benefit from such employment is not clear, it is clear that prison labour generates significant revenue for both private companies and the state and territory governments that operate correctional facilities.<sup>3</sup>

Forced labour has long been prohibited under international law. However, article 2(c) of the International Labour Organisation (ILO) Convention 29 on Forced Labour (*ILO Convention 29*) provides an exception and legalises prison labour, under certain conditions. Article 2(c) provides that:

*for the purposes of this Convention, forced or compulsory labour shall not include...*  
*(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations.*<sup>4</sup>

We are concerned that current labour programmes in Australia exploit the incarcerated for the purpose of profit and breach the certain conditions imposed by the exception in article 2(c).

Overall Australia has developed a relatively strong government response to slavery, in line with international conventions. For example, the explanatory memorandum of the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* states: *The International Labour Organization (ILO) Convention No. 29 on Forced or Compulsory Labour defines the term ‘forced or compulsory labour’ as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person*

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<sup>1</sup> Colin Fenwick, ‘Regulating Prisoners’ Labour in Australia: A Preliminary Review’ (2004) *University of Melbourne Law School Legal Studies Research Paper Series 77*.

<sup>2</sup> Frances Simon, *Prisoners’ Work and Vocational Training* (Routledge London and New York, 1<sup>st</sup> ed, 1999) 201.

<sup>3</sup> LC LSIC, Submission No 157 to Parliament of Victoria, *Inquiry into Victoria’s Criminal Justice System* (15 October 2021) 1.

<sup>4</sup> *International Labour Organisation Forced Labour Convention* (No 29), opened for signature 28 June 1930, C29 (entered into force 1 May 1932).

*has not offered himself voluntarily'. In keeping with the ILO definition, the new definition of forced labour at section 270.6 adopts the concept of labour services being obtained by more subtle forms of coercion, rather than only through force or threats.<sup>5</sup> More recently, the introduction of the *Modern Slavery Act 2018* requires certain entities to report on actions taken to address modern slavery risks in their operations and supply chains.<sup>6</sup>*

Further, there have been investigations, prosecutions and convictions for the criminal offences of slavery, sexual servitude, forced labour and trafficking in persons.<sup>7</sup> However, in light of our international and domestic response, there has been little consideration given to the applicability of exploitation and slavery in the Australian prison system. To deny individuals currently or formerly incarcerated with protections against exploitative labour practices, including contemporary forms of slavery, would indicate a biased and unjust legal system.

We suggest that this oversight represents a significant gap in Australia's anti-slavery efforts. Certain current prison labour practices in Australia appear to serve as a form of 'double punishment' - where incarcerated individuals are also further punished by being compelled to work in exploitative conditions.

## Australia's Legislative Regime

Australia has a robust legislative framework in place to combat modern slavery. Division 270 of the *Criminal Code Act 1995* (Cth) (the *Criminal Code*) criminalises slavery and slavery-like practices, including servitude and forced labour. Section 270.4(1) defines servitude as:

*the condition of a person (the **victim**) who provides labour or services, if, because of the use of coercion, threat or deception:*

- a) *a reasonable person in the position of the victim would not consider himself or herself to be free:*
  - i. *to cease providing the labour or services; or*
  - ii. *to leave the place or area where the victim provides the labour or services;**and*
- b) *the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.*

<sup>5</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (Cth).

<sup>6</sup> *Modern Slavery Act 2018* (Cth)

<sup>7</sup> Australian Government, Attorney-General's Department, *Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the Criminal Code Act 1995* (Cth) (11 September 2023); Samantha Lyneham, Australian Institute of Criminology, *Attrition of human trafficking and slavery cases through the Australian criminal justice system*, Trends & issues in crime and criminal justice no. 640 (2021).

Forced labour is defined under section 270.6(1) of the *Criminal Code* as:

*the condition of a person (the **victim**) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free:*

- a) *to cease providing the labour or services; or*
- b) *to leave the place or area where the victim provides the labour or services.*

However, at the same time, Australian legislation legalises compulsory work for people in prison. Each Australian jurisdiction's corrections legislation and/or regulations empower prisons to require an incarcerated person (including appellants) to work. For example, section 6(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW) states:

*a correctional centre may make an order directing any convicted inmate in the correctional centre to carry out such work as the governor considers suitable.*<sup>8</sup>

Similarly, people in Tasmanian prisons must work or be engaged in education or training, and work performance is considered when determining the length of remission from a person's sentence.<sup>9</sup> In Victoria, 'sentenced prisoners are to be required to work while in prison', and each person's 'individual management plan' incorporates a work requirement.<sup>10</sup> In Western Australia (WA), all sentenced prisoners may be assigned to employment, subject to their medical fitness.<sup>11</sup> Moreover, parole applications where the person has been employed in prison are looked upon favourably by decision makers, thus reducing the time in prison.<sup>12</sup>

A variety of different provisions, processes and powers are available to sanction a person in prison for failing or refusing to work. A prisoner may be liable for punishment within the prison discipline regime – with refusal to work a specific disciplinary offence in Victoria,<sup>13</sup> the Northern Territory (NT),<sup>14</sup> Tasmania<sup>15</sup> and South Australia (SA).<sup>16</sup> A refusal to work may also constitute a more general offence of failing to comply with a direction made by a prison officer.<sup>17</sup> Minor

<sup>8</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 6(1).

