

# WOMEN'S JUSTICE NETWORK

## Submission to the Inquiry into Australia's Human Rights Framework

WJN works to raise awareness of and progress the cultural, social, economic and political inequalities that exist for criminalised women by addressing the policies and practices that sustain these injustices.

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# Introduction

This submission is respectfully made on behalf of the Women's Justice Network, an NSW based organisation that aims to empower, support and advocate for the wellbeing of women who are currently, or have been, incarcerated within the NSW criminal justice system. In making this submission, WJN refers not only to both domestic and international sources of human rights law, but importantly, draws upon the lived experiences of women whose rights have been violated, dismissed or ignored. By sharing the stories of women within the network, WJN hopes to give a voice to these women, making this submission in the hopes that federal human rights reform will improve their access to justice, health, well-being and dignity.

This submission addresses the questions posed by the Inquiry in three parts. Firstly, this submission briefly canvasses the inadequacies of current human rights mechanisms, in reference to the Human Rights Framework published in 2010, and the National Human Rights Action plan published in 2012. Part One outlines how the lack of concrete federal statute undermines the value of any Parliamentary Statements of Compatibility. Further, it discusses how the Australia Human Rights Commission's lack of enforcement mechanisms limits its efficacy. This means that the majority of the current federal human rights framework is weakened by its lack of a uniform, statutorily enshrined, enforceable law.

Part Two of this submission highlights how the inadequacy of the current framework allows for unregulated human rights violations by drawing upon the lived experiences of women within the NSW justice system. These experiences are supported by the AHRC's Factsheet on Human Rights and Prisoners, and in contravention with Australia's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

Part Three of this submission asserts its support for a federal Human Rights Act, largely championing the provisions contained within the Australian Human Rights Commission's 2022 Position Paper, as a response to the stories shared in Part Two. However, this submission highlights the need for a Federal Act to significantly encourage the introduction of complementary state-based legislation; a policy proposal that the Position Paper does not deeply grapple with. This is because the proposed AHRC Human Rights Act limits the statutes applicability to federal institutions and bodies; the human rights violations experienced by members of WJN are committed by state agencies such as Justice Health. In this regard, the role of the AHRC can plausibly extend to consulting with, and assisting state parliaments who are yet to draft a human rights act/charter introduce appropriate statute. Theoretically, the Federal Act would therefore serve as a blueprint for states such as NSW to follow.

In support of this argument, Part Three also discusses developments in the common law within state jurisdictions that have introduced human rights legislation. Cases such as *Castles v Secretary of Dept of Justice*<sup>1</sup> are directly relevant to the experiences of women incarcerated within NSW and highlight the specific healthcare needs particular to the increasing female prison population. The success of these state-based statutes in protecting and empowering the rights of prisoners within those jurisdictions highlights the gains to be made by encouraging states to introduce their own human rights legislation.

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<sup>1</sup> (2010) 28 VR 141.

# Part One: Inadequacies of Current Framework

The aim of this Inquiry is to assess the effectiveness of current federal human rights mechanisms in Australia, reflected within the 2010 Human Rights Framework and the subsequent 2012 National Human Rights Action Plan. It is this submission's position that the current framework is limited by its failure to adopt and implement a federal statute that empowers organizations such as the AHRC to refer complaints to the judicial system, enforce remedies or provide a streamlined legal pathway through which human rights violations can be compensated. The 2010 Framework premised its reform on the four key actions: educate, engage, protect and respect. As a result, the Framework emphasised the need to educate both young people, public sector servants and the community generally on the importance of, and respect for, human rights. To achieve this, the Framework created the Commonwealth Parliamentary Joint Committee on Human Rights ('PJCHR') and introduced the need for a Statement of Compatibility with human rights for all new bills and delegated legislation. Missing from this Framework however, was the introduction of a core federal Australian Human Rights Statute, that provides legal remedies for rights breaches. As a result, where it is found by the PJCHR that an act breaches human rights under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the breach is scrutinised, but produces no consequence.<sup>2</sup> Within the 88 page 2012 Action Plan, only two pages discuss actions targeted at improving outcomes for people in prisons.<sup>3</sup> Where a state already has human rights legislation in place, such as Victoria, the Action Plan draws upon these pre-existing obligations and augments them. For example, page 71 examines efforts to improve the mental health of offenders within the justice system, and notes that the Victorian Department of Justice has a pre-existing Mental Health strategy for offenders with cognitive impairments or mental illness. The Action Plan acknowledges and supports the regular review of Justice Health Care Standards by the Victorian government, however fails to assert the need for a similar structure within NSW. In many ways, the Action Plan codifies obligations for states with pre-existing human rights statutes, making the protection of rights within those states even stronger, but remains silent on the obligations of states without pre-existing legislation, widening the rights gap between jurisdictions. This submission therefore supports the AHRC's assessment of current legislation as 'patchy' – human rights vary across jurisdictions, find minimal support in the Constitution, and suffer from a lack of uniformity.

