26. CONFORMING WITH INTERNATIONAL OBLIGATIONS (RECOMMENDATIONS 328 - 333)

1. Rights of prisoners

The final chapter of The Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’)\(^1\) assessed the care and treatment of Indigenous people in detention and custody by reference to Australia's obligations under international treaties.

In 1955, the United Nations adopted The Standard Minimum Rules for the Treatment of Prisoners (‘SMR’).\(^2\) The SMR sets down the minimum conditions accepted by the United Nations in areas such as accommodation, personal hygiene, food, exercise, sport, medical services, discipline procedures, complaint systems, visitation rights, and education.

In 1976, a working party comprised of heads of prison services throughout Australia, prison officers, prisoners' action groups, the NSW Law Foundation and Council for Civil Liberties, the Prisoners' Aid Association of South Australia and visiting experts, was established to draft minimum standard guidelines for Australian prisons based on the SMR.


In 1992, the Standard Guidelines were revised by Correctional Administrators in the light of developments which had occurred in the Corrections area and to ensure they reflected the Recommendations of the RCIADIC.

More recently in 2004, and finally in 2012, the Standard Guidelines were reviewed and revised.\(^3\)

The preface to the 2012 Standard Guidelines says:

> The guidelines and the accompanying principles constitute outcomes or goals to be achieved by correctional services rather than a set of absolute standards or laws to be enforced. They represent a statement of national intent, around which each Australian State and Territory jurisdiction must

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continue to develop its own range of relevant legislative, policy and performance standards that can be expected to be amended from time to time to reflect 'best practice' and community demands at the state and territory level.

The 2012 Standard Guidelines continue:

While the guidelines, particularly after the most recent review, incorporate a contemporary approach, capturing the very diverse nature of modern corrections, there is still a very strong recognition of the unique position held by Indigenous Australians within the criminal justice system.

In each State and Territory, the 2012 Standard Guidelines are cross-referenced in various correctional management standards documents.

The RCIADIC was concerned, in the National Report, to ensure that there were adequate resources to enable the Standard Guidelines to be translated into effective operation. Accordingly, the RCIADIC recommended (Recommendation 328) that resources be made available to translate the Standard Guidelines into practice. By "resources", the RCIADIC meant both a budgetary commitment of further financial resources and human resources.⁵

Recommendation 328 provides as follows:

That as Commonwealth, State and Territory Governments have adopted Standard Guidelines for Corrections in Australia which express commitment to principles for the maintenance of humane prison conditions embodying respect for the human rights of prisoners, sufficient resources should be made available to translate those principles into practice.

It has been difficult to assess the extent to which financial and human resources have been made available by the State and Territory Governments (and specifically, that these resources have increased since the RCIADIC). Accordingly, we do not comment on the implementation of this Recommendation, save to say that (for example) a Government of Western Australia 2000 Implementation Report on the Royal Commission into Aboriginal Deaths in Custody, co-ordinated by Aboriginal Affairs Department and issued in June 2001⁶ concluded that this Recommendation had been substantially implemented in WA by 2000.

The RCIADIC also recommended legislative action in the form of legislative embodiment of the Standard Guidelines.

Recommendation 329 provides as follows:

⁴ See 36.2.21 of RDIADIC Report.
⁵ See 36.2.24 of RDIADIC Report.
⁶ See page 250: "[t]he Government of Western Australia makes available funds and resources to provide prison services to acceptable standards. An Independent Inspector of Custodial Services has been appointed to ensure that the principles governing the proper care of prisoners are met in practice." Available at: http://www.daa.wa.gov.au/Documents/ReportsPublications/RCIADIC_Implementation_Report2000.pdf.
That the National Standards Body comprising Ministers responsible for corrections throughout Australia give consideration to the drafting and introduction of legislation embodying the Standard Guidelines and in drafting such legislation give consideration to prisoners' rights contained in Division 4 of the Victorian Corrections Act 1986.