<sup>9</sup> *Corrections Regulation 1997* (Tas) r 12(2).

<sup>10</sup> *Correctional Management Standards 2007* (Vic).

<sup>11</sup> *Prisons Regulations 1982* (WA).

<sup>12</sup> *Lee v State Parole Authority of New South Wales* [2006] NSWSC 1225; *Karpatsis v Parole Authority of New South Wales* [2020] NSWSC 1326.

<sup>13</sup> *Corrections Act 1986* (Vic) ss 48 and 84H(2).

<sup>14</sup> *Prisons (Correctional Services) Regulations* (NT) r 3(1)(b).

<sup>15</sup> *Corrections Act 1997* (Tas) Sch 1 items 13-15.

<sup>16</sup> *Correctional Services Act Regulations 1985* (SA) r 36.

<sup>17</sup> *Crimes (Administration of Sentences) Regulations 2001* (NSW) r 120; *Prisons Act 1981* (WA) ss 69(a)-(b); *Corrective Services Regulations 2001* (Qld) r 15(1)(a)-(b).

correctional centre offences in NSW<sup>18</sup> and WA<sup>19</sup> also include refusals to work and prison employment history and 'attitude to work' is included in the sentence management process and recorded in inmate reviews.

## Risks of Modern Slavery in Australia's Prison Labour Programmes

There are a variety of correctional industries in Australia, including textiles and furniture manufacturing, fruit-picking, slate tile manufacturing and agricultural and horticultural production.<sup>20</sup> These jobs are commercially oriented and the value from prison labour contributes to the profits of corporations that operate in or outside of prisons. There are also jobs that relate to the upkeep of the prison or community – such as prison maintenance, general cleaning or work in the kitchens or laundry.<sup>21</sup> The working conditions of inmates, in the absence of any contractual relationship, are entirely a matter of state policy.<sup>22</sup> Incarcerated people required to work are not classified as 'workers' in Australia's common law, as is the case in most English-speaking common law jurisdictions, and are hence excluded from statutory regimes which would ordinarily protect workers in the free labour market.<sup>23</sup> They are also not able to join a union or participate in industrial action.

In some jurisdictions, inmates are paid rates extraordinarily below the minimum wage.<sup>24</sup> In NSW, the regulations governing inmate wages in the Corrective Services Industries Policy Manual state the wage ceiling for an inmate working a 30-hour week is \$70.29 - equating to an hourly wage of \$2.34, a ninth of the Australian minimum wage.<sup>25</sup> Similarly dismal rates are offered by Australia's other jurisdictions.<sup>26</sup> The working conditions of inmates has been described by some ex-inmates as 'slave labour'.<sup>27</sup> We argue these practices are a form of gross exploitation of those incarcerated and a means for private companies to access cheap labour. The jobs that are assigned to inmates often involve menial tasks which offer few

<sup>18</sup> *Crimes (Administration of Sentences) Regulations 2001* (NSW) r 120.

<sup>19</sup> *Prisons Act 1981* (WA) ss 69(a)-(b).

<sup>20</sup> Colin Fenwick, 'Regulating Prisoners' Labour in Australia: A Preliminary Review' (2004) *University of Melbourne Law School Legal Studies Research Paper Series 77*.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

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

<sup>24</sup> *Ibid.*

<sup>25</sup> *Corrective Services Industries Policy Manual 2020* (NSW) s 1.1, 1.2, 1.4.

<sup>26</sup> LC LSIC, Submission No 157 to Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (15 October 2021) 1.

<sup>27</sup> LC LSIC, Submission No 157 to Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (15 October 2021) 1.



marketable skills.<sup>28</sup> Jobs for women, in particular, are often grounded in gendered roles and expectations.<sup>29</sup> In addition, some jurisdictions such as Victoria prohibit payment for inmates' participation in research. Others, such as New South Wales, have a cap of \$15.

The evidence of the benefits these practices provide for private corporations is prolific. Whilst state governments have been extremely secretive with the arrangements made with private corporations – rejecting Freedom of Information requests on the basis the information is 'commercial in confidence' – it has been well known that both small and large businesses have benefitted from the low wages they are required to pay prisoners.<sup>30</sup> Household name companies such as Qantas, Bunnings, the Golden Bone Bakery, Fantastic Furniture, Orotan and Flower Power are alleged to have previously used labour derived from prisons in their production of goods.<sup>31</sup> As discussed earlier, participation in these schemes is often not voluntary as inmates are subject to a range of different sanctions for failure to participate in these labour programmes.