Further, without both uniform state protection, and a federal Human Rights Act, remedies for individuals who have their rights violated are weak. Within their Information Factsheet on Human Rights and Prisoners, the AHRC acknowledges that the relief they are able to provide for rights violations is significantly hampered by their inability to enforce recommendations. Where a finding was made that the NSW Department of Corrections had breached prisoners' rights to freedom of expression by banning the prisoners' magazine '*Framed*', the NSW Department of Corrections stated that it had no intention of taking any action to effect the recommendation made by the AHRC. Presently, the AHRC also lacks the ability to refer a complaint for judicial review under the Court system – once a complaint is received and a recommendation is made, the AHRC is unable to provide any further assistance to the applicant. This strips the applicant of the possibility of seeking legal compensation within the Australian judicial system.

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<sup>2</sup> See the AHRC Position Paper, 'Free and Equal' Page 47.

<sup>3</sup> See pages 71-72.

## Part Two: the Lived Experiences of Incarcerated Women in NSW

The 'nothing about us without us' stance of the Women's Justice Network is founded upon the principle that policy and programming should be designed and implemented by women who have been affected by the criminal process – that agendas should be set by women who know what it is like to be behind bars. For this reason, WJN suggests that any human rights statute should be informed by the lived experience of those who have had their own human rights violated.

Jane\* is a WJN member, with lived experience within NSW correctional facilities. When Jane first arrived at her designated facility in 2015, she had applied for both a medical and psychiatric assessment. Whilst her medical assessment was completed within 2-3 weeks, her psych assessment remained outstanding. After a month, she put in a second application, which was not acknowledged, and a third the following month. The third application remained unactioned, and her attempt to follow up with a fourth application was met with an administrative response that the psychiatrist would *'call you when they are ready.'* During this period, Jane says *'I knew I was not feeling right, I was anxious all the time and I didn't want to speak to anyone being officer or inmate. My health was not good.'* Jane did not receive any psychiatric assessment for the following 16 months.

In August 2016, Jane was able to speak with a psych nurse whilst working as a clinic sweeper, who was able to follow up on her application for her. As a result, Jane was able to receive a psych nursing assessment the following week and was referred to a psychiatrist. Jane believes that *'if I had not had the job as clinic sweeper which gave me some access to the nursing staff and the chance conversation with the psych nurse, I don't believe I would have been called up at all.'*

Following her appointment with her psychiatrist, Jane was diagnosed with PTSD and gross depression. She was prescribed with fluvoxamine. On the fourth day of taking fluvoxamine, Jane says *'I asked to see a nurse as an emergency. I felt like I was going to die. An officer took me to the clinic where I had a blood pressure of 211. They would not let me go back to my cell and kept me in the clinic where I climbed the walls. Officers came in at approximately 11pm and told me I had to change cells. I could barely walk. They put me in a single cell and I vomited blood for the rest of the night.'*

Since Jane has been released, she has seen different psychiatrists. When she told her new psychiatrist about her experience on fluvoxamine he was appalled. *'He said (fluvoxamine) reacts severely with the medications I was on. He was in disbelief.'*

When Ally\* was in prison, she was desperate for trauma informed, private counselling, exercise programs, healthy food and activity programs. But she was not eligible to access programs like IDAPT (the Intensive Drug and Alcohol Treatment Program) or RUSH (Real Understanding of Self Help). She experienced hallucinations, vomiting and nightmares during her withdrawal and when she was eventually sentenced, Ally received 'time served' plus two weeks. She was released without having received any support or counselling. *'I would like to see better access for women prisoners to support services, intensive case management, access to educational programs and activities, counselling, and a lot of focus on the reasons to led to the woman ending up in prison in the first place,'* says Ally.