There has been no legislative embodiment of the Standard Guidelines per se. This is because the Standard Guidelines constitute outcomes or goals to be achieved by correctional services (rather than a set of absolute standards or laws to be enforced). Some States or Territories however, have engendered specific guidelines of their own which reflect and elaborate on the Standard Guidelines 2012 (e.g. Victoria).

Additionally, the second part of Recommendation 329 (which requires legislative embodiment of prisoner rights) has been substantially implemented in the majority of the States and Territories. In Victoria, section 47 of the Corrections Act 1986 (VIC) (as updated and amended at 31 October 2014), provides for the following prisoners' rights:

(a) to be in the open air for at least an hour each day, if the weather permits;
(b) to be provided with food that is adequate to maintain the health and well-being of the prisoner;
(c) to be provided with special dietary food where the Governor is satisfied that such food is necessary;
(d) to be provided with clothing that is suitable for the climate and for any work which the prisoner is required to do (and adequate to maintain the health of the prisoner);
(e) if not serving a sentence of imprisonment, to wear suitable clothing owned by the prisoner;
(f) to have access to reasonable medical care and treatment necessary for the preservation of health;
(g) if intellectually disabled or mentally ill, to have reasonable access to such special care and treatment as the medical officer considers necessary or desirable;
(h) to have access to reasonable dental treatment necessary;
(i) to practise a religion of the prisoner's choice;
(j) to make complaints concerning prison management and certain other bodies (e.g. the Minister or Human Rights Commissioner);
(k) to receive at least one visit which is to last at least half an hour in each week;
(l) to be classified as soon as possible after being sentenced and to have that classification reviewed annually;
(m) to send letters to, and receive letters from, certain listed individuals or bodies (e.g. legal advisers) without those letters being opened by prison staff;
(n) to send and receive other letters uncensored by prison staff;
(o) to take part in educational programmes in the prison.

The other States and Territories have similar, but not identical, provisions in their respective legislation, which codify the majority of these rights.

1.1 New South Wales

In New South Wales, the *Crimes (Administration of Sentences) Act 1999 (NSW)* and *Crimes (Administration of Sentences) Regulation 2014 (NSW)* set out the significant majority of the rights laid out in the Victorian legislation, save for explicit similar obligations related to clothing and obligations to provide specific medical care to mentally ill inmates at the discretion of a medical officer.\(^8\)

1.2 Western Australia

In Western Australia, most, but not all, of the rights set out in section 47 of the *Corrections Act 1986 (VIC)* are provided for in the *Prison Act 1981*, the *Prison Regulations 1982* or rules or policy directives made under the *Prison Act 1981*. The following rights are prescribed:

- the right to send letters to certain listed individuals or bodies without the letters being opened or read;\(^9\)
- the right to medical care and treatment (although there is no express provision for access to a physiotherapist);\(^10\)
- the right to practise and observe religious or *spiritual* beliefs and receive guidance and visits for that purpose;\(^11\)
- the right to wear clothing other than prison clothing during an authorised absence from prison;\(^12\)
- the right to receive visits;\(^13\)
- the right to make a request or a complaint to certain listed personnel;\(^14\) and
- the right to have access to clean drinking water and nutritional food adequate for health and well-being, or special dietary food where required.\(^15\)

There appears to be no legislative prescription of the right to be in the open air (save for prisoners kept in confinement) or the right to take part in education programmes, however services and programmes may be designed and instituted with the intention of providing for this right.

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\(^8\) See *Crimes (Administration of Sentences) Regulation 2014 (NSW)* sections 21A, 47-49, 50, 51, 57-58, 59-69, 70-77, and 104-109; and *Crimes (Administration of Sentences) Act 1999 (NSW)* sections 72A and 295.

\(^9\) *Prisons Act 1981 (WA)* s 67(1).

\(^10\) *Prisons Act 1981 (WA)* s 95A.

\(^11\) *Prisons Act 1981 (WA)* s 95E.

\(^12\) *Prison Regulations 1982 (WA)* Reg 33.