## Australia's Non-Compliance with International Law

Since the 1990s, private prisons have begun operating in Australia.<sup>32</sup> Following the global surge of neoliberalism in the 1980s, Australian governments increasingly began to contract the management of prisons to security corporations, including Serco and GEO.<sup>33</sup> The justification for this transition is that the competitive market process will allow for prisons to be run in the most efficient manner possible.<sup>34</sup> However, the challenges of the COVID-19 epidemic revealed their failures in providing safe prison conditions.<sup>35</sup> Issues of accountability

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<sup>28</sup> Jordan House, 'Working prisoners are entitled to employment and safety standards just like anybody else,' *The Conversation* (online, 25 November 2022) < <https://theconversation.com/working-prisoners-are-entitled-to-employment-and-safety-standards-just-like-anybody-else-194099>>.

<sup>29</sup> Ibid.

<sup>30</sup> 'Australia's prisons are also a source of forced labor', *Freedom United* (online, 13 June 2022) <<https://www.freedomunited.org/news/australias-prisons-forced-labor/>>.

<sup>31</sup> Ibid.

<sup>32</sup> Richard Harding, 'Private Prisons in Australia: The Second Phase', (1998) *Australian Institute of Criminology Trends & Issues in Crime and Criminal Justice* 3.

<sup>33</sup> Ibid.

<sup>34</sup> LC LSIC, Submission No 157 to Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (15 October 2021) 1.

<sup>35</sup> E.g. the largest COVID-19 outbreak was at the privately run Parklea Prison: <https://www.thesaturdaypaper.com.au/news/politics/2021/09/25/inside-the-parklea-prison-covid-19-outbreak/163249200012549#hrd>

and transparency in relation to private prisons have resulted in a number of recent closures of these prisons in Australia.<sup>36</sup>

The remaining privately-operated prisons, including the largest prison in Australia (Clarence, run by Serco that has 1700 beds), continue to force incarcerated people to work – just as a publicly-operated prison would, including in the upkeep of the prison.<sup>37</sup> The common justification for this practice in Australia, alongside many other jurisdictions such as the United Kingdom, Germany, Russia and Austria, is that “in effect it sees that private company as acting in the place of the state.”<sup>38</sup> In addition, these jurisdictions have often argued that the rehabilitation purpose of prison labour cannot be achieved by the state alone – instead it is necessary to have involvement and investment from non-state actors.<sup>39</sup> They argue having closer links with local employment markets and private involvement in prisoners’ education, qualifications and work experience better improves incarcerated peoples’ long-term employment prospects.<sup>40</sup> Such claims are made without reference to evidence. Indeed, the drastic cut to state teachers in prisons in 2016 has had a deleterious effect on the education of people in prison.<sup>41</sup>

We believe the practice of enabling private corporations to determine the employment of people in prison places Australia at risk of breaching the conditions found in article 2(c) of *ILO Convention 29*. Additionally, allowing private corporations to dictate the education and training of individuals in prison may potentially violate Rule 104 of The United Nations Standard Minimum Rules for the Treatment of Prisoners.<sup>42</sup> Further, the exploitation of people in prison to carry out the maintenance of the prison and the caring of individuals (see below) is based on a fiscal benefit to the state and, for privately run prisons, the corporate contractor. The state is saved from paying for essential costs for the serving of its correctional centres. We also

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<sup>36</sup> Nino Bucci, ‘Australian authorities once embraced privately operated prisons. But some governments are taking back control,’ *The Guardian* (online, 24 December 2023) <<https://www.theguardian.com/australia-news/2023/dec/24/australian-authorities-once-embraced-privately-operated-prisons-but-some-governments-are-taking-back-control>>.

<sup>37</sup> Ibid.

<sup>38</sup> Ben Jarman and Catherine Heard, ‘Labouring Behind Bars: Assessing International Law on Working Prisoners’, University of London Institute for Crime & Justice Policy Research 19.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> New South Wales Teachers Federation, *Prisons struggling to fill teacher positions* (online, 9 March 2020) <<https://www.nswtf.org.au/news/2020/03/09/prisons-struggling-to-fill-teacher-positions/>>

<sup>42</sup> General Assembly resolution 70/175, annex, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, adopted on 17 December 2015.

support the position that work done by incarcerated people in publicly operated prisons, producing goods or services under contract with private companies may be contrary to article 2(c) of *ILO Convention* <sup>43[OBJ]</sup>. As such, Australia may be in breach of *ILO Convention 29*.