Whilst Jane's and Ally's experience cannot account for the experience of all women who are incarcerated, statistics indicate that their experiences are not uncommon. In comparison to male

prisoners, women often present with more complex mental healthcare needs.<sup>4</sup> Alarming, Justice Health, in conjunction with Forensic Mental Health NSW, found that 43.3% of female inmates reported suicidal ideation, compared to 29.6% of males.<sup>5</sup> Women were also more likely to report self-harming behaviour at 24.6%, compared to 10.9% of men.<sup>6</sup> In the 2021 report by the Inspector of Custodial Services into the provision of healthcare services through NSW correctional facilities, it was found that the demand for custodial mental health beds significantly outweighs supply. Worryingly, the extent of this demand, whilst known generally, was not able to be quantified, as Justice Health was unable to specify the number or acuity of patients waiting for a mental health bed. Noting the discrepancy between the mental health care needs of men and women, whilst both genders are harmed by the insufficiency of psychological services, incarcerated women are arguably worse off than their male counterparts, in terms of accessing mental health services for complex needs. WJN notes that this submission broadly canvasses the mental health challenges of incarcerated women generally, without exploring the additional challenges that face intersectionally marginalised groups such as First Nations and trans women. This is largely because the lived experience cited cannot account for these realities, as Jane does not identify as trans or First Nations. However, WJN would like to statistically highlight the overrepresentation of First Nations women within the incarceration context, making up just under a third of all female prisoners at 32%<sup>7</sup>, and the documented challenges trans women face in accessing hormone therapy when placed within male prisons, as well as an increased risk of sexual violence.<sup>8</sup> Both groups face additional forms of complex trauma, and these women may require specified and tailored mental healthcare which remains inadequate in the current carceral context.

The denial of access to mental health care constitutes a human right violation. In the AHRC Factsheet on Human Rights and Prisoners, the AHRC highlights that access to the highest attainable standard of physical and mental health is a right, alongside humane treatment and respect for a person's dignity, and the positive right to not be subjected to cruel, inhuman or degrading treatment. The Factsheet emphasises that Australian prisoners are often faced with inadequate mental health services and solitary confinement can exacerbate the symptoms of prisoners with mental illness. Waiting 16 months for a psychiatric assessment, as in Jane's case, is an unacceptable violation of the right to mental healthcare. Being prescribed a contraindicated medication that causes a severe adverse reaction is a clear departure from the highest attainable standard of mental healthcare. Being placed in solitary confinement as a result of this reaction, cannot be characterized as humane treatment that respects a person's dignity. Similarly, in Ally's case of unassisted withdrawal causing hallucinations, vomiting and nightmares, her right to not be subject to cruel, inhuman or degrading treatment was also violated. These experiences also violate the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), signed and ratified by Australia in 2017. It is the view of WJN, informed by the lived experience of its members, that human rights of incarcerated women are regularly violated, with no legal consequence. Creating a federal human rights statute would help prevent these violations from

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<sup>4</sup> Mental Health Commission of New South Wales, *Living Well: A Strategic Plan for Mental Health 2014-2024*, (2014) 82.

<sup>5</sup> Justice Health and Forensic Mental Health Network (NSW), *2015 Network Patient Health Survey Report* (May 2017) 60.

<sup>6</sup> Inspector of Custodial Services, *Health Services in NSW Correctional Facilities* (2021) 37.

<sup>7</sup> Lucy Phelan, Mindy Sotiri and Margaret Scott on behalf of Keeping Women Out of Prison Coalition, *Profile of women in prison in NSW: Executive Summary* (2009) 7.

<sup>8</sup> Meghna Bali, ABC News, 'Why are transgender women jailed in men's prisons around Australia?' (3 July 2020) < <https://www.abc.net.au/news/2020-07-03/why-are-transgender-women-jailed-in-mens-prisons-in-australia/12416562>>.

continually occurring, ensuring that incarcerated women can access the quality, humane and respectful healthcare they require and deserve.