\(^13\) *Prisons Act 1981 (WA)* s 59(1).

\(^14\) Adult Custodial Rules, Rule 5. These Rules are made by the Head of the Department of Corrective Services, the Commissioner, with approval from the Minister.

\(^15\) Policy Directive 15. Policy directives are issued by the Head of the Department of Corrective Services but do not require Ministerial approval.
1.3 South Australia

Certain prisoner rights are set out in Part 4, Division 6 of the *Correctional Services Act 1982* (SA) such as the right to education, to receive and send letters, to have visitors, to have access to legal aid and to make a complaint. There are also legislated rights to access education and for prisoners to have their classifications reviewed. However the list is not as extensive as the Victorian counterpart. Notably, there is no express legislative right to access open air or certain medical procedures.\(^\text{16}\)

1.4 Queensland

In Queensland, section 3 of the *Correctional Services Act 2006* (QLD) provides a general right to basic human rights as follows:

*The purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders.*

*This Act recognises that every member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.*

*This Act also recognises -
the need to respect an offender's dignity; and
the special needs of some offenders by taking into account-
an offender's age, sex or cultural background; and
any disability an offender has.*

There is no express prescription of prisoner rights in the same way as under the Victorian *Corrections Act 1986*. However, inmates do have prescribed rights to access religious and educational programs, to make complaints and benefit from similar rights in relation to letters and visits.\(^\text{17}\) Certain rights for inmates in separate confinement are enshrined in the legislation, including the right to a visit from a personal visitor once a week,\(^\text{18}\) and the protection of certain rights when in separate confinement\(^\text{19}\) (to water, a toilet and shower, a mattress and bedding, appropriate clothing and exercise in the fresh air for 2 hours a day).

Under the Queensland *Correctional Services Regulations 2006* an Aboriginal or Torres Strait Islander prisoner is to be accommodated in a corrective services facility as close as practicable to the prisoner's family unless the chief executive (of the facility) is satisfied the prisoner does not want to be accommodated near the prisoner's family. This provision recognises an Aboriginal or Torres Strait Islander prisoner's cultural background.

\(^{16}\) See in particular *Correctional Services Act 1982* (SA) sections 23, 30, 33-34, 35AA, 35A.

\(^{17}\) See *Correctional Services Act 2006* (QLD), sections 44-49, 153, 266 and 290-292.

\(^{18}\) *Correctional Services Act 2006* (Qld) s 153.

\(^{19}\) *Correctional Services Regulation 2006* (Qld) s 5.
1.5 Tasmania

Tasmanian legislation provides a comprehensive set of rights for prisoners (section 29 Corrections Act 1997 (TAS)) which virtually mirrors the Victorian Corrections Act 1986.

1.6 Australian Capital Territory

Section 12 of the Corrections Management Act 2007 provides the following minimum living conditions for detainees:

- (a) access to sufficient food and drink to avoid hunger and poor nourishment;
- (b) access to suitable clothing that does not degrade or humiliate detainees;
- (c) access to suitable facilities for personal hygiene;
- (d) suitable accommodation and bedding for sleeping in reasonable privacy and comfort;
- (e) reasonable access to the open air and exercise;
- (f) reasonable access to telephone, mail and other facilities for communicating with people in the community;
- (g) reasonable opportunities to receive visits from family members, accredited people and others;
- (h) reasonable opportunities to communicate with their lawyers;
- (i) reasonable access to news and education services and facilities to maintain contact with society;
- (j) access to suitable health services and health facilities; and
- (k) reasonable opportunities for religious, spiritual and cultural observances.