These forms of exploitation, both for private and public benefit, may conflict with article 8 of the *International Covenant on Civil and Political Rights* that upholds the right to freedom from forced labour and slavery.<sup>44</sup> Additionally, it could be inconsistent with both federal, and state and territory criminal laws prohibiting forced labour (e.g., *Criminal Code* sections 270.5 and 270.6A<sup>45</sup>; *Modern Slavery Act 2018* (NSW)).<sup>46</sup>

### Disproportionate Effect on First Nations Peoples and People Living with Disabilities

Australia's prison labour practices disproportionately affect First Nations peoples and people living with disabilities, with both groups of peoples incarcerated at exceedingly high levels in Australia. Indeed, Australia's First Peoples are imprisoned higher than any other group in the world.<sup>47</sup> This lends them to be more likely to be subject to exploitative prison labour practices. Australia has a long history of Aboriginal slavery, with studies suggesting widespread exploitation of Aboriginal labour starting in the 1860s.<sup>48</sup> Slavery practices were often disguised as 'Protectionism' because they were being inculcated with European and Christian ethics.<sup>49</sup>

We believe that these practices are in contravention with Article 17(3) of the United Nations Declaration on the Rights of Indigenous Peoples, which provides:

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<sup>43</sup> Ibid.

<sup>44</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>45</sup> *Criminal Code Act 1995* (Cth) s 270.4(1).

<sup>46</sup> *Modern Slavery Act 2018* (NSW).

<sup>47</sup> Thalia Anthony, 'FactCheck: are first Australians the most imprisoned people on Earth', *The Conversation* (online, 6 June 2017) <<https://theconversation.com/factcheck-are-first-australians-the-most-imprisoned-people-on-earth-78528>>.

<sup>48</sup> Thalia Anthony and Stephen Gray, 'Was there slavery in Australia? Yes. It shouldn't even be up for debate', *The Guardian* (online, 11 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/11/was-there-slavery-in-australia-yes-it-shouldnt-even-be-up-for-debate>>.

Jens Korff, 'Australia has a history of Aboriginal slavery', *Creative Spirits* (online, 26 February 2022) <<https://www.creativespirits.info/aboriginalculture/history/australia-has-a-history-of-aboriginal-slavery>>.

<sup>49</sup> Ibid.

*Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.*<sup>50</sup>

People with disabilities – particularly intellectual or psychosocial disabilities – are also over-represented in prison and hence more likely to be subject to labour exploitation.<sup>51</sup> Whilst those with disabilities comprise about 18 percent of the nation’s population, they comprise around 50 percent of people entering prison.<sup>52</sup> Some are criminalised because of behaviours related in their disability.<sup>53</sup> Once again, people living with disabilities are more likely to be subject to exploitative labour practices by way of their overrepresentation in prison systems.

Prisoners with disabilities who require high support in Australia have been reported to have “prison carers” - other prisoners whom prison authorities have paid to look after them.<sup>54</sup> Public reporting on the practices occurring in Darwin Correctional Centre reveals some incarcerated women were paid in canteen vouchers to care for other incarcerated women with disabilities due to the lack of any other form of disability services or support being provided.<sup>55</sup>

Given the disproportionate representation of people with disabilities in the Australian prison system and their involvement in potential exploitative work within prisons, we have concerns that this may raise issues regarding compliance with Article 27(2) of the Convention on the Rights of Persons with Disabilities which states:

*States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.*<sup>56</sup>

<sup>50</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

<sup>51</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) vol 2.

<sup>52</sup> Kriti Sharma, “I Needed Help, Instead I Was Punished”: Abuse and Neglect of Prisoners with Disabilities in Australia’, *Human Rights Watch* (online, 6 February 2018) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>.

<sup>53</sup> *Ibid.*

<sup>54</sup> “No option for her’: Prison cashes in on disabled inmates’, *NT News* (online, 27 October 2022) <<https://url.au.m.mimecastprotect.com/s/j-g3CZY1WDc5PQ2jWfzH4Dc?domain=ntnews.com.au>>.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008).

## Our Recommendations

We argue there is no good legal or moral argument for denying prisoners the statutory or common law rights that are granted to workers. We make the following recommendations:

**Recommendation 1:** Consider extending the classification of incarcerated individuals as "workers" to ensure their rights align with Australian national workplace standards.

**Recommendation 2:** Repeal all provisions in Australian legislation which force people in prison to work.

**Recommendation 3:** Renumerate work in prisons at Award rates (i.e. at least minimum wages).

**Recommendation 4:** Provide employer references for people in prison following the end of their term of employment.

**Recommendation 5:** Provide fair work conditions for work in prison, including adequate breaks, training and compensation for injuries.

**Recommendation 6:** Provide people in prison the right to form or join unions.

**Recommendation 7:** Provide every person in prison the opportunity to work and receive education and/or training.

Anti-Slavery Australia thanks the Special Rapporteur for the opportunity to make this submission.