## Part Three: Implementing a Federal Human Rights Act

This submission champions the overarching provisions of the AHRC's Position Paper on what a Human Rights Act could look like. The Position Paper suggests the codification of 28 rights. Whilst WJN unequivocally supports each right, from the perspective of incarcerated women, noting the stories shared above, the following rights are particularly pertinent: 1) protection from torture and cruel, inhuman or degrading treatment, 2) recognition and equality before the law; and freedom from discrimination, 3) humane treatment when deprived of liberty, 4) right to health, 5) right to an adequate standard of living, and 6) right to a healthy environment.

However, the AHRC's position paper could be improved by outlining a specific pathway for state parliaments to adopt complementary statutes. A limitation of the proposed Act is that its jurisdiction is limited to Federal agencies.<sup>9</sup> The AHRC Position Paper suggests that the remaining states and the Northern Territory could be encouraged to adopt a Human Rights Act that mirrors the federal Human Rights Act, allowing the Commonwealth statute to serve as a possible blueprint for complementary state legislation. The Position Paper suggests that this encouragement could take the form of fiscal incentive. This submission specifies the form of this encouragement, by recommending that s96 of the Constitution (the 'Grants Power') be provisionally enacted within a Commonwealth Human Rights Act, to allow the Federal government to provide implementation grants to state governments who draft complementary and corresponding state legislation. The role of the AHRC could be extended; a condition of the grant could be AHRC oversight, to ensure national uniformity and assist in the role of this implementation.

Lastly, this submission highlights the positive impact state based human rights legislation has had on the lives of incarcerated women within jurisdictions that have implemented rights-based statute. The case of *Castles v Secretary of Dept of Justice*<sup>10</sup> is particularly relevant to the right of incarcerated women to access reproductive healthcare. This case interpreted the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and found that a female prisoner was entitled to access IVF treatment during her sentence. Broadly, the case highlights the benefit to prisoners of a rights-based approach to their medical care, as it increases the scope for prisoners to access necessary and reasonable medical treatment they might otherwise be denied. This is particularly relevant for women who have specific female healthcare needs, that a prison system fundamentally designed for a male population inadvertently overlooks. Whilst female prisoners in NSW still make up the minority of the prisoner population at 7%, this figure has grown in excess of 33% in the last ten years.<sup>11</sup> As evident in Jane's story, health services within the carceral setting are yet to adjust to an increased need for tailored female healthcare, particularly mental health. Several other cases from human rights jurisdictions have enforced the need for decision-makers to consider the human rights of prisoners

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<sup>9</sup> AHRC Position Paper, page 243.

<sup>10</sup> (2010) 28 VR 141.

<sup>11</sup> Lucy Phelan, Mindy Sotiri and Margaret Scott on behalf of Keeping Women Out of Prison Coalition, *Profile of women in prison in NSW: Executive Summary* (2009) 7.

when determining the imposition of solitary confinement,<sup>12</sup> and providing prisoners within solitary confinement legitimate access to open air and reasonable space to exercise.<sup>13</sup> The availability of a legal remedy for human rights abuses has had a clear positive impact on prisoners within rights jurisdictions. Noting Jane's and Ally's lived experience drawn upon above, particularly female healthcare needs, it is clear that women within the NSW criminal justice system would benefit from the introduction of rights-based statute.

## Conclusion

WJN unequivocally supports reform in Australia's federal human rights space, by supporting the drafting and introduction of a federal human rights statute. Drawing upon the lived experiences of members within the organization, this submission has highlighted the very real occurrences of rights violations experienced by women in custody. By introducing rights-based statutes, it is WJN's hope that the Australian government will protect and defend the rights of incarcerated women to live healthy, safe and dignified lives.

The authors of this submission would be willing to attend the Hearing of this Inquiry if requested, to speak further on the issues we have raised and consider relevant. Noting the lived experience included in this submission does not account for experiences of First Nations or trans women, if invited to submit orally, WJN would work to ensure that oral submissions account for the nuances of these experiences by drawing upon further lived experience of diverse WJN members.

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\* Pseudonyms used for privacy reasons.

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<sup>12</sup> *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273.

<sup>13</sup> *Davidson v Director-General, Justice and Community Safety Directorate* (2021) 18 ACTLR 1.