1.7 Northern Territory

In the Northern Territory, the Correctional Services Act 2014 (NT) provides for most, but by no means all, of the prisoner rights set out in the Victorian legislation, as follows:

- the right to receive visitors as determined by the Director and unmonitored visits from a legal representative or interpreter at any reasonable time;\(^{20}\)
- the right to receive and despatch letters including the right to send letters to and receive letters from the relevant Minister;\(^ {21}\)
- the right to access a medical officer;\(^ {22}\)
- the right to attend religious services and activities;\(^ {23}\)
- the right to be provided with food of a sufficient quality and quantity, appropriate clothing and exercise.\(^ {24}\)

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\(^{20}\) Sections 94-102.
\(^{21}\) Sections 106-108.
\(^{22}\) Sections 82-93.
\(^{23}\) Sections 59-60.
\(^{24}\) Sections 23(a)-23(c).
**Recommendation 330** recommended:

*That the National Standards Body establish and maintain direct consultation with relevant Aboriginal organisations including Aboriginal Legal and Health Services.*

It is not clear whether Aboriginal stakeholders were consulted in the latest revision of the 2012 Standard Guidelines. To a similar end, the RCIADIC recommended the adoption of guidelines specifically directed to the needs of Aboriginal prisoners.

**Recommendation 331** recommended:

*That the National Standards Body consider the formulation and adoption of guidelines specifically directed to the needs of Aboriginal prisoners. In that process the findings and recommendations of this Commission relating to custodial conditions and the treatment of Aboriginal persons in custody should be taken into account.*

The 2012 Standard Guidelines contain guiding principles which account for the particular needs and cultural background of Indigenous people. This consideration was not reflected in the version of the Standard Guidelines produced immediately prior to the RCIADIC. In particular, Guiding principles 7 and 8 provide that:

7. *The design and management of community correctional services should: (i) reflect specific needs of offenders that may arise from their gender, age, cultural background, physical or mental impairment, health status, or other potential sources of discrimination; and (ii) take account of particular needs and disadvantages that may be faced by Indigenous people.*

8. *Community correctional services should aim to achieve effective partnerships with Indigenous communities and organisations, in the development of policies, and in the delivery of programmes and services for Indigenous offenders.*

Under the 2012 Standard Guidelines, the following principles are specifically directed to the needs of Aboriginal prisoners:

Guideline 1.6

*Interpreters or elders from Indigenous communities and other ethnic groups should be utilised, where possible and appropriate, to assist in communicating with offenders of their own cultural background. Advisers on cultural or ethnic issues should be recognised for their expertise by the group(s) to which their advice relates.*

Guideline 1.73

*Where necessary a prisoner should be allowed to use an interpreter when making a defence. Indigenous prisoners should be allowed to obtain culturally relevant advice and assistance to present a defence.*

Guideline 2.6
Where practicable, Indigenous prisoners should be provided with the opportunity to be accommodated in family, community or language groups to provide a supporting environment.

Guideline 2.17

Indigenous prisoners should be allowed access, where possible, to elders who are recognised as elders or leaders of their community to address the emotional and spiritual needs of Indigenous prisoners.

Guideline 2.20

Spiritual beliefs and needs of Indigenous prisoners should be taken into account when managing the welfare of these groups of prisoners during times of individual, family or community crisis.

Guideline 2.50

In the case of [the death of] an Indigenous prisoner, the Aboriginal Legal Service and any Aboriginal spiritual advisers are also to be advised.

Guideline 3.14

Programmes and services provided to prisoners, especially women, Indigenous prisoners and prisoners from culturally and linguistically diverse backgrounds, should be established following close consultation with the appropriate community groups and experts.

Guideline 3.29

The arrangements for visits should take into consideration different family structures particularly in relation to Indigenous or other culturally and linguistically diverse prisoners.

2. Rights of persons in police custody

The RCIADIC was concerned to ensure that, similar to the adoption of Standard Guidelines, there should be similar guidelines formulated for police custodial facilities. The rights of persons in police custody should be afforded the same attention as the rights of prisoners.

Accordingly, Recommendation 332 provided: That the Commonwealth State and Territory Ministers for Police should formulate and adopt standard guidelines for police custodial facilities throughout Australia.

26. CONFORMING WITH INTERNATIONAL OBLIGATIONS (RECOMMENDATIONS 328-333)
The Australian Federal Police (‘AFP’) National Guidelines on persons in custody and police custodial facilities (‘AFP Guidelines’)[25] establish requirements to manage persons in AFP custody and give guidance on the appropriate handling of persons in police custody. The AFP Guidelines were last revised and published in May 2012. In respect of Indigenous persons, the key principles set out in the AFP Guidelines are that (in accordance with section 23H of the Crimes Act 1914 (Cth) (as amended) when an Indigenous person is taken into custody the police force should both notify the Aboriginal Legal Service (‘ALS’) and ensure an interview friend is available for the Indigenous person (unless the latter right is expressly and voluntarily waived).

The AFP Guidelines were issued by the Chief Police Officer for the ACT under the Australian Federal Police Act 1979 (Cth) and form part of the AFP’s professional standards framework. A breach of the AFP Guidelines is subject to Part V of the Australian Federal Police Act 1979 (Cth). In June 2007, the AFP, in co-operation with the Commonwealth Ombudsman, also conducted a review of the ACT Policing’s Watchhouse operations. [26] The review was aimed at examining the policies, procedures and practices in place to deliver adequate care to persons in custody at the Watchhouse.

Several States and Territories have adopted similar guidance in a range of policy and operational documents.

In New South Wales, a Code of Practice for Custody, Rights, Investigation, Management and Evidence was adopted in January 2012. It sets out various guidelines for the detention of Indigenous persons in custody (including a right to have a litigation friend present at interview and an obligation on police to notify the ALS).[27] In Queensland, an Operational Policy on detention of persons in custody was updated in December 2014. It contains similar guidance as to the detention of Indigenous persons in custody, including rights to an interview friend and notification of the ALS. [28] The Western Australian Police Service Lockup Manual (at item LP 2.1) provides that whenever an Aboriginal person is charged the police must advise the local office of the ALS. Item AD 1.3 of the same provides that when interviewing an Indigenous person police must utilise the services of an Aboriginal interview friend or interpreter where such services are available. The Victorian Police Manual [29] codifies certain rules as to the custody of Indigenous persons. It does codify a process to ensure automatic notification to the ALS.

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Similar publicly available guidelines for police custodial facilities in the Northern Territory, South Australia and Tasmania have not been identified. These jurisdictions do have general policies to provide "appropriate policing services to Aboriginal and diverse communities" (in the language of the South Australian police). However, it is also noted that the Tasmanian Department of Police and Emergency Management recently delivered an 8-year Aboriginal strategic plan one goal of which is to "reduce the number of Aboriginal people who are detained in custody, and provide a safe environment should a viable alternative not be readily available." The document sets out guiding principles for the detention of Indigenous persons in custody (and specifies the notification of the ALS where an Indigenous person is detained).

3. Ratification of International Treaties

Finally, the RCIADIC recommended that the Commonwealth Government make a declaration under Article 22 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and become a party to the Optional Protocol to the International Convention on Civil and Political Rights.

Recommendation 333 provided:

While noting that in no case did the Commission find a breach of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, it is recommended that the Commonwealth Government should make a declaration under Article 22 of the Convention and take all steps necessary to become a party to the Optional Protocol to the International Convention on Civil and Political Rights in order to provide a right of individual petition to the Committee Against Torture and the Human Rights Committee, respectively.

This Recommendation has been fully implemented. On 25 September 1991, Australia agreed to be bound by and acceded to the Optional Protocol to the ICCPR. And, on 28 January 1993, the Commonwealth Government made declarations under Articles 21 and 22 of the Convention Against Torture.

31 Available at: http://www.police.tas.gov.au/uploads/file/Corporate%20Documents/Brochures%20%26%20Publications/DPEM%20Aboriginal%20Strategic%20Plan%202014-2022.pdf. The Tasmanian police recognises the need to: "be aware of their obligations to people in custody and, in particular, the duty of care to those Aboriginal people who are considered to be at greater risk."
32 Ibid., page 5